(3)

No. 93-44-ATX
Status: GRANTED

Title: Turner Broadcasting System, Inc., et al., Appellants
v.
Federal Communications Commission, et. al.,

Docketed:
July 2, 1993

Court: United States District Court
for the District of Columbia

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5 notices of appeal in appendix. App for stay denied by Chief Justice April 29, 1993

Entry	Date	Note	Proceedings and Orders
1	Apr 19 1993	D	Application (A92-798) for Injunction pending appeal, submitted to The Chief Justice.
2	Apr 22 1993		Response to application (A92-798) from FCC represented by the SG's office requested by The Chief Justice, due April 26, 1993.
3	Apr 26 1993		Response to application (A92-798) filed by FCC represented by the SG's office.
4	Apr 26 1993		Response to application (A92-798) filed by National Assoc. Broadcasters & Assoc. of Ind TV Stations.
5	Apr 26 1993		Response to application (A92-798) filed by Public Broadcasters.
6	Apr 27 1993		Response to application (A92-798) filed by Consumer Federation of America, et al..
7	Apr 28 1993		(A92-798) Reply brief in support of application for injunction filed by petitioner Turner Broadcasting System, Inc., et al
8	Apr 29 1993		Application (A92-798) denied by the Chief Justice.
9	Apr 29 1993		(A92-798) (in chambers opinion filed by CJ)
10	Jul 2 1993	G	Statement as to jurisdiction filed.
12	Jul 28 1993		Order extending time to file response to jurisdictional statement until September 7, 1993.
13	Jul 28 1993		This extension is granted for all appellees.
14	Sep 7 1993		Motion of appellees Association of America's Public Television Stations, et al. to affirm filed.
15	Sep 7 1993		Motion of Federal Respondents to affirm filed.
16	Sep 7 1993		Motion of appellee National Association of Broadcasters to affirm filed.
17	Sep 7 1993		Motion of appellee Association of Independent Television Stations, Inc. to affirm filed. VIDED.
19	Sep 7 1993		LODGING consisting of three copies of two lower court memoranda received from counsel for National Cable Television Association, Inc. VIDED.
18	Sep 8 1993		DISTRIBUTED. September 27, 1993
20	Sep 15 1993	X	Reply brief of appellants Turner Broadcasting System, et al. filed. VIDED.

No. 93-44-ATX

Entry	Date	Note	Proceedings and Orders
21	Sep 15 1993	X	Reply brief of appellants National Cable Television Assn., et al. filed.
22	Sep 28 1993		PROBABLE JURISDICTION NOTED. The brief of appellant is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 9, 1993. The brief of appellees is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 7, 1993. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 21, 1993. Rule 29 does not apply.
			**********
35	Oct 29 1993		Record filed.
		*	Original proceedings United States District Court for the District of Columbia (4 BOXES)
23	Nov 8 1993		Brief amicus curiae of New Inspirational Network filed.
24	Nov 9 1993		Brief of appellants Turner Broadcasting System, Inc., et al. filed.
25	Nov 9 1993		Brief of appellant Time Warner Entertainment Company, L.P. filed.
26	Nov 9 1993		LODGING consisting of two bound volumes of affidavits submitted by counsel for appellant Times Warner Entertainment Company
27	Nov 9 1993		Brief of appellant National Cable Television Association, Inc. filed.
28	Nov 9 1993		LODGING consisting of ten sets of five affidavits submitted by counsel for appellant National Cable Television Association
29	Nov 9 1993		Joint appendix filed.
30	Nov 9 1993		Brief amicus curiae of Media Institute filed.
31	Nov 9 1993		Brief of appellant Daniels Cablevision, Inc. filed.
32	Nov 9 1993		Brief of appellants Discovery Communications Inc., et al. filed.
33	Nov 9 1993		Brief amicus curiae of California Cable Television Association filed.
34	Nov 9 1993		Brief amicus curiae of American Civil Liberties Union filed.
36	Nov 9 1993		Brief amici curiae of United States Telephone Assn., et al. filed.
37	Nov 9 1993		Brief amicus curiae of Sound Economy Foundation filed.
38	Nov 9 1993		Brief amicus curiae of Courtroom Television Network filed.
40	Nov 18 1993		CIRCULATED.
39	Nov 22 1993		SET FOR ARGUMENT WEDNESDAY, JANUARY 12, 1994.(1ST CASE).
41	Dec 6 1993	X	Brief amici curiae of National Association of Telecommunications Officers, et al. filed.
45	Dec 6 1993	X	Brief of appellees Federal Communications Commission, et al. filed.
47	Dec 6 1993	X	Brief amici curiae of Los Angeles California, et al. filed.
43	Dec 7 1993	X	Brief of appellee National Association of Broadcasters filed.
44	Dec 7 1993	X	Brief of appellee Association of Independent Television Stations, Inc. filed.

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Entry	Date	Note	Proceedings and Orders
46	Dec 7 1993	X	Brief of appellees Intervenors Assn. of America's Public TV Stations, et al. filed.
48	Dec 7 1993	X	Brief amicus curiae of Connecticut filed.
49	Dec 7 1993	X	Brief amicus curiae of Telemundo Group, Inc. filed.
50	Dec 7 1993	X	Brief amici curiae of DirecTv, et al. filed.
51	Dec 7 1993	X	Brief of appellees Consumer Federation of America, et al. filed.
53	Dec 17 1993	X	Reply brief of appellant Daniels Cablevision, Inc. filed.
54	Dec 20 1993		LODGING cosisting of three copies of three lower court documents submitted by counsel for the appellee, National Asociation of Broadcasters.
55	Dec 21 1993	X	Reply brief of appellants Turner Broadcasting System, Inc., et al. filed.
56	Dec 21 1993	X	Reply brief of appellant National Cable Television Association filed.
57	Dec 21 1993	X	Reply brief of appellant Time Warner Entertainment Company, L.P. filed.
58	Dec 21 1993		LODGING consisting of one copy of the brief submitted by the United States in City of Los Angeles v. Preferred Communications, October Term, 1985.
59	Dec 21 1993	X	Reply brief of appellants Discovery Communications Inc., et al. filed.
60	Jan 6 1994		LODGING by appellant 11 copies of Reply Comment of the Staff of the Bureau of Economics and the San Francisco Regional Office of the Federal Trade Commission submitted before the Federal Communications Commission.
61	Jan 12 1994		ARGUED.

Supreme Court, U.S.
FILED
JUL 2 1993
CLERK OF THE COURT

No. 93-44

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

Appeal from the United States District Court for the District of Columbia

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QUESTION PRESENTED

Whether Congress, consistent with the First Amendment, may require that operators of cable television systems devote channels to programmers favored by Congress—*i.e.*, local broadcast stations—regardless of the preferences of the operators and regardless of the effects on other, unfavored programmers.

PARTIES TO THE PROCEEDINGS

Plaintiffs: *

Atlanta Interfaith Broadcasters, Inc.
Arts & Entertainment Network
Black Entertainment Television, Inc.
Daniels Cablevision, Inc.
Discovery Communications, Inc.
E! Entertainment Television, Inc.
Hearst/ABC-Viacom Entertainment Services
International Family Entertainment, Inc.
The Learning Channel, Inc.
National Cable Satellite Corporation
National Cable Television Association, Inc.
National Interfaith Cable Coalition, Inc.
QVC Network
Time Warner Entertainment Company, L.P.
The Travel Channel, Inc.
Turner Broadcasting System, Inc.
USA Network

Defendants:

Association of America's Public Television Stations
Association of Independent Television Stations, Inc.
Community Broadcasters Association
Consumer Federation of America
The Corporation for Public Broadcasting
Sandra Engle
Federal Communications Commission
The International Association of Machinists and Aerospace Workers, AFL-CIO
International Broadcasting Network
The International Television Broadcasting, Inc.
Morningstar Communications
National Association of Broadcasters

* Appellants' Rule 29.1 disclosure statements are set forth in the Appendix to this Jurisdictional Statement at 111a-17a.

National Council of Senior Citizens
National Rural Telecommunications Cooperative
Office of Communication of the United Church of Christ
Paging Associates, Inc.
The Public Broadcasting Service
Sherjan Broadcasting Co., Inc.
Triplett & Associates, Inc.
TV 14, Inc.
TV 58 St. Louis, Inc.
United States of America
Zantech, Inc.

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IN THE

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OCTOBER TERM, 1993

No. ———

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

Appeal from the United States District Court for the District of Columbia

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JURISDICTIONAL STATEMENT

Appellants, operators of cable television systems and suppliers of programming for cable television systems, appeal from the judgment of a three-judge district court holding that various provisions of the Cable Television Consumer Protection and Competition Act of 1992 (47 U.S.C. §§ 531 *et seq.*)—in particular, those provisions compelling cable systems to devote more than one-third of their channels to the programming of commercial and noncommercial broadcast stations (47 U.S.C. §§ 534, 535)—do not violate appellants' rights to freedom of speech and freedom of the press under the First Amendment.[1]

---

[1] Plaintiffs in five civil actions consolidated by the court below—including both cable operators and cable programmers—have joined in filing this Jurisdictional Statement. In doing so, the parties do not intend to waive their right to file separate briefs on the merits.

OPINION BELOW

The opinion of the three-judge United States District Court for the District of Columbia is reported at 819 F. Supp. 32. It is reprinted in the Appendix to this Jurisdictional Statement at 1a-72a.

JURISDICTION

The judgment of the district court was entered on April 8, 1993. Timely notices of appeal were filed in the district court on May 3, 1993. *See* J.S. App. 73a-81a.

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1253, which provides that "[e]xcept as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying . . . an interlocutory or permanent injunction in any civil action . . . required by any Act of Congress to be heard and determined by a district court of three judges." Section 23 of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. § 555(c)(1), requires that challenges to sections 4 and 5 of the Act "be heard by a district court of three judges convened pursuant to [28 U.S.C. § 2284]."

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

Relevant provisions of the Cable Television Consumer Protection and Competition Act of 1992 are reprinted in the Appendix to this Jurisdictional Statement at 82a-110a.

STATEMENT

Appellants brought this action before a three-judge district court seeking to enjoin enforcement of various provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Cable Act"), 47 U.S.C. §§ 531 *et seq.* Appellants' principal challenge was

directed at the so-called "must-carry" provisions, 47 U.S.C. §§ 534, 535, which require that cable operators carry the programming of commercial and noncommercial broadcast stations. Appellants contended that the provisions violated appellants' rights to freedom of speech and of the press under the First Amendment. The district court, by a 2-1 vote, upheld the provisions.

1. a. Cable television is a medium for providing programming to television viewers. As one court of appeals has explained, a cable system, in addition to original programming, "offers local over-the-air broadcast signals captured by a strategically located master antenna, distant broadcast signals, which are often imported via satellite, and non-broadcast signals transmitted exclusively to cable systems by satellite or microwave relay. The cable operator converts the signal received from these or other sources into an electronic impulse and delivers it to subscribers' homes over a coaxial cable." *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1438-39 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

Cable television is not subject to the physical limitations that have placed a finite upper limit on the number of broadcast stations possible in each local community: most, if not virtually all, communities have the room—on utility poles or below ground—to accommodate the construction of additional cable systems. *See Home Box Office, Inc. v. FCC*, 567 F.2d 9, 45 (D.C. Cir.) (per curiam), *cert. denied*, 434 U.S. 829 (1977) (cable operators not subject to physical scarcity as are broadcasters). Each cable operator, however, has limited capacity within its own system. For this and other reasons, cable operators must exercise editorial discretion in choosing what programming to include and what programming to leave out, tailoring their program mix to meet viewer interests. In addition, cable operators must choose the channel position to be assigned to each programmer carried on the system and the terms on which that programmer will be offered to subscribers in an attempt to create the most

attractive package for consumers of news, information, and entertainment.[2]

Cable programmers, in turn, must compete for a place on each cable system. At present, for example, there are more than 75 nonbroadcast providers of programming on a national basis to cable television operators, as well as numerous regional nonbroadcast providers of cable programming.[3] While television stations can, through use of the government-granted spectrum, reach most or all of the homes in their service areas through over-the-air transmission, cable programming networks have no access to the airwaves. It is, therefore, of vital importance to cable programmers that they be selected for placement on one of the limited number of channels provided to viewers by each cable system and other multichannel providers. Indeed, given the need for a critical mass of viewers, a cable programmer cannot survive if it fails to gain access to a significant number of cable systems.

b. Beginning more than 30 years ago, the federal government has repeatedly sought to dictate the choices made by cable operators with respect to programming, requiring them to carry local broadcast stations in preference to competing programming. *See Quincy Cable TV, Inc.*

[2] Cable operators typically offer a "basic" tier of program services that all subscribers receive. Additional tiers and services are then available on an optional basis. A decision to place programming within the basic tier thus directly controls whether all subscribers will view the programming for the minimum monthly charge or whether they must elect to add the programming at additional cost.

[3] This number has risen sharply as the subscribership to cable television has increased. (In 1976, for example, there were four national cable program networks. Cable Television Developments, October 1992, at 7-A.) These programming sources include such well-recognized offerings as HBO, C-SPAN, ESPN, CNN, and the Discovery Channel, as well as recently-developed sources such as the Cartoon Network and the Sci-Fi Channel. In addition, cable operators increasingly are developing their own programming for distribution to their subscribers, as Time Warner Cable has done with New York 1, a 24-hour local news service produced and offered by its cable systems in the New York City area.

v. FCC, supra. In 1985, the Court of Appeals for the District of Columbia Circuit held that these must-carry rules violated the First Amendment rights of both cable programmers and cable operators. Pointing out that "the rules are explicitly designed to 'favor[] certain classes of speakers over others,'" 768 F.2d at 1451 (quoting *Home Box Office, Inc. v. FCC*, 567 F.2d at 48), and that "[t]he rules coerce speech," *id.* at 1452, the court determined that the asserted justifications for the rules did not support the degree of intrusion on First Amendment interests. The court found insufficient evidence that "an unregulated cable industry presents a serious threat to local broadcasting," *id.* at 1459, and concluded that, in any event, the rules were "'grossly' overinclusive." *Id.* at 1460. Although the purported basis for the rules was "to protect local broadcast*ing* and not local broadcast*ers*," *id.*, the court observed that "[t]he rules indiscriminately protect each and every broadcaster regardless of the quantity of local service available in the community and irrespective of the number of local outlets already carried by the cable operator." *Id.*

The Commission thereafter redrafted the must-carry rules, and the court of appeals once more invalidated them, again emphasizing a lack of factual support. *See Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988). Noting that "[t]he Commission relies heavily on its assumption that in the absence of must-carry rules, cable companies would drop local broadcasts," *id.* at 303, the court found that "[e]xperience belies that assertion." *Id.* Rather, the court stated, "during the 16 months that elapsed between *Quincy Cable TV* and the reimposition of the modified must-carry rules, cable companies generally did not drop the local broadcast signals that they had been carrying prior to *Quincy Cable TV*." *Id.* The court also pointed to separate reports by the Federal Trade Commission and the Justice Department concluding "that the absence of must-carry would not harm local broadcasting." *Id.*

2. The statute here at issue was enacted by Congress in 1992. In terms even more sweeping than the earlier rules, it compels cable operators to carry a specific number of local broadcast stations—depending upon the number of channels on the cable system—regardless of the preferences of operators and viewers and regardless of the effects on other programmers. Although Congress made findings with respect to economic factors such as a "shift in market share" from broadcast to cable television (*see* Findings ¶ 13), it made clear, as well, that the must-carry provisions were intended to promote "unique noncommercial, educational programming" (*id.* ¶ 7), assure "programming that is responsive to the needs and interests of the local community" (*id.* ¶ 8(B)), support "local origination of programming" (*id.* ¶ 10), and preserve local broadcast stations as "an important source of local news and public affairs programming" (*id.* ¶ 11).[4]

The principal must-carry provisions are contained in two sections of the Act: Section 4, which deals with carriage of commercial stations, and Section 5, which deals with carriage of noncommercial stations. Section 4(b) of the Act requires that cable systems with more than 12 usable activated channels—the vast majority of cable systems throughout the country—allocate up to one-third of their channels for the carriage of local commercial television stations. *See* 47 U.S.C. § 534(b)(1)(B); *see also id.* § 534(c) (requirements for carriage of low power television stations). Systems with 12 or fewer channels but with more than 300 subscribers must carry at least three local commercial television stations. *Id.* § 534 (b)(1)(A).

[4] These findings appear in numbered paragraphs in Section 2(a) of the 1992 Act, reprinted in 47 U.S.C. § 521 Historical and Statutory Notes and in the Appendix, *infra*, at 82a-87a.

The committee reports confirm the focus on the content of programming, asserting that if broadcasters are not carried the result will be "reductions in local news, public affairs, and other public interest programs . . . ." H.R. Rep. No. 628, 102d Cong., 2d Sess. 51-52 (1992). *See also id.* at 69 (naming with approval several specific programs offered on public television stations).

Additional channels—over and above the one-third cap of Section 4(b)—must be devoted to carriage of educational television stations under Section 5(b) of the Act. That section requires that, subject to certain limitations, a cable operator shall carry "any qualified local noncommercial educational television station requesting carriage." In particular, cable systems with more than 36 channels must show the programming of *all* noncommercial broadcast stations requesting carriage, unless the programming of a station "substantially duplicates" the programming of another station carried by the system. *See In the Matter of the Implementation of the Cable Television Consumer Protection and Competition Act of 1992* (Broadcast Signal Carriage Issues) Docket No. 92-259, released March 29, 1993, ¶ 19 (defining "substantially duplicates" to mean a 50% overlap in programming). Moreover, the Act mandates carriage of any qualified educational station carried as of March 29, 1990, regardless of the channel capacity of the system.

The effect of these provisions, taken together, is significant. For a cable system of 36 channels, the Act requires carriage of up to 12 local broadcast stations and three educational stations—in essence asserting government control over more than 40 percent of its channels.[5] Furthermore, the Act interferes directly with decisions of the cable operator about the channels on which to place the stations (*see* 47 U.S.C. §§ 534(b) and 535(a)) and mandates their inclusion in the basic tier (*id.* § 543 (b)(7)(i))—which must, by law, be provided to all subscribers before they can purchase any other tier of programming (*id.* § 543(b)(7)(A)). As a result, the broadcast stations not only benefit from mandatory car-

[5] These requirements are in addition to those of the Cable Communications Policy Act of 1984 ("the 1984 Cable Act"), which requires cable operators to relinquish editorial and business control over (1) an unlimited number of channels (to be determined by franchising authorities) for public, educational and governmental access channels (Section 611(b)) and (2) up to 15% of capacity for leased access by persons unaffiliated with the operator (Section 612(b)(1)).

riage, regardless of interest in the community, but from mandatory carriage to all subscribers in a preferred position.[6]

3. A divided three-judge district court, convened pursuant to Section 23 of the 1992 Cable Act (47 U.S.C. § 555(c)(1)), upheld the must-carry requirements against appellants' First Amendment challenge.[7] The majority first took the view that Congress was regulating "a market in a commercial commodity . . ., not a market in speech." J.S. App. 12a. Regarding the law as "simply industry-specific antitrust and fair trade practice regulatory legislation," *id.* at 13a, the court said that "to the extent First Amendment speech is affected at all, it is simply a byproduct of the fact that video signals have no other function than to convey information." *Id.* Indeed, despite the fact that the must-carry provisions dictate what programming cable operators must place on their systems, the court concluded that the provisions are "unrelated (in all but the most recondite sense) to the content of any messages that these embattled cable operators, broadcasters, and programmers have in contemplation to deliver." *Id.*

The district court did acknowledge that it was too late to reconsider the proposition "[t]hat the First Amendment is to some extent implicated whenever a govern-

[6] The must-carry provisions, in turn, are linked to an additional set of provisions: the retransmission consent provisions, set forth in Section 6 of the Act. *See* 47 U.S.C. § 325(b). Having mandated carriage of signals by cable operators, the Act nonetheless allows commercial broadcasters the alternative of refusing to allow carriage without payment. Under the Act, local commercial television broadcast stations may elect either to assert their rights of mandatory carriage *or* to bar cable reception of their signals absent consideration satisfactory to the station.

[7] The court also rejected, without comment, appellants' challenges to the tiering and channel positioning requirements and, with brief comment (J.S. App. 7a n.10), appellants' challenge to the retransmission consent provisions. In the event that this Court reverses the decision below with respect to the must-carry provisions, we believe that these other issues should be remanded to the district court for further consideration.

ment endeavors to regulate a cable industry component." J.S. App. 13a. In keeping with its belief that the must-carry requirements were "essentially economic regulation" (*id.* at 13a), however, the court refused to subject them to strict judicial scrutiny. *See id.* at 15a-16a (provisions must only "satisfy the criteria established in [*United States v.*] *O'Brien*[, 391 U.S. 367 (1968)] and its progeny"). Rejecting the argument of cable operators that strict scrutiny is required for laws compelling speech, the court held that "[a] compulsory speech requirement, or one imposing upon the discretion of a speaker to say only what he wishes, it appears, is to be strictly scrutinized *only* if it appears that the government has prescribed the content—either the message or the subject matter—of the speech to be spoken." J.S. App. 16a (emphasis added). The court similarly rejected the argument, advanced by cable programmers, that strict scrutiny was necessary for laws impeding some speakers in order to advance other speakers, stating that "[s]peaker partiality alone . . ., absent evidence that the government's distinction between groups of speakers is related to what the speakers are saying, is insufficient to trigger strict scrutiny." *Id.* at 18a. Finally, although not entirely clear on the point, the court appeared to conclude that, because of "certain characteristics unique to the way the industry has evolved and is presently structured," *id.* at 20a, it was appropriate to give "relaxed First Amendment scrutiny of the must-carry provisions even if marginally content-related . . . ." *Id.* at 22a n.25.

The court then determined that, under its more lenient standard of review, the requirements were adequately justified. Even though appellants had pointed out that local broadcast stations had *increased* in number since invalidation of the prior must-carry rules—indicating that the system of local broadcasting was still not in any jeopardy (*see Century Communications Corp. v. FCC*, 835 F.2d at 303)—the district court responded that "Congress . . . did not agree." J.S App. 24a. Because Congress had assembled evidence "demonstrating, to its [own] satisfaction" that cable operators posed a threat to

local broadcast stations, *id.* at 24a-25a, the court believed that "the deference [it] should accord to the factfinding abilities of the nation's legislature" required it to "conclude that the danger perceived by Congress is real and substantial." *Id.* at 26a (citations omitted). The court extended a comparable degree of deference with respect to the need for "prophylactic measures," *id.* at 27a, saying that it was "unwilling to second-guess Congress' determination that the must-carry provisions are necessary to accomplish its objective." *Id.*[8]

Judge Williams dissented. He noted that the must-carry provisions (unlike the leased access provisions enacted in 1984) "extend the privilege of access only to a special class of unaffiliated programmers—local commercial and non-commercial television stations," J.S. App. 51a, and that "Congress rested its decision to promote these stations in part, but quite explicitly, on a finding about their content." *Id.*; *see also id.* at 53a ("Here . . . the beneficiaries are local stations that are required by government to include specific content that the government has deemed especially worthy"). Turning to the proper standard of judicial review, Judge Williams concluded that "the proper test is strict scrutiny." *Id.* at 57a. He reasoned that "the statute is content-based under controlling precedent. The must-carry provisions mandate speech: they require cablecasters to carry the speech of local broadcast stations." *Id.* at 54a. Although Judge Williams noted that less exacting scrutiny was given to general laws regulating conduct and having only an "incidental" effect on speech, J.S. App. 54a, he stated: "The treatment of First Amendment values as irrelevant cannot be transported to the context of a burden imposed on one set of speakers for the direct and explicit advantage of a limited class of their competitors—a class whose programming

[8] In a concurring opinion, Judge Sporkin termed appellants' attempts to invoke First Amendment rights "mischievous." J.S. App. 47a. Judge Sporkin stated that "[i]t is inconceivable that our forefathers at any time contemplated that the First Amendment would be used to regulate an industry that came into existence over 150 years after the Bill of Rights was adopted." *Id.*

must, as a matter of law, include content of a type specified by the government." *Id.* at 57a.

Judge Williams then determined that the interests advanced in support of the law were inadequate to justify it. With respect to the asserted interest in "promoting diversity of views," J.S. App. 58a, Judge Williams found that "the fit between the interest and the regulation is extremely weak." *Id.* He observed, *inter alia*, that "[b]ecause cablecasters now carry the vast majority of local stations . . ., the must-carry rules may have little effect, but where they have any, it will be only to replace the mix chosen by cablecasters—whose livelihoods depend largely on satisfying audience demand—with a mix derived from congressional dictate." J.S. App. 58a. With respect to the asserted interest in "the preservation of local broadcasting," *id.* at 60a, Judge Williams expressed doubt that the goal of promoting local programming would qualify as a legitimate compelling interest, given that government typically cannot select the issues to be communicated to the public and given that less restrictive means (like direct subsidies) are available to Congress. And, while he "assume[d] . . . as an abstract matter" that the interest in preserving access to free television is compelling, he found "no evidence that this access is in jeopardy." J.S. App. 61a-62a; *see also id.* at 65a ("we have *nothing* to connect the limited evidence of cable operators' actual conduct with any inference that a threat to broadcasting is imminent or serious").[9]

THE QUESTIONS ARE SUBSTANTIAL

This case involves a law that requires businesses providing "news, information, and entertainment" to the

[9] Judge Williams also considered, and rejected, the notion that cable television should be given the lesser degree of protection afforded to broadcasters, which make use of the scarce electromagnetic spectrum (*see National Broadcasting Co. v. United States*, 319 U.S. 190 (1943)). In light of less restrictive alternatives like leased access channels, Judge Williams saw no basis on which "Congress can constitutionally deny cable operators the ordinary rights of any First Amendment speaker." J.S. App. 71a.

public, *see Leathers v. Medlock*, 111 S. Ct. 1438, 1442 (1991), to include programming selected by the government in that material. By its terms, the must-carry statute orders all cable operators to select, as part of their mix of programming, the material offered on local broadcast stations, regardless of whether the operators would select that material voluntarily and regardless of whether other programmers are thereby prevented from being heard. This interference with speech is not the effect of applying a general law regulating the activities of all businesses—whether or not engaged in providing speech to the public—nor is it the effect of applying a neutral law regulating the time, place, and manner of speech. Rather, it is the result of a deliberate, focused effort by Congress to control the editorial choices made by cable operators—in order to assure that the programming expressly preferred by Congress (that of local broadcast stations) will gain the largest possible audience. The district court, refusing to subject the law to exacting scrutiny under the First Amendment, sustained the law, holding that it was "essentially economic regulation." J.S. App. 13a.

This conclusion, and many of the legal principles announced in reaching it, reflect a material departure from traditional protections afforded to freedom of speech and of the press. Although government may subject businesses engaged in speech to laws of general applicability without provoking strict judicial scrutiny, it is a different matter when government singles out the press (or part of the press) for special regulation and when that regulation gives the government power to control the content of speech. *See Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983). Moreover, contrary to the views of the district court, there is no basis for saying that either the right of cable operators not to speak—the constitutional equal of the right to speak (*see Riley v. National Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988))—or the right of operators and programmers to be free of government-mandated discrimination turns upon whether the government

compels the carriage of prescribed *messages* rather than the speech of particular *speakers* favored by the government. Yet, relying on these unfounded doctrines and suggesting that cable television is less deserving of First Amendment protection than other media, the court below engaged in only a highly deferential review of the asserted justifications for the must-carry law, declaring that "[f]ederal courts do not ordinarily review the adequacy of the record before Congress to support the laws it enacts." J.S. App. 15a.

These issues are substantial and of widespread importance. With the exception of broadcasters—whose rights are limited by the unique need to allocate the scarce frequencies of the electromagnetic spectrum—no member of the press has ever been subjected to a targeted law requiring it to devote a significant percentage of its capacity to speech selected by the government. Nor has this Court ever suggested that it is permissible for government to dictate that certain speakers be given preferred positions in the marketplace for speech at the expense of other competing speakers. Yet Congress, through the must-carry law, has done just those things and done so on the basis of a factual record that, viewed without the extraordinary deference given by the district court, makes quite clear that local broadcast stations are in no immediate danger of extinction at all. The decision below thus marks a dangerous and wrong-headed expansion of government power over speech. Full review by this Court is necessary to correct it.

1. The district court got off on the wrong foot by treating the must-carry law as "simply industry-specific antitrust and fair trade practice regulatory legislation," J.S. App. 13a, with at most a tangential effect on speech. *See id.* ("to the extent First Amendment speech is affected at all, it is simply a byproduct of the fact that video signals have no other function than to convey information"). Although the district court apparently thought that this characterization justified a lenient standard of

judicial review, the opposite is true: regulation singling out the press, and giving government the opportunity to dictate the content of its speech to the public, merits the most rigorous scrutiny.

This Court has recognized that cable television "is engaged in 'speech' under the First Amendment, and is, in much of its operation, part of the 'press.'" *Leathers v. Medlock*, 111 S. Ct. at 1442. "[T]hrough original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, [a cable operator] seeks to communicate messages on a wide variety of topics and in a wide variety of formats." *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986). *See also FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979) (cable operators must exercise "a significant amount of editorial discretion regarding what their programming will include"). In that cable operators create and select programming to be provided to subscribers, "[c]able television partakes of some of the aspects of speech and the communication of ideas as do the traditional enterprises of newspaper and book publishers, public speakers, and pamphleteers." *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. at 494. Cable programmers, in turn, provide much of the "news, information, and entertainment," *Leathers v. Medlock*, 111 S. Ct. at 1442, that cable operators elect to provide to their subscribers.

The fact that cable operators and programmers are part of the press does not mean, of course, that the First Amendment exempts their business activities from regulation. The press enjoys no "constitutional sanctuary" from economic regulation, *Associated Press v. United States*, 326 U.S. 1, 7 (1945), and regulation of business practices is not typically reviewed under exacting First Amendment standards. But that relaxed scrutiny has traditionally been applied to, and is only appropriate for, regulation carried out pursuant to general laws—*i.e.*, laws applicable to businesses generally, not just to the press.

Thus, while observing that it "ha[d] long upheld economic regulation of the press," *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. at 583, this Court has expressly noted that "[t]he cases approving such economic regulation . . . emphasized the general applicability of the challenged regulation to all businesses." 460 U.S. at 583. *See also Cohen v. Cowles Media Co.*, 111 S. Ct. 2513, 2518 (1991) (reviewing "decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news"). The requirement of "general applicability" acts as an inherent, essential check against the improper use of government power against the press: as the Court pointed out in the context of taxation of the press, "we need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency." *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. at 585 (citing *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring)).

That inherent check is wholly absent, however, when government singles out the press for special regulation. In those circumstances, the decision to subject only the press to particular regulation necessarily raises the concern that Congress is not merely engaged in "economic regulation" but, rather, is employing legislation as a means of allowing it to achieve the largely forbidden goal of controlling what is said in the press. As the Court has said, "differential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional." *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. at 585. *See also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 61 U.S.L.W. 4587, 4593 (U.S. June 11, 1993) (No. 91-948) (striking down law under free exercise clause and indicating

that, where the "general applicability requirement" is at issue, there are "parallels" between the free exercise and speech and press clauses). Although it is enough that a targeted law may lead to indirect interference with speech (*e.g.*, the threat of more burdensome taxation in *Minneapolis Star*), the must-carry law embodies *direct* interference: it purposefully discriminates by enhancing the message of those holding broadcast licenses to the detriment of other speakers. Whether framed as "economic regulation" or not, that targeted effort should be upheld only if it is " 'necessary to serve a compelling state interest and . . . is narrowly drawn to achieve that end.' " *Burson v. Freeman*, 112 S. Ct. 1846, 1851 (1992) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)).

2. Although the district court held that the must-carry law was "essentially economic regulation," J.S. App. 13a, it ultimately acknowledged (albeit grudgingly) "[t]hat the First Amendment is to some extent implicated whenever a government endeavors to regulate a cable industry component," *id.*, finding it "a proposition now too well-established to reconsider." *Id.* The court then went on, however, to devalue the First Amendment interests at stake, finding hitherto unknown limitations on the right not to speak under government compulsion and the right to be free of government-compelled discrimination in the marketplace for speech. These limitations—applicable by their terms to all members of the press, not just to cable operators and programmers—are unprecedented and ill-founded.

a. This Court has recently made clear that, while "[t]here is certainly some difference between compelled speech and compelled silence, . . . in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say." *Riley v. National*

Fed'n of the Blind, 487 U.S. at 796-97; *see Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985). Thus, along with the familiar right not to be censored, "[t]here is necessarily, and within suitably defined areas, a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.' " *Id.* at 559 (quoting *Estate of Hemingway v. Random House, Inc.*, 23 N.Y.2d 341, 348, 296 N.Y.S.2d 771, 776, 244 N.E.2d 250, 255 (1968)). This freedom, by its terms, is not limited to particular speakers or particular speech: "*all* speech inherently involves choices of what to say and what to leave unsaid." *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 11 (1986) (plurality opinion).[10]

The right not to speak is, likewise, an inseparable part of freedom of the press. This Court has expressed its longstanding concern about any "compulsion exerted by government on a newspaper to print that which it would not otherwise print," *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974), noting that "[t]he clear implication" of its prior cases was "that any such compulsion to publish that which ' "reason" tells them should not be published' is unconstitutional." *Id.* (quoting *Associated Press v. United States*, 326 U.S. at 20 n.18). Although the law at issue in *Tornillo*—a statute requiring newspapers to print replies by political candidates to criticism in their pages—was defended on the ground that it would provide newspaper readers with a greater diversity of views, the Court nonetheless concluded that "[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public

[10] The Court has allowed somewhat greater latitude for laws compelling statements in the area of commercial speech. *See, e.g., Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626 (1985). It is clear, however, that the programming on cable television may not generally be treated as commercial speech. *See Leathers v. Medlock*, 111 S. Ct. at 1442 ("[c]able television provides to its subscribers news, information, and entertainment").

issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time." 418 U.S. at 258.

Notwithstanding these established principles, the district court declined to give close scrutiny to the must-carry requirements, announcing that "[a] compulsory speech requirement, or one imposing upon the discretion of a speaker to say only what he wishes, it appears, is to be strictly scrutinized *only* if it appears that the government has prescribed the content—either the message or the subject matter—of the speech to be spoken." J.S. App. 16a (emphasis added). But this novel limitation cannot be squared with the most basic notions of freedom of speech. If full protection under the First Amendment depended upon whether "the government has prescribed the content—either the message or the subject matter—of the speech to be spoken," *id.*, then it would follow that the government, without strict judicial review, could direct every newspaper to commit a section of its pages to the publication of material submitted by particular writers, or compel bookstores to carry a specified amount of works published by "local" authors, or movie theatres to show films produced by designated movie studios. Under the theory adopted by the district court, none of those mandates would dictate the "message or subject matter" of the speech, yet each would cut deeply into the right of newspapers, booksellers, and movie theatres to choose what they will offer to the public. The freedom not to speak under "compulsion exerted by government" (*Miami Herald Publishing Co. v. Tornillo*, 418 U.S. at 256) is a freedom from the compulsion itself: it does not come and go depending upon the particular speech to be compelled. *See Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 124-25 (1973) ("[f]or better or for worse, editing is what editors are for; and editing is selection and choice of material").

The illogic of the district court's new rule is demonstrated, in fact, by the law at issue here. Whatever face Congress may put upon it, the fact remains that, by ordering cable operators to distribute the speech of certain broadcast stations, Congress is changing the nature of the speech provided by cable operators to their subscribers: "[M]andating speech that a speaker would not otherwise make necessarily alters the content of the speech," *Riley v. National Fed'n of the Blind*, 487 U.S. at 795, and, for that reason, laws compelling speech are necessarily considered "as a content-based regulation of speech." *Id.* at 795. Thus, even though the prescription of speech here is ostensibly defined in terms of the speakers, rather than the speech itself, the government nevertheless is exerting direct control over the content of speech. That interference is properly subject to strict judicial review. *See id.*

b. The district court also lessened the protections against actions by government that discriminate against some speakers in order to promote the speech of others. The must-carry law, by its terms, creates two classes of speech: the speech of local broadcast stations, which is *guaranteed* access to certain cable channels, and the speech of cable programmers and other speakers, which must compete for access to a proportionately diminished number of channels. But "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . ." *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976). As a consequence, "distinguishing among types of speech requires that the statute be subjected to strict scrutiny." *Burson v. Freeman*, 112 S. Ct. at 1855.

The district court, however, again refused to apply strict scrutiny to the must-carry law, declaring that " 'speaker-partial' regulations, or those that purportedly favor one group of speakers at the expense of others, . . . are not subject to strict scrutiny unless they are content-

based." J.S. App. 17a. *See also id.* at 18a ("Speaker partiality alone, however, absent evidence that the government's distinction between groups of speakers is related to what the speakers are saying, is insufficient to trigger strict scrutiny."). But this narrow reading of the doctrine against discrimination appears to start from an assumption that it is normally acceptable for the government to decide which speakers should be heard and which should not. That notion gets matters precisely backwards: in fact, except when government is itself funding speech through grants or subsidies, it is presumptively invalid for the government to decide who may speak and who may not. " '[T]he constitutional right of free expression is . . . intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us . . . .' " *Leathers v. Medlock*, 111 S. Ct. at 1444 (quoting *Cohen v. California*, 403 U.S. 15, 24 (1971)). Absent compelling reasons, therefore, it is simply not the business of government to reorder the private marketplace for speech, commanding that certain favored speakers be given preferred access to their listeners and other disfavored speakers be left to fend for themselves. Whether the government legislates discrimination because it prefers certain speech, or just because it prefers certain speakers, does not change the illegitimate nature of the intrusion.[11]

In any event, the refusal of the district court to apply strict scrutiny was mistaken even under its own novel test, because the preference for local broadcasters embodied in the must-carry provisions is plainly "content-based." In enacting the must-carry law, Congress expressly sought to ensure dissemination of speech that

[11] As Judge Williams pointed out in his dissent: "Given the finite number of cable channels, replacement of the cablecaster's choice of programs with those of local broadcasters suppresses the alternative programs as completely as if Congress had ordered them shut down; there is nothing 'incidental' [*see O'Brien*, 391 U.S. at 376-77] about the burden." J.S. App. 55a (footnote omitted).

"educat[es]" citizens in a manner endorsed by the government. Findings ¶ 7 (noncommercial stations). Similarly, Congress deemed local broadcast stations entitled to preference because of its belief that they present "local news and public affairs programming and other local broadcast services critical to an informed electorate." *Id.* ¶ 11. *See also* S. Rep. No. 92, 102d Cong., 1st Sess. 59 (1991) (expressing concern that failure of broadcasters will reduce "local public service programming" and "lead to diminished diversity of opinion"); H.R. Rep. No. 628, 102d Cong., 2d Sess. 64 (1992) (same). As Judge Williams pointed out, Congress acted to promote the speech of local broadcasters—at the direct expense of cable programmers—because the government has deemed the specific content of broadcasters' speech to be "especially worthy." J.S. App. 53a (Williams, J., dissenting). It thus cannot be said that the purposes of the provisions are "unrelated to the content of expression," or that the carriage requirements are " '*justified* without reference to the content of the regulated speech.' " *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citation omitted).[12]

c. The district court also referred, in a footnote, to "its conclusion that contextual factors unique to cable require relaxed First Amendment scrutiny of the must-carry provisions even if marginally content-related . . . ." J.S. App. 22a n.25; *see id.* at 20a (listing characteristics "unique to the way the industry has evolved and is presently structured"). But, while this Court has said that

[12] While Congress did not mention the fact, it is worth noting that the class of programming favored by Congress is the same programming over which Congress exercises the greatest degree of control. Congress not only appropriates funds to support noncommercial broadcast stations; it also imposes, in exchange for the free award of scarce broadcast licenses, legislative requirements on the programming of commercial broadcast stations. *See, e.g.*, 47 U.S.C. § 303b(a)(2) (children's programming); Pub. L. No. 102-356 § 16(a), 106 Stat. 954, Aug. 26, 1992, *to be codified at* 47 U.S.C. § 303 (Indecent Programming Restrictions).

"[e]ach medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems," *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975), it has emphasized that "the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles . . . make freedom of expression the rule." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952). Indeed, the district court itself noted that, the maxim about different media notwithstanding, this Court "has infrequently invoked unique media characteristics to justify relaxed scrutiny of content-based regulations." J.S. App. 21a n.24. It would seem to go almost without saying, therefore, that, whatever differences may exist among various media, any categorical dilution of First Amendment rights is to be undertaken only under compelling circumstances.

There is nothing in the nature of cable television as a medium of communication—and nothing identified by the court below—that would justify a watering-down of its First Amendment rights. Although the district court correctly noted that cable operators (unlike many members of the press) commonly make special use of public rights-of-way,[13] *see* J.S. App. 20a, perhaps suggesting an analogy to use of frequencies by broadcasters, the circumstances are, in fact, very different. The justification for greater regulation of broadcast licensees is not simply that they make use of public property (*i.e.*, the airwaves) or that it would be inconvenient or burdensome for the government to allow duplicative access to those airwaves: it is that it would be *impossible* to allow duplicative access.

[13] The use of public property or rights-of-way, in and of itself, would not seem a promising basis for justifying laws dictating the content of speech. For example, even if a city could refuse to allow any newsboxes on its streets, it would not be able to grant permission subject to a requirement that the favored newspapers publish material approved by the City. *See City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988); *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993).

As this Court has explained, "only a tiny fraction of those with resources and intelligence can hope to communicate by radio at the same time if intelligible communication is to be had." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388 (1969). No one could credibly argue that the same problem exists in the cable industry. *Home Box Office, Inc. v. FCC*, 567 F.2d at 46 ("there is no readily apparent barrier of physical or electrical interference to operation of a number of cable systems in a given locality"). Cable operators' ability to speak—like that of fledging newspapers—is limited by economic concerns, not physical ones.[14]

It would be a step of enormous gravity to hold that the protections afforded by the First Amendment apply with less force to an emerging member of the media, especially one to whom the unique conditions of spectrum scarcity do not pertain. To the extent that cable television differs in some respects from newspapers, magazines, movie theatres and other traditional members of the press, those differences can be taken into account in determining whether government has demonstrated an overriding interest in the particular regulation at issue. They should not, however, provoke a wholly new standard of scrutiny

[14] None of the other factors mentioned by the district court justifies distinguishing cable television from those media fully protected by the First Amendment. For example, it is hardly distinctive that cable television competes for advertising; newspapers and magazines do the same. Nor is diminished constitutional protection warranted because there is commonly only one cable operator in a given locality. Most towns have only one movie theatre and, as the Court noted in *Tornillo*, most communities are served by only one daily newspaper. 418 U.S. at 249 n.13. Indeed, the proponents of an enforced right of access in *Tornillo* pointed to "dominant features of a press that has become noncompetitive and enormously powerful," manifested by such characteristics as "[c]hains of newspapers, national newspapers, national wire and news services, and one-newspaper towns" and a "monopoly controlled by the owners of the market" (*id.* at 249, 251). But the Court held that all such indicia of economic concentration were insufficient to uphold compelled access to the press or to justify governmental intrusion upon the editorial function. *Id.* at 256, 258.

under the First Amendment, permanently tilted in favor of more expansive government regulation and against full-fledged freedom of speech. And, in any event, there is *no* difference between cable television and those media given full protection that would justify allowing the government to dictate the content of speech that must be provided by cable television to its subscribers. *See* J.S. App. 54a-56a (Williams, J., dissenting).

3. Having decided that the must-carry law need not be reviewed according to the most exacting standards, the district court, in fact, gave the asserted justifications for the law almost no independent scrutiny at all. Rather than assess for itself the fit between legislative ends and means, the court simply deferred to Congress with respect to whether the must-carry provisions were necessary. The lack of meaningful judicial review would be error even under the less demanding *O'Brien* test. It was wrong *a fortiori* under strict scrutiny.

This Court has often stressed the importance of subjecting restrictions on speech to independent judicial review, saying that "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978); *see also Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 129 (1989); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915 (1982). Indeed, were the courts barred from going beneath the surface of congressional findings, "[t]he scope of freedom of speech and the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified." 435 U.S. at 844; *see also Lamprecht v. FCC*, 958 F.2d 382, 392 n.2 (D.C. Cir. 1992). Although the Court has at times spoken of giving deference to Congress' factual findings, *see Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 569 (1990), it has made clear that "whatever deference is due legislative findings would not foreclose [this Court's] independent judgment of the facts bearing on an issue of constitutional law . . . ." *Sable Communications of California, Inc. v. FCC*, 492 U.S. at 129. The need for independent judgment is particularly apparent here, given that prior must-carry rules have twice been found to have little grounding in fact, *see* pages 4-6 *supra*, and that the current rules are prophylactic, not corrective, in nature. *See NAACP v. Button*, 371 U.S. 415, 438 (1963) (citations omitted) ("[b]road prophylactic rules in the area of free expression are suspect").

The court below, however, repeatedly stressed "the deference this Court should accord to the factfinding abilities of the nation's legislature." J.S. App. 26a; *see also id.* at 27a (court "unwilling to second-guess Congress' determination that the must-carry provisions are necessary to accomplish its objective.") If this sort of exaggerated deference is put aside, it is clear that the supposed threat to local broadcasters, far from being present and concrete, is speculative if not fanciful.[18] Congress itself found that "the most popular programming on cable systems, and a substantial portion of the benefits for which consumers pay cable systems is derived from carriage of [broadcast signals]." Findings ¶ 19. It is not surprising, therefore, that, following the invalidation of the original must-carry rules, cable operators did not elect to drop local broadcasters to any significant degree. Indeed, the FCC survey said by Congress to show "a serious problem," S. Rep. No. 92 at 43, actually found that only one in five cable operators had refused carriage to even one broadcast station within the scope of the survey.

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[18] Indeed, if there were genuine concern about the continued availability of broadcast programming on cable systems, it is difficult to see why Congress, in the same statute, would give to broadcast stations a new privilege to *refuse* to allow cable systems to show their programming. *See* note 6 *supra*. To the extent that local stations withhold consent to retransmission, they are undercutting the very goals that Congress is ostensibly seeking to advance by the must-carry requirement.

See FCC Mass Media Bureau, *Cable System Broadcast Signal Carriage Survey Report* 10 (Sept. 1, 1988) (filed by NAB as Attachment B to Affirmation of Jack N. Goodman). Overall, as Congress observed, the survey indicated a nationwide total of "3,600 instances" of non-carriage of a local station, S. Rep. No. 92 at 43, but that number, deceptively large when viewed in isolation (as Congress viewed it, *ibid.*), actually amounts to a non-carriage rate of 5% (approximately 8500 cable systems were then carrying an average of eight broadcast stations each). *See* J.S. App. 64a (Williams, J., dissenting); *Cable System Broadcast Signal Carriage Survey Report* 4; NCTA's Statement of Material Facts ¶ 18. In short, as the House Report acknowledges, "[t]he Committee has not found that cable systems are engaging in a widespread pattern of denying carriage of local television stations . . . ." H.R. Rep. No. 628 at 52. *See also* J.S. App. 63a (Williams, J., dissenting); NCTA Statement of Material Facts as to Which There Is No Genuine Issue ¶ 8 (the average U. S. cable system actually carried *more* local broadcast signals in 1990 than in 1986).[16]

Far from being imperiled, in fact, broadcasting has flourished in the years since invalidation of the must-carry rules in *Quincy*: "the number of commercial broad-

[16] It is also highly likely that, if broadcast television, including the networks, were not available on cable systems, consumers would then use inexpensive switching devices and antennas, which would readily make available both cable programming and over-the-air broadcast programming. While it is true, as Congress found, that this technology is not used when the overwhelming majority of broadcast stations *are* voluntarily carried on cable systems, it hardly follows that it would not be used if broadcasting—"the most popular programming on cable systems" (Findings ¶ 19)—were otherwise massively unavailable. *See* J.S. App. 66a (Williams, J., dissenting). To the contrary, "[c]ommon sense suggests that consumers who want to receive an off-the-air channel will quickly observe that they may need to purchase (or reconnect) antennas should their cable system cease offering their favorite broadcast stations." *Century Communications*, 835 F.2d at 301 (internal quotation omitted).

cast stations has increased by 22% (from 919 to 1118), the number of educational broadcast stations by 15% (from 316 to 363), and the number of cities receiving broadcast television by 16% (from 514 to 594)." *See* J.S. App. 62a (Williams, J., dissenting) (citing NCTA Statement of Material Facts ¶¶ 12-14.)[17] This significant expansion took place at least partially *because of* the growth of cable television, and despite the purported "economic incentive" of cable operators "to delete, reposition, or not carry local broadcast signals." Findings ¶ 16. That incentive, to the extent that it exists at all, is thus clearly overcome by the economic incentive to carry the vast majority of broadcast signals.[18]

4. These issues are of great practical, as well as doctrinal, importance. The requirements of the must-carry law control the programming of every cable operator throughout the nation. They prevent every cable operator from deciding, voluntarily, what programming it will offer to its subscribers, thus invading each operator's editorial prerogatives. No less offensively, the must-carry requirements deprive cable programmers of the opportunity to communicate their messages on terms of equality with broadcasters and other speakers competing for space on cable systems.

[17] The fact that broadcast stations are increasing in number casts grave doubt on the theory that cable operators maintain, and will exploit, a "bottleneck" over transmission of video programming. The ability of broadcast stations to reach their viewers without significant impediment indicates either that transmission by cable systems is not essential to their success or that cable systems are carrying the great majority of them. *See* P. Areeda & H. Hovenkamp, Antitrust Law § 736.2, at 847 (1992 Supp.).

[18] The district court also gave little consideration to the availability of other means of preserving the system of local broadcasting. For example, if local broadcasters ever faced genuine financial hardship, Congress could provide subsidies to the stations, as it does in partial form now through the grant of free broadcast licenses. *See* J.S.App. 66a (Williams, J., dissenting).

The decision below is significant for another reason as well: while it was less than fully explicit on the point, the court below quite plainly regarded cable television as less deserving of full First Amendment protection than other forms of communication. Although many of the First Amendment doctrines pronounced by the court below would apply on their face to newspapers and other traditional members of the press, it is hard to imagine that the federal courts would allow Congress to impose comparable requirements on other, more traditional media. *See Turner Broadcasting Sys., Inc. v. FCC*, 113 S. Ct. 1806, 1807-08 (1993) (Rehnquist, C.J., in chambers) ("[u]nder *Tornillo*, Congress plainly could not impose the must-carry provisions on privately owned newspapers"). Yet, the basic principles of the First Amendment—the belief that government should not decide who may speak or what they may say—are no less applicable to new forms of speech than to old forms. The decision below marks a serious departure from those principles and warrants plenary review by this Court.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 92-2247

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Plaintiffs,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Defendants.

Civil Action No. 92-2292

DANIELS CABLEVISION, INC.,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

Civil Action No. 92-2494

TIME WARNER ENTERTAINMENT COMPANY, L.P.,
Plaintiff,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Defendants.

Civil Action No. 92-2495

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
Plaintiff,

v.

UNITED STATES OF AMERICA, *et al.*,
Defendants.

Civil Action No. 92-2558

DISCOVERY COMMUNICATIONS, INC., *et al.*,
Plaintiffs,

v.

UNITED STATES OF AMERICA, *et al.*,
Defendants.

MEMORANDUM AND ORDER

[Filed Apr. 8, 1993]

Before WILLIAMS, Circuit Judge, JACKSON and SPORKIN, District Judges.

THOMAS PENFIELD JACKSON, District Judge.

Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (to be codified at 47 U.S.C. §§ 534 & 535) ("the 1992 Cable Act" or "the Act") require cable television system operators to carry the video signals of certain commercial and non-commercial educational television broadcast stations requesting that their signals be carried. The plaintiffs in these five consolidated lawsuits contend that these mandatory carriage (or "must-carry") provisions violate their First Amend-

ment rights. Upon consideration of the entire record,[1] the Court holds that sections 4 and 5 of the 1992 Cable Act do not violate the plaintiffs' First Amendment rights.

Background

On October 5, 1992, Congress overrode a Presidential veto to enact the 1992 Cable Act. The Act subjects the cable industry to extensive regulation. Among other things, it subjects certain cable system operators to rate regulation by the FCC and by municipal franchising authorities; it imposes restrictions on distributors of cable programming that are affiliated with cable operators; and it directs the FCC to promulgate regulations imposing minimum technical standards for operators of cable systems.

Sections 4, 5, and 6 of the Act limit the freedom of cable operators to refuse to carry the signals of local broadcast stations, and, as a corollary, prevent cable operators from carrying broadcast signals without a broadcaster's consent.[2] The plaintiffs' constitutional challenge

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[1] During the pendency of this litigation, no fewer than 16 parties have sought to intervene as plaintiffs or defendants. These applications have been held in abeyance, but all of these applicants, together with several *amicus curiae* applicants, have been granted leave to participate herein as *amici*. All applicants for intervention have been permitted to file motions and memoranda as exhibits to their motions for intervention, and the Court has considered the entire record amassed in this case. The Court has, contemporaneously with the filing of this opinion, issued an order granting all pending motions for intervention insofar as the applicants seek to challenge or defend the must-carry provisions.

[2] "Broadcast" stations reach their viewers by transmitting electromagnetic waves through the air for interception by television receivers, usually equipped with antennas. Other entities in the business of producing video images, generically referred to herein as "programmers," do not have access to the electromagnetic spectrum, and must find alternative means by which to reach viewers. Most often, programmers will arrange to have their signals transmitted by satellite to receptor dishes across the world. Cable "oper-

to these three sections is the matter presently to be addressed by this opinion.

Section 4 of the Act requires all cable system operators with more than 12 channels to carry, upon request, the signals of licensed "local" commercial broadcast television stations whose signal is received over-the-air in the same television market as the cable system.[3] The operator need not devote more than one-third of its active useable channels to deliver local broadcast signals, but if there are not enough local broadcast stations to fill the one-third set-aside, the operator must carry the signal of one or two "qualified" low power broadcast stations.[4] Cable systems with 12 or fewer channels must deliver the signals of at least three local commercial broadcast stations unless the cable system has 300 or fewer subscribers, in which case it is not subject to the requirements of section 4 at all. An operator must carry the entire programming schedule of each commercial station it is required to

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ators" develop a package of programming services by creating their own programming, by capturing the satellite signals of different programmers, and by capturing the broadcast signals of local and distant broadcasters on master antennas. These programming packages are generally sent by cable operators to their subscribers by coaxial cables strung along public rights-of-way.

[3] An operator's television market is defined by regulation, *see* 47 C.F.R. § 73.3555(d)(3)(i) (1992), but the FCC is empowered to make special market determinations upon request, *see* 1992 Cable Act § 4 (definitions) (to be codified at 47 U.S.C. § 533(h)(1)(C)).

[4] Low power television stations are small broadcast operations with a limited geographic transmission range. These stations are licensed on a secondary basis; they cannot interfere with the signals of any full power station and must give way to any full power station attempting to occupy the same frequency. *See generally* 47 C.F.R. §§ 74.701-74.781 (1992); In the Matter of An Inquiry into the Future Role of Low Power Television Broadcasting and television Translators in the National Telecommunications System, BC Docket No. 78-253, 51 Rad. Reg. 476 (P & F) (April 26, 1982) [hereinafter *1982 LPTV Inquiry*].

carry, and it may not accept or request payment for doing so. Every commercial broadcast station having a right to mandatory carriage must be carried by the cable operator, at the station's election, on its current over-the-air channel position, at the channel position it occupied on July 19, 1985, or at the channel position it occupied on January 1, 1992.

Section 5 of the Act requires operators of cable systems able to deliver signals on more than 36 channels to carry the signals of every local non-commercial educational broadcast television station requesting carriage,[5] unless the educational station's programming substantially duplicates that of another station carried by the system. Systems with 12 or fewer channels must carry one qualified non-commercial station, and systems having 12 to 36 channels must carry between one and three such stations. Section 5, like section 4, directs cable system operators to carry the entire programming schedule of the broadcast stations they are required to carry, and similarly prohibits operators from accepting payment in exchange for carriage. Each non-commercial station having a mandatory carriage right must be carried, at its election, on its current over-the-air channel position or on its channel position as of July 19, 1985.

Section 6 of the Act, which becomes effective on October 5, 1993, prohibits cable operators from retransmitting the signals of any commercial broadcasting station without obtaining the station's consent. In conjunction with section 4, section 6 provides local broadcasters with an option to request mandatory (but uncompensated) carriage on a system or to negotiate a carriage

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[5] A qualified noncommercial educational station is (1) a station licensed by the FCC as such, owned by a public agency or nonprofit entity, and eligible to receive a grant from the Corporation for Public Broadcasting; or (2) a station owned and operated by a municipality which transmits predominantly noncommercial programs for educational purposes. 1992 Cable Act § 5 (definitions) (to be codified at 47 U.S.C. § 535(l)(1)).

agreement with the operator. (Presumably, cable operators will want to carry the signals of larger, viewer-popular broadcasters and will pay for the privilege;[6] less popular broadcasters will be able to force their carriage by making a carriage demand under section 4.).

On the same day that the 1992 Cable Act became law, Turner Broadcasting System, Inc., the owner of several cable programming operations, brought this case against the FCC and the United States, challenging sections 4, 5, and 6 as unconstitutional under the First Amendment, asking for declaratory and injunctive relief.[7] Within the ensuing five weeks, four other plaintiff groups—comprised of cable system operators and programmers—brought similar suits seeking similar relief.[8] In addition to challenging sections 4, 5 and 6 of the Act, two of these plaintiff groups brought First Amendment challenges to multiple other provisions of the 1992 Act and to certain provisions of the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2782 ("the 1984 Act").[9] This three-judge U.S. District Court ("the Court" or "this Court") was convened pursuant to § 23 of the 1992 Cable Act, which commands that a three-judge court hear "any civil action challenging the constitutionality of section [4] or [5]" of the 1992 Act.

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[6] Prior to the 1992 Act, cable operators were free to carry the signals of local broadcasters subject only to the "compulsory license" provisions of the copyright law. *See* 17 U.S.C. § 111 (1988). Under these provisions, operators may transmit broadcast signals if they pay royalty fees determined pursuant to an administrative schedule.

[7] *Turner Broadcasting Sys., Inc. v. FCC*, CA No. 92-2247. Turner later amended its complaint to add several additional cable programmers as plaintiffs.

[8] *Daniels Cablevision, Inc. v. United States*, CA No. 92-2292; *Time Warner Entertainment Co. v. FCC*, CA No. 92-2494; *National Cable Television Assoc. v. United States*, CA No. 92-2495; *Discovery Communications, Inc. v. United States*, CA No. 92-2558.

[9] *Time Warner*, CA No. 92-2494; *Discovery*, CA No. 92-2558.

On November 23, 1992, this Court consolidated these five cases for the "purpose of determining issues related to the constitutionality of sections 4 and 5 of the [Act], and any matters determined to be ancillary thereto." *Turner Broadcasting Sys., Inc. v. FCC*, CA No. 92-2247, order at 2 (D.D.C. Nov. 23, 1992) (three-judge court). Four of the five plaintiff groups filed comprehensive preliminary injunction motions, but a hearing on those motions as to the must-carry provisions was postponed indefinitely upon the Court's approval of the parties' assent to a "standstill order" proposed by the parties. *See id.*, standstill order (D.D.C. Dec. 9, 1992) (three-judge court). On December 15, 1992, this Court declined to exercise jurisdiction over any claim other than the must-carry claims, *see Turner Broadcasting Sys., Inc. v. FCC*, 810 F. Supp. 1308 (D.D.C. 1992) (three-judge court).[10]

The matter, i.e., the constitutionality of sections 4 and 5, is now before the Court on motions for summary judgment of all five plaintiff groups; on the cross-motions for summary judgment of several intervenor-defendants; on the federal defendants' cross-motion to dismiss; on an intervenor-plainiff's motion for preliminary injunction of sections 4 and 5 on "religion clause" grounds; and on an intervenor-defendant's motion for summary judgment on a cross-claim.

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[10] All motions for preliminary injunction with respect to sections other than 4 and 5 were denied by the single-judge district court. *See Time Warner Entertainment Co. v. FCC*, 810 F. Supp. 1302 (D.D.C. 1992) (Jackson, J.). A decision in these cases on the merits is forthcoming.

All of the plaintiffs challenge section 6, the retransmission consent provision, on the ground that it is not severable from section 4, and must be struck if section 4 is declared unconstitutional. Because the Court holds that section 4 is constitutional, plaintiffs' challenge to section 6 must fail, and the Court expresses no opinion on the severability issue. One of the plaintiffs, Daniels Cablevision, has brought an independent constitutional challenge to section 6. Pursuant to the Court's jurisdictional ruling, this challenge is before the single-judge court.

I.

The plaintiff cable system operators and programmers contend that the must-carry provisions are, on their face, violative of their First Amendment rights to freedom of speech. The primary evil of those provisions, they assert, is that they force cable system operators to devote a portion of their finite signal-carrying capacity to deliver the signals of a privileged class of competing "speakers," i.e., over-the-air broadcasters, thus diminishing the number of channels remaining available to them for other programming they might prefer to carry. Must-carry also violates the First Amendment rights of the operators, they say, because it inhibits the operators' "editorial discretion" to determine what programming messages to provide to their subscribers,[11] compelling them perforce to deliver some programming they might otherwise choose not to carry. And the programmers argue that must-carry exalts broadcasters to preferred status as "speakers" by awarding them favored cable channel positions the programmers covet.

The concept of governmentally ordained mandatory carriage of broadcast signals is not a novel threat to the cable industry. The FCC first began to experiment with must-carry rules in the early 1960s.[12] The perceived need for must-carry today is based on the same premise that gave rise to it then: that local broadcast stations, unable to secure carriage on cable systems serving the same viewer markets, will, over time, lose their audiences and perish. *Compare* 1992 Cable Act § 2(a)(15) *and* S. Rep. No. 92, 102d Cong., 1st Sess. 42-46 *and* H.R. Rep. No. 628, 102d Cong., 2d Sess. 50-57 (*with Rules Re*

[11] The plaintiffs note that the 1992 Act not only requires operators to carry local broadcast stations, it requires operators to carry these stations on a "basic service tier" that must be made available to all subscribers. 1992 Cable Act § 3(a) (to be codified at 47 U.S.C. § 543(b)(7)(A)).

[12] The early development of must-carry regulation is comprehensively traced in *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1438-43 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

Microwave-Served CATV, Dockets Nos. 14895 and 15233, 38 F.C.C. 683 ¶ 51, 57, 58-82 (1965). As the audiences of broadcasting stations decline, so the reasoning goes, their advertising revenues will decrease correspondingly. Local over-the-air broadcasting operations, once they become unprofitable, will expire. Cable carriage of local broadcasting was then and is still now thought by its proponents to be essential not merely to ensure the continuing availability of programming with a "local" flavor to cable system subscribers, but also to preserve the vitality of a free source of over-the-air programming to television viewers unwilling or unable to obtain a cable connection.

Not surprisingly, the parties have expended considerable effort and resources arguing over the level of First Amendment scrutiny to be applied to speech regulation in the cable context. The plaintiffs contend that the must-carry provisions must be subjected to exacting First Amendment scrutiny; if they are not *per se* unconstitutional, they are assuredly permissible only if found to have been precisely drawn to serve a compelling government interest, and to go no further. *See, e.g., Sable Communications v. FCC*, 492 U.S. 115, 126 (1989); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983). The defendants respond that if the First Amendment is implicated at all in this case, the must-carry provisions need only be judged by the interest-balancing traditionally applied to content-neutral speech regulation or legislation ostensibly unrelated to expression that is discovered to impose incidental burdens on speech. The nature of this inquiry, originating in *United States v. O'Brien*, 391 U.S. 367 (1968), and refined in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), is to uphold such regulation when shown to promote a significant government interest and not to burden substantially more speech than necessary to vindicate that interest. *Rock Against Racism*, 491 U.S. at 799.

II.

In 1989, Congress began the first in a series of several hearings to assess the video programming distribution landscape in light of the 1984 Cable Act.[13] After an exhaustive fact-finding process including hearings held over three years,[14] the 1992 Act was passed.[15] Congress' principal finding was that, for a variety of reasons, concentration of economic power in the cable industry was preventing non-cable programmers from effectively competing for the attention of a television audience. *See* 1992 Cable Act §§ 2(a)(2), (4), & (15). *See generally* 1992 Cable Act § 2(a); 1991 S. Rep. No. 92; 1992 H.R. Rep. No. 628, 102d Cong., 2d Sess. (1992); H.R. Rep. No. 862 (conference report).

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[13] *See Media Ownership: Diversity and Concentration: Hearing before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation*, 101st Cong., 1st Sess. (1989) [hereinafter *Hearing of June 1989*].

[14] *See, e.g., Hearings before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce*, 102d Cong., 2d Sess. (1991); *S. 12: Hearing before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation*, 101st Cong., 1st Sess. (1991); *"Must-Carry:" Hearing before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation*, 101st Cong., 1st Sess. (1989) [hereinafter *Hearing of October 25, 1989*]. *See generally* 1991 S. Rep. No. 92 at 3-5 (1991) (discussing the 11 Senate hearings, held over two years, related to cable television); Debates, 138 Cong. Rec. S400, S635 (statement of Sen. Inouye) (daily ed. Jan. 30, 1992) ("[T]he bill before us is the result of 18 days of hearings and 113 different witnesses. We have had countless numbers of communications experts and lawyers look over the measure. We have conferred with, in addition to the 113 witnesses, at least 500 knowledgeable citizens.")

[15] *See generally* 1991 S. Rep. No. 92; 1992 H.R. Rep. No. 628 (1992); 1992 H.R. Rep. No. 862, 102d Cong., 2d Sess. (1992) (conference report).

Congress specifically found that cable had become the "dominant nationwide video medium." 1992 Cable Act § 2(a)(3); *see* 1991 S. Rep. No. 92 at 3. Almost 56,000,000 households—60 percent of the households with televisions—receive cable television, 1992 Cable Act § 2(a)(3), and cable service is available to almost 90% of the nation, 1991 S. Rep. No. 92 at 3. In those homes receiving video signals by cable, cable has all but supplanted over-the-air broadcast television reception. 1992 Cable Act § 2(a)(17).

Congress also found that despite the dominance of cable, there is insufficient competition within the cable industry. First, there is little competition between cable operators. For many reasons "including local franchising requirements and the extraordinary expense of constructing more than one cable television system to serve a particular geographic area," most regions of the country are served by one cable operator only. 1992 Cable Act § 2(a)(2).[16] Second, the industry has become horizontally concentrated—many operators share common ownership. *See* 1992 Cable Act § 2(a)(4).[17] Third, the industry is becoming vertically integrated. 1992 Cable Act § 2(a)(5). Many large entities that operate cable franchises also own and operate programming enterprises. *Id.*; *see also FCC Report, supra* note 16, at ¶¶ 77-80.

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[16] Evidence received by Congress indicated that less than 1% of the cable operators in the nation face competition from other operators. *Federal Communications Commission Report*, MM Docket No. 89-600 ¶ 98 [hereinafter *FCC Report*]; *Hearing of October 25, 1989, supra* note 14, at 40. *See generally* Debates, 138 Cong. Rec. S400, S436 (comments of Sen. Gorton) (daily ed. Jan. 30, 1992) (stating that although there are 11,000 cable operators, in the nation, there are only 53 communities which are served by more than one).

[17] *See also Hearings of June 1989, supra* note 13, at 78 (testimony of Prof. Bagdikian) (testifying that the operators serving one-third of the cable subscribers in the nation are owned by two cable companies).

Congress determined that geographic monopolization, horizontal concentration and vertical integration have created barriers to entry for non-cable programmers, primarily broadcasters, attempting to obtain carriage on cable. Vertical integration contributes to this cable "bottleneck" by providing cable operators with economic incentive to grant affiliated programmers access to their systems while denying it to others. 1992 Cable Act § 2 (a)(5). Similarly, horizontal concentration and the absence of effective competition among operators have obstructed broadcaster access by creating a climate conducive to another anti-competitive operator practice. Cable operators compete with broadcasters for advertising revenue. *Id.* at § 2(a)(14). Consequently, operators have an economic incentive to refuse carriage of broadcasters' signals to reduce broadcast viewership, thus attracting advertising dollars that otherwise would go to broadcasters. *Id.* at § 2(a)(15).

In summary, Congress concluded that the economic forces at work and the market conditions they had already produced had placed free local broadcast television in serious jeopardy. *Id.* at § 2(a)(16). It determined that mandatory carriage was necessary to remedy unfair trade practices, to preserve local broadcasting for those who do not receive cable television. *id.* § 2(a)(12), as well as those who do, *id.* at § 2(a)(7), and to ensure that the public will continue to have access to a wide diversity of sources of video programming, *id.* at § 2(a)(6)-(11).

This Court is of the opinion that, in enacting the 1992 Cable Act, Congress employed its regulatory powers over the economy to impose order upon a market in dysfunction, but a market in a commercial commodity nevertheless; not a market in "speech." The commodity Congress undertook to regulate is the means of delivery of video signals to individual receivers. It is not the information the video signals may be used to impart. That the video signals can only be used to convey a message is of no

particular significance. The same is true of printing presses, or broadcast transmitters; loudspeakers, or movie projectors. Yet no one doubts that Congress could regulate a market in those commodities in danger of chaos or capture without being accused of attempting to infringe the First Amendment freedoms of those by whom they will be used to express protected "speech." The Cable Act of 1992 is simply industry-specific antitrust and fair trade practice regulatory legislation: to the extent First Amendment speech is affected at all, it is simply a by-product of the fact that video signals have no other function than to convey information.

In other words, the Court holds that the must-carry provisions are essentially economic regulation designed to create competitive balance in the video industry as a whole, and to redress the effects of cable operators' anti-competitive practices. The regulation is justified by the existing structure of the cable business itself, and by the market peculiarities resulting from the technological differences in the manner in which different video signal distributors deliver their products to their viewers' receivers. So perceived, the Court concludes that the must-carry provisions are, in intent as well as form, unrelated (in all but the most recondite sense) to the content of any messages that these embattled cable operators, broadcasters, and programmers have in contemplation to deliver.

III.

That the First Amendment is to some extent implicated whenever a government endeavors to regulate a cable industry component, however, is a proposition now too well-established to reconsider.[18] But although many courts

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[18] *See City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986) (holding that operators' exercise of editorial control "plainly implicate[s] First Amendment interests."); *Quincy*, 768 F.2d at 1452-53; *see also Leathers v. Medlock*, 111 S. Ct. 1438, 1442-43 ("[c]able television provides to its subscribers

have considered the application of the First Amendment to various laws regulating cable,[19] the question of the First Amendment standard to be applied to compulsory signal-carriage requirements has yet to be definitively answered. Despite twice confronting the issue, the D.C. Circuit has avoided its resolution. *See Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987), *clarified*, 837 F.2d 517 (D.C. Cir.), *cert. denied*, 486 U.S. 1032 (1988); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).[20]

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news, information, and entertainment. It is engaged in 'speech' under the First Amendment . . . ."). Although the defendants vigorously contend that the plaintiff programmers have raised no First Amendment issues because their only claim is that broadcasters have been favorably treated, this argument misses the point because it mischaracterizes the programmers' claims. The programmers do not merely contend that Congress has failed to provide a benefit to programmers that it has provided to others. Instead, the programmers contend that Congress has, by increasing broadcaster speech in a limited forum, *reduced* the speech of the programmers. This is a First Amendment claim. *Quincy*, 768 F.2d at 1451-52.

[19] *See, e.g., Preferred Communications, Inc.*, 476 U.S. 488; *Chicago Cable Communications v. Chicago Cable Comm'n*, 879 F.2d 1540 (7th Cir. 1989) *cert. denied*, 493 U.S. 1044 (1990); *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987), *clarified*, 837 F.2d 517 (D.C. Cir.), *cert. denied*, 486 U.S. 1032 (1988); *Quincy Cable*, 768 F.2d 1434; *Community Communications Co. v. City of Boulder*, 660 F.2d 1370 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982); *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977); *Telestat Cablevision, Inc. v. Riviera Beach*, 773 F. Supp. 383 (S.D. Fla. 1991); *Century Federal, Inc. v. Palo Alto*, 710 F. Supp. 1552 (N.D. Cal. 1987); *Group W Cable, Inc. v. Santa Cruz*, 669 F. Supp. 954 (N.D. Cal. 1987).

[20] As discussed below, in both cases, the court held FCC must-carry regulations unconstitutional without finding it necessary to define the precise level of First Amendment scrutiny to be applied to them. *See also Preferred Communications, Inc.*, 476 U.S. 488 (holding that municipal restrictions on cable operator franchise access implicate First Amendment interests, but expressing no opinion on the level of scrutiny to be applied).

It appears to this Court that the must-carry provisions of the 1992 Cable Act squarely present this fundamental issue, and these cases demand that it be resolved. The Court today holds that the government need not demonstrate that it has used the least restrictive means to accomplish what is, primarily and essentially, economic regulation of an industry in the business of delivering video signals. The Court concludes that sections 4 and 5 of the 1992 Act will pass constitutional muster if they satisfy the criteria established in *O'Brien* and its progeny.

To be sure, in *Quincy* and *Century*, the D.C. Circuit held FCC rules requiring cable operators to carry the signals of local broadcasters to be unconstitutional. Neither case, however, is controlling here; the court of appeals was careful, in both opinions, to note that must-carry rules are not *per se* unconstitutional. *Century*, 835 F.2d at 304; *Quincy*, 768 F.2d at 1463. The court of appeals simply held, in both cases, that the FCC had failed to make a record demonstrating the existence of a governmental interest of sufficient moment—whether "compelling" or merely "significant"—to warrant such First Amendment burdens as were imposed by its regulations, or to demonstrate that the means it had chosen to employ to its putative end were necessary at all.

The record in support of the 1992 Cable Act, in contrast, was made by Congress. Federal courts do not ordinarily review the adequacy of the record before Congress to support the laws it enacts.

IV.

All parties agree (at least, the plaintiffs concede) that the must-carry provisions are not *viewpoint*-based; must-carry rights are conferred upon all full-power local broad-

casters, and the obligations upon most cable operators, regardless of any views expressed in the programming of either. The provisions do not compel the carriage of any particular messages nor do they impose any burden on operators or programmers on the basis of the messages they or the broadcasters propose to transmit. Nevertheless, a law need not be viewpoint-based to be subject to strict First Amendment scrutiny. It may, for example, be considered content-based and subjected to strict scrutiny if it purports to restrict a particular type or character of speech, irrespective of the position taken on any issue. *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 537 (1980) (public policy leaflets accompanying utility bills); *Boos v. Barry*, 485 U.S. 312, 319 (1988) (placards embarrassing to or disparaging of a foreign government) (plurality opinion).

The plaintiffs contend that strict scrutiny applies because the must-carry provisions compel an operator to utter "speech" not of its choosing; because they alter an operator's editorial decision-making about what to say; and because they favor the speech of broadcasters over that of operators and programmers. But none of the epithets invoked by the plaintiffs—"compelled speech," or "editorial discretion," or "speaker-partiality"—are talismans automatically necessitating strict scrutiny. Strict scrutiny applies only if governmental regulation is overtly content-based or presents an opportunity for official censorship. A compulsory speech requirement, or one imposing upon the discretion of a speaker to say only what he wishes, it appears, is to be strictly scrutinized only if it appears that the government has prescribed the content—either the message or the subject matter—of the speech to be spoken.[21] Examined carefully, all of the

[21] Compelled speech presents two distinct content-related dangers. First, it may cause a speaker to say things he or she might otherwise choose not to say. *See Wooley v. Maynard*, 430 U.S. 705, 715 (1977). Second, it may deter a speaker from engaging in speech

compelled speech and editorial discretion cases cited by the plaintiffs can be seen to have involved regulation telling the speaker *what* to say or at least what to talk about. *See Riley v. National Fed'n of the Blind*, 487 U.S. 781 (1988) (state law requiring charitable fundraisers to disclose percentage of receipts actually devoted to good works); *Pacific Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1, 10-11 & n.7 (1986) (plurality opinion) (state regulation requiring utility to mail fundraising appeals of its rate-making opponents); *Wooley v. Maynard*, 430 U.S. 705 (1977) (state law requiring motorist to display bellicose state motto on license plates); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 214 (1974) (state law requiring newspaper to carry replies of political candidates it had opposed editorially).

These cases stand in sharp contrast to *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), in which the Supreme Court upheld a California constitutional provision interpreted to protect speech and petitioning at a privately owned shopping center. Significantly, the speaker's right to speak on the objecting owner's property upheld in *PruneYard* had nothing to do with the content or subject matter of his speech, and there was no danger that, in affording the speaker access to his shopping center, the owner would be affected to any degree in his ability to speak his own piece.

"Speaker-partial" regulations, or those that purportedly favor one group of speakers at the expense of others, similarly are not subject to strict scrutiny unless they are content-based. *Walsh v. Brady*, 927 F.2d 1229, 1236 (D.C. Cir. 1991); *see id.* at 1238-39 (Williams, J., concurring). *Buckley v. Valeo*, 424 U.S. 1 (1976), the principal speaker-partiality case cited by the plaintiffs,

that is inconsistent with the compelled speech. *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256-57 (1974); *Pacific Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1, 10-11 & n.7 (1986) (plurality opinion).

is not to the contrary. In *Buckley*, the Supreme Court struck down a statutory provision imposing a $1,000 limit on the amount which an individual could spend to support a particular political candidate. The government sought to justify the provision on the ground that it was necessary to provide those of modest means with an opportunity to participate in the political process equal to that of the wealthy. *Id.* at 48. Implicit in this reasoning, of course, was a Congressional judgment that the speech of those spending over $1,000 was not only "louder" than those spending less than $1,000, but was also different and, more importantly, more sinister. *See id.* at 16-17. *Buckley* is thus a case in which the government sought, in effect, to suppress the expression of a meretricious idea. Speaker partiality alone, however, absent evidence that the government's distinction between groups of speakers is related to what the speakers are saying, is insufficient to trigger strict scrutiny.[22]

[22] The plaintiffs contend that any regulation that singles out a particular segment of the press, like cable operators, and imposes burdens on them alone, is presumptively unconstitutional. Although the Supreme Court has applied such a presumption to certain taxes that single out members of the press, *see Minneapolis Star*, 460 U.S. 575 (1983). *See generally Leathers*, 111 S. Ct. at 1443-44, this presumption does not apply to the must-carry provisions. The Court is unpersuaded that mandatory carriage of local broadcasters, as opposed to the specifically targeted differential taxes struck in *Minneapolis Star*, will so cripple cable operators as to leave them unable to exercise their own constitutionally conferred right to inform and entertain the public as they wish. *See Grosjean v. American Press Co.*, 297 U.S. 233, 246-47, 250 (1936) (discussing the historical use of differential *taxation* as a means of governmental censorship of the press). Furthermore, specifically targeted differential taxes raise an inference that government has regulated content because it is difficult to imagine governmental purposes unrelated to content that cannot be served by generally applicable means other than differential taxation. *Minneapolis Star*, 460 U.S. at 585. This inference does not arise with cable carriage requirements, however, because there are plausible legitimate goals that can be served by compelling broadcast carriage that cannot be served by any generally applicable means. The Court thus concludes that the must-carry provisions will not be strictly scrutinized merely because they treat operators and programmers differently from other components of the media.

A regulation is deemed to be content-neutral if it is addressed to ends unrelated to the content of expression upon which it may have an effect. *Ward v. Rock Against Racism*, 491 U.S. at 791; *Texas v. Johnson*, 491 U.S. 397, 407 (1989). As the Court has previously noted, because the record indicates that Congress' primary purpose in enacting must-carry was to restore competitive balance and assure a functional market in the distribution of video signals, whatever might be said with those signals, the must-carry provisions appear to be unrelated to the content of the expression they will affect.

V.

The plaintiffs argue that the government's asserted interest in "promoting widespread dissemination of information from diverse sources," Federal Defendant's Memorandum at 33, betrays a content-based purpose. That Congress has found it necessary to preserve local broadcast television to promote "diversity," even for those who receive cable television, they contend, indicates that Congress perceives some content difference between the messages of "local" broadcasters and cable programmers.[23]

[23] *See* 1992 Cable Act § 2(a)(6) ("[t]here is a substantial governmental and First Amendment interest in promoting a *diversity of views* provided through multiple technology media.") (emphasis added); *Amicus* Brief of the United States Senate at 27 ("[a]lthough cable systems may provide programming on a wide range of subjects, the *diversity of approaches* to those subjects may be reduced [if] control over the selection and development of programming is in the hands of fewer entities.") (emphasis added) *cf. Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 570-71 (1990) (equating diversity in ownership of broadcast licenses to diversity of messages available to the public; "it is upon *ownership* that public policy places primary reliance with respect to diversification of content . . . .") (citations omitted, emphasis in original).

But if the must-carry provisions are content-related at all, they are only marginally so, to the point of *de minimis*. Congress may have presumed, on a very non-specific (and unarticulated) level, that there would be some content differences between the subject matter and/or emphasis of the video signals emitted by local broadcasters and those produced by cable programmers. It appears to the Court, however, that Congress' solicitousness for local broadcasters' material simply rests on its assumption that they have as much to say of interest or value as the cable programmers who service a given geographic market audience, not on any recognition that there is a discrete "local" subject-matter. So viewed, the must-carry provisions hardly evince the type of nefarious governmental activity guarded against by the First Amendment generally and the strict scrutiny standard in particular.

Moreover, even if a "local" versus "non-local" dichotomy of message exists, and can be said to be content-related in some abstract way, the cable medium exhibits certain characteristics unique to the way the industry has evolved and is presently structured, and of equally "local" dimensions having nothing whatsoever to do with message. Cable operators have prevailed upon "local" public authorities to license their use of public rights-of-way over which to string their coaxial cable networks, and there are manifestly limits to the number of such licenses likely to be issued. They vie with broadcasters for "local" advertisers. Cable operators have also historically enjoyed the right to retransmit "local" broadcast programming when and to the extent they wished subject only to administratively set royalty fees. The technology they employ enables a single cable operator to transmit a video signal superior to that of conventional over-the-air transmitters, and to deliver at a "local" television receiver a vastly greater number of channels to watch than all local broadcasters combined. There is, moreover, little competition among "local" cable operators themselves. In

short, the term "local" as applied to the cable industry has many implications other than as a synonym for "provincial" as an adjective applied to programming and all were within the contemplation of Congress when it enacted must-carry.

The Supreme Court has observed that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them."[24] *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975); *see Quincy*, 768 F.2d at 1448. *Compare Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969) *with Tornillo*, 418 U.S. 241. Cable has achieved its present market dominance, in large part, due to such "local" factors—artifacts of a sort of the industry's evolution—not because it has delivered an intrinsically better message. Similar factors, benign in themselves, perhaps, and characteristic of many successful industries having supplanted older rivals, have nevertheless led to regulation of such industries *for economic reasons* when their market powers have reached dangerous proportions.

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[24] Although this maxim is oft-repeated, the Supreme Court has infrequently invoked unique media characteristics to justify relaxed scrutiny of content-based regulations. The single notable exception is in the broadcast context, in which the Supreme Court has found content-based, fair access regulation to be justified by scarcity of electromagnetic spectrum space, *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), and has found limited content-based indecency regulations to be justified by broadcasting's pervasive presence and unique accessibility to children, *FCC v. Pacifica Found.*, 438 U.S. 726 (1978). *PruneYard*, arguably, is also a case in which the Court found that special contextual characteristics of the "California shopping center" justify special First Amendment treatment. *See PruneYard*, 447 U.S. at 87. As discussed above, however, *PruneYard* is just as easily explained as a content-neutral case. *See Pacific Gas*, 475 U.S. at 12. The Seventh Circuit apparently has ruled that all regulation of cable speech, whether or not content-based, is subject to relaxed First Amendment scrutiny because of special characteristics peculiar to the cable medium. *Chicago Cable*, 879 F.2d at 1547-49; *Omega Satellite Prods. v. City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982).

Absent an indication of a Congressional purpose, whether avowed or covert, to effect a degree of content-control by mandating carriage of "local" broadcasters' signals, the First Amendment should not unduly inhibit Congress in what clearly appears on its face to be an effort to level the economic playing field in the television industry, at large, even if in doing so it may coincidentally inhibit some freedom of choice of the cable operators as to whose signals are to be carried and under what conditions. The Court accordingly concludes that *O'Brien* and *Rock Against Racism* provide the appropriate standard for determining the constitutionality of Congress' mandatory carriage provisions.[25]

[25] The plaintiffs correctly note that the Supreme Court, in *Tornillo*, rejected the suggestion that economic impediments to access justified Florida's right-of-reply law. *Tornillo*, 418 U.S. at 247-57. But, read in context, the Supreme Court's discussion in *Tornillo* has no application in this case. Importantly, the regulation in *Tornillo* was *expressly* based on content in two ways; it exacted its penalty on the basis of the antecedent publication of one message and it compelled carriage of another. *Tornillo*, 418 U.S. at 256-58. The government, in *Tornillo*, sought to use economic scarcity as a justification for ensuring that the public had access to messages favorably portraying political candidates who had been criticized in the press. It was in this context that the Court rejected the argument that economic barriers to newspaper access justify content-based compelled speech requirements. In this case, by comparison, the government has sought only to ensure that the public has access to diverse kinds of communications in order to overcome technological, structural, and historic, as well as economic factors creating a bottleneck. This goal is a far cry from the message-specific goal in *Tornillo*, even if marginally content-related.

The Court notes that its conclusion that contextual factors unique to cable require relaxed First Amendment scrutiny of the must-carry provisions even if marginally content-related, depends, to some extent, on Congress' factual findings. The parties have raised the issue of whether the courts should strictly scrutinize a congressional decision that a particular communications medium warrants special First Amendment treatment. The Court finds that it need not resolve this intriguing question. With respect to the

VI.

The inquiry to be made under the *O'Brien-Rock Against Racism* formulation is to ascertain whether the must-carry provisions further a significant government interest, *O'Brien*, 391 U.S. at 377; *Rock Against Racism*, 491 U.S. at 798-99; *see also Quincy*, 768 F.2d at 1454, and whether they are "narrowly tailored" to serve that interest, *O'Brien*, 391 U.S. at 377; *Rock Against Racism*, 491 U.S. at 798. The narrow tailoring requirement is satisfied if the government's regulation will effectively remedy the condition that the government has identified as in need of correction, and if it does not burden substantially more speech than necessary in doing so. *Rock Against Racism*, 491 U.S. at 799.

Congress' objective in enacting the mandatory carriage requirements, it has declared, was to promote fair competition among video "speakers" in order to assure the survival of local broadcasting for the benefit of both those who subscribe to a cable service and for those who do not. *See* 1991 S. Rep. No. 92 at 58; Federal Defendant's Memorandum at 33. Although the D.C. Circuit declined an invitation to rule on whether this is a governmental goal of sufficient significance for *O'Brien* purposes, *see Quincy*, 768 F.2d at 1454, other cases establish that the importance of broadcasting generally, and in particular local broadcasting, to the American public is now beyond dispute.[26] *See United States v. Southwestern Cable Co.*,

factual findings made by Congress, the Court has provided Congress with the level of deference befitting a co-equal branch of government that is well-equipped to take evidence and make findings. *Metro Broadcasting*, 457 U.S. at 569; *see also Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 103 (1973). The Court, however, has viewed as a matter of law, subject to no deference to Congress, the issue of whether the facts present the need for special First Amendment treatment.

[26] 1992 H.R. Rep. No. 628 at 50 ("[l]ocal television stations are central to [a competitive system of over-the-air-broadcasting]—they are both the leading source of news and public affairs informa-

392 U.S. 157, 172-73 & nn. 38 & 39 (1968); *National Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1198 (D.C. Cir. 1984); *see also Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984);[27] *cf. Metro Broadcasting*, 497 U.S. at 566-68, 572-73. *See generally* Communications Act of 1934, § 307(b), 48 Stat. 1083.

The plaintiffs submit that even if averting the demise of local broadcasting is deemed an important governmental goal, the factual premise on which the must-carry provisions are based, *viz.*, that local broadcasting is in peril, is incorrect. Citing their own statistics, the plaintiffs contend that broadcasting is alive and well, and has actually grown since the FCC's must-carry rules were struck down in *Quincy*. Oppressive artifices such as must-carry, they say, are unnecessary.

Congress, however, did not agree, and in sharp contrast with the meager record before the FCC when the court of appeals struck down the must-carry provisions in *Quincy* and *Century*, the current must-carry provisions are based on a substantial record assembled by Congress itself. *See generally* 1991 S. Rep. No. 92 at 42-46 (citing Federal Communications Commission, Policy and Rules Division, Mass Media Bureau, Cable System Broadcast Signal Carriage Survey (1988) (staff report)); 1992 H.R. Rep. No. 628 at 50-57 (same). Congress received evi-

tion for a majority of Americans and the most popular entertainment medium.")

[27] The Supreme Court, in *Capital Cities*, considered an Oklahoma Law prohibiting state cable companies from carrying out-of-state alcohol advertising. The Court held that the law was preempted by the FCC must-carry provisions in effect at the time. The Court rejected the state's argument that its power to regulate alcohol under the Twenty-First Amendment was paramount to the federal mandatory carriage program. The Court found that the state's interest in regulating alcohol was outweighed the "substantial federal interest" in protecting broadcast television for those that do not receive cable, and in ensuring diverse video programming. *Capital Cities*, 467 U.S. at 714.

dence demonstrating, to its satisfaction, that cable operators, in significant numbers, are denying carriage to local broadcasters, are attaching onerous conditions to their agreements to carry broadcasters, and are exiling broadcasters being carried to remote channel positions. 1991 S. Rep. No. 92 at 42-43; 1992 H.R. Rep. No. 628 at 51. Congress also apparently credited evidence indicating that this unfavorable treatment of broadcasters is the result of the cable operators' attempts to obtain a competitive advantage, not a function of consumer demand. 1992 Cable Act § 2(a)(12)-(15); 1991 S. Rep. No. 92 at 44.[28] Congress determined that refusal to carry, termination of carriage, and channel repositioning artificially diminish the audiences of local broadcasters, and, in turn, decrease their revenues. 1992 Cable Act § 2(a)(11)-(15); 1991 S. Rep. No. 92 at 44-45, 59; 1992 H.R. Rep. No. 628 at 50-51. In light of all of the evidence, Congress concluded that local broadcast television is not flourishing; it is in serious jeopardy. 1992 Cable Act § 2(a)(16); 1991 S. Rep. No. 92 at 59.

Furthermore, even if the state of the broadcasting industry is not now as parlous as the defendants contend, the Court finds it to be indisputable on this record that cable operators have attained a position of dominance in the video signal distribution market, and can henceforth exercise the attendant market power. The Court does not find improbable Congress' conclusion that this market power provides cable operators with both incentive and present ability to block non-cable programmers' access to

[28] The Senate Committee on Commerce, Science, and Transportation, for example, received evidence indicating that "[i]n almost every instance, [broadcast] stations [that have been repositioned] have been replaced by a cable program service in which the system operator is selling advertising or in which the operator has an equity interest or both." 1991 S. Rep. No. 92 at 44. The Committee concluded that channel repositioning of broadcasters is "made solely to enhance the competitive position of the cable operator's programming or its advertising availabilities." *Id.*

the bulk of any prospective viewing audience; unconstrained, cable holds the future of local broadcasting at its mercy. In light of the considerable body of evidence amassed by Congress, and the deference this Court should accord to the factfinding abilities of the nation's legislature, *see Metro Broadcasting*, 457 U.S. at 569; *Columbia Broadcasting Sys.*, 412 U.S. at 103, the Court must conclude that the danger perceived by Congress is real and substantial.

The plaintiffs also contend that the must-carry provisions are not "narrowly tailored" to accomplish their objective. There seems to be little doubt that the must-carry provisions will be effective in sustaining local broadcasting for the present. Rather than dispute their effectiveness as a means to the end, therefore, the plaintiffs' complaint is that they are overly so; being excessive, they burden speech in instances in which governmental intrusion is unnecessary.

First, they argue that Congress' goal can be achieved by the use of rudimentary technology, (a selector switch, for example), enabling broadcast and cable signals to be equally accessible to cable subscribers who want to watch them; viewer preference will then determine the victor in an idealized "marketplace of ideas." Second, they contend that mandatory cable carriage of *all* local broadcasters is too much of a good thing; it may require an operator to carry signals of broadcasters it would not otherwise carry in a market in which there is actually a surfeit of "local" programming on cable as well as over-the-air. The Court concludes, however, that the must-carry provisions are sufficiently, if not surgically, tailored to Congress' larger economic market-adjusting objective.

It is, of course, conceivable that there are less restrictive alternatives that Congress could have employed in its attempt to preserve the vitality of local broadcasting. Importantly, however, under *O'Brien*, the government is not required to settle for means that serve its interests less

effectively merely because an alternative might be less burdensome. *Rock Against Racism*, 491 U.S. at 799 (citing *United States v. Albertini*, 472 U.S. 675, 689 (1985)). Congress actually found that input-selector switches were ineffective simply because viewers tended not to use them (a function, perhaps, of viewer inertia as much as viewer preference). *See* 1991 S. Rep. No. 92 at 44-45; 1992 H.R. Rep. No. 628 at 54; *see also* 1992 Cable Act § 2(a)(17). Of more significance, however, is that Congress further found that prophylactic measures were necessary to combat the operators' tendencies toward anti-competitive treatment of broadcasters generally. *See* 1991 S. Rep. No. 92 at 41-46; 1992 H.R. Rep. No. 628 at 50-58. Once again, the Court is unwilling to second-guess Congress' determination that the must-carry provisions are necessary to accomplish its objective. Provoking a popularity contest between broadcast and cable programmers was not what it had in mind. *See FEC v. National Right to Work Comm.*, 459 U.S. 197, 207-11 (1982).

Finally, the Court concludes that the must-carry provisions do not unnecessarily burden a substantial amount of the plaintiffs' own speech. Operators retain complete discretion over much the greater proportion of the channel spectrum on their systems, and non-broadcast programmers are free to compete for access to those channels not dedicated. Under no circumstances will an operator be required, under section 4, to devote more than one-third of its channel capacity to local broadcast use.[39] Similarly, under section 5, operators with less than 36 useable channels need not carry more than 3 non-educational channels, and no operator must carry duplicative non-

[39] Furthermore, it appears to the Court that the burdensomeness of the must-carry provisions is illusory in the potentially significant number of cases in which a cable operator receives a carriage request from an operator it would have carried even in the absence of the request.

educational programming. Thus, although the must-carry regulations may reduce the overall quantity of cable operator and programmer speech "opportunities," as it were, it leaves open adequate—in fact, plentiful—alternative, intra-medium channels of communication for cable speakers to deliver whatever messages they choose. The Constitution requires no more. *Compare Heffron v. Int'l Soc. for Krishna Consciousness*, 452 U.S. 640 (1981) *with Community for Creative Non-Violence v. Turner*, 893 F.2d 1387, 1393 (D.C. Cir. 1990).

Conclusion

The 1992 Cable Act represents a major congressional effort to bring order and stability to an industry that significantly, and often profoundly, touches American lives. It is not the province of this Court to pass judgment upon the wisdom of the policies the national legislature has chosen to pursue in such endeavors. That, of course, is a task our system of government commits to the electoral and political processes, and the Court's power in that regard is not enlarged merely because it is invoked in the name of the First Amendment. Simply put, the governmental intention evinced by the must-carry provisions is economic, not ideologic, and raises no suspicion of the type of ominous government interference with speech against which the First Amendment protects.

VII.

National Interfaith Cable Coalition ("NICC") seeks to enjoin enforcement of sections 4 and 5 of the 1992 Cable Act on another First Amendment ground, namely, that the provisions violate the Free Exercise and Establishment of Religion Clauses of the First Amendment. NICC's motion is opposed by the federal defendants, who have filed a motion to dismiss, and by several intervenor-defendants, many of whom have filed dispositive motions. The Court concludes that sections 4 and 5 do not violate the Religion Clauses of the First Amendment.

NICC is an "interfaith consortium" of several Judeo-Christian religious groups in the United States. NICC disseminates its messages through the Vision Interfaith Satellite Network ("VISN"), a cable programming operation which competes for carriage on the many cable systems across the country. Like the other programmers, NICC objects to the must-carry provisions because the provisions will reduce the number of cable television channel positions available for use by non-broadcast programmers. By mandating carriage of the religious programming of local broadcasters, the provisions represent a special danger to NICC: it fears that cable operators forced to carry some broadcast religious programming will resist voluntary carriage of additional religious fare.

NICC's Religion Clause challenges center on the premise that the religious programming of local broadcasters is different in kind from NICC's programming. NICC contends that most local religious broadcasters tend to present fundamentalist religious views and are often critical of other viewpoints, while NICC transmits messages that are more "mainstream" and "religiously balanced." NICC argues that the must-carry provisions, by granting preferential treatment to local religious broadcasters, create an illicit liaison between the federal government and particular sectarian interests in violation of the Establishment Clause, and by impeding NICC from reaching its audience and delivering its own religious message, the provisions violate the Free Exercise Clause.

To comport with the Constitution under the now familiar Establishment Clause test, government action must "(1) reflect a clearly secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) avoid excessive government entanglement with religion." *Lee v. Weisman*, 112 S. Ct. 2649, 2654 (1992) (citing *Lemon v. Kurtzman*, 403 U.S. 602 (1971) and *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973)). Even if the Court were to accept NICC's major premise—that the

must-carry provisions disproportionately favor the speech of certain types of religious speakers over others—the provisions do not violate the Establishment Clause. There is no evidence that the must-carry provisions were intended to be anything but religion—as well as content-neutral; they do not involve the government in religious affairs; and there is no basis for concluding that they will be perceived to represent governmental endorsement of particular religious views or religion in general.

The provisions clearly reflect a secular purpose, as discussed above. There is nothing in the record to indicate that Congress was even aware of any difference in the religious messages of broadcasters and programmers, much less to indicate that must-carry represents a deliberate attempt to favor or disfavor any religious views or practices.

Similarly, the must-carry provisions have a primary effect that neither advances nor inhibits religion. A law does not violate the Establishment Clause merely because it benefits or burdens religious institutions in some way. *Mueller v. Allen*, 463 U.S. 388, 393, 398-402 (1983); *see Waltz v. Tax Comm'n*, 397 U.S. 664 (1970). "Incidental" burdens and benefits on religious institutions do not violate the Establishment Clause's primary effect inquiry. *See Widmar v. Vincent*, 454 U.S. 263, 273-74 (1981). Central to the primary effect inquiry is whether a reasonable observer would interpret the governmental action to be religion-preferential, *County of Allegheny v. ACLU*, 492 U.S. 573, 592-93 (1989); *see Widmar*, 454 U.S. at 274, and there is little danger of such a perception if a law applies to a broad range of entities, both religious and secular. *Widmar*, 454 U.S. at 274-74.[80] *Compare*

[80] As the Supreme Court noted in *Widmar*, "[i]f the Establishment Clause barred the extension of general benefits to religious groups, a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair." *Widmar*, 454 U.S. at 274-75 (citations omitted).

Mueller, 463 U.S. 388 (upholding state law providing income tax deduction for tuition, textbook and transportation expenses for parents of children in public as well as parochial schools) *with Nyquist*, 413 U.S. 756 (1983) (holding unconstitutional public assistance grants to parents of children in nonpublic schools only). The must-carry provisions apply to all broadcasters, without regard to whether their programming contains any religious fare at all. Accordingly, the Court cannot conclude that the primary effect of the provisions is to advance the religious message of local broadcasters or suppress the religious messages of cable programmers.

Nor can the Court conclude that the must-carry provisions foster excessive governmental entanglement with religion. Regulatory legislation creates excessive entanglement only if there is "detailed monitoring and close administrative contact" between the government and sectarian organizations or affairs. *Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680, 696-97 (1989); *see Mueller*, 463 U.S. at 403. There is no basis on which to conclude that the federal government will, in implementing must-carry, become involved in any activity in the nature of religious oversight. To be eligible for mandatory carriage, a broadcaster must meet two basic requirements only; it must be licensed by the FCC and it must operate within a cable operators' television market. 1992 Cable Act § 4. The must-carry provisions accordingly present no danger of entanglement beyond that created by the FCC's broadcast license scheme itself. It is well-settled that "routine regulatory interaction which involves no inquiries into religious doctrine" creates no Establishment Clause infirmity. *Hernandez*, 490 U.S. at 697.

NICC contends that the must-carry provisions violate the Free Exercise Clause because they prevent NICC from effectively disseminating its religious message. Any burden imposed on NICC's religious practice, however,

is merely the incidental effect of a facially religion-neutral law that is generally applicable to all operators, programmers, and broadcasters. Such laws do not violate the Free Exercise Clause. *Employment Div. v. Smith*, 494 U.S. 872 (1990). The must-carry provisions do not, in any way, foreclose dissemination of any religious message or abridge any religious practice.

VIII.

The Local Community Broadcasters ("LCB"), an intervenor-defendant in these consolidated cases, argues that section 4 of the 1992 Act violates the First Amendment rights to free speech and equal protection rights of low power television ("LPTV") stations. By way of relief, LCB asks this Court to require the FCC to provide expansive mandatory carriage rights, similar to those provided to full power broadcasters, to LPTV. Even assuming this Court has the power to provide such a remedy, a dubious proposition, the Court finds that section 4 does not abridge LCB's constitutional rights.

In the late 1970s and early 1980s, the FCC began to implement a program for providing low power television service to viewers across the nation. LPTV operates on the same technological principles as broadcast television, but within a minimal geographic range. In addition, LPTV stations are licensed by the FCC on a secondary basis; they may not interfere with the signals of licensed full power stations, and they must give way to any full power station attempting to use the same frequency. *See generally* 47 C.F.R. §§ 74.701-74.781 (1992); *1982 LPTV Inquiry*, *supra* note 4. The Commission envisioned LPTV as a less costly alternative for those seeking to enter the television broadcast industry,[31] and saw

[31] *An Inquiry Into the Future Role of Low Power Television Broadcasting and Television Translators in the National Telecommunications System*, 82 F.C.C.2d 47, 80 (1980) (statement of Chairman Ferris).

LPTV as enhancing diversity in the television market, especially for minority broadcasters.[32]

The 1992 Cable Act provides very limited mandatory carriage rights to LPTV. Under section 4, a cable operator is only required to carry a low power station if there are not enough full power commercial broadcasters to fill the one-third channel set-aside imposed by the section. Furthermore, a low power station is eligible for mandatory carriage only if it serves a rural area without full power service. Cable operators with fewer than 36 channels are required to carry one qualified LPTV station, and those with 36 channels or more need only to carry two qualified LPTV stations.

LCB's constitutional claims are similar to those made by the programmers. LCB claims that because the must-carry provisions favor local full power broadcasters by providing them with scarce channel positions and fail to provide similar rights to many rural and all non-rural LPTV stations, the provisions impede the ability of LPTV stations to reach their audiences. LCB also claims that like the programmers, LPTV operators need must-carry to defend themselves against anti-competitive cable operator practices.

Although LCB's claims are similar to those of the programmers, the relief they seek is entirely different. LCB asks this Court to order the FCC to provide LPTV broadcasters with mandatory carriage rights similar to those enjoyed by full power stations. The success of LCB's claim accordingly rests on the untenable position that the must-carry provisions do not violate the constitutional rights of programmers, but do violate the constitutional rights of LCB's members. Furthermore, comparison of the relief sought by LCB and that sought by the programmers makes clear that LCB is not challenging the must-carry provisions on the grounds that they interfere

[32] *See id.*

with First Amendment rights; it is, instead, claiming that they have been disparately treated.[83]

Unless viewpoint-based, disparate governmental treatment of different speakers, unlike governmental imposition of burdens on expression, does not implicate either *O'Brien* balancing or strict scrutiny. Message-neutral government decisions to provide benefits to one group of speakers but not others are constitutional if there are rational legislative reasons for distinguishing between groups. *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 806 (1985); *Regan v. Taxation with Representation*, 461 U.S. 540, 545-46; *accord id.* at 548-51 (governmental distinctions between groups of speakers subject only to rational basis review under equal protection component of Fifth Amendment unless they are aimed at the suppression of ideas); *Walsh*, 927 F.2d at 1235-37 (same); *id.* at 1238-39 (Williams, J., concurring) (same).[84]

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[83] Because LCB asks this Court to uphold a statute that is alleged to burden their expressive activity, their claim is distinguishable from those made in virtually all of the First Amendment cases LCB has cited. *Minneapolis Star* and *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987), for example, both involved challenges to differential taxation schemes applicable to small segments of the press. *See generally Leathers*, 111 S. Ct. 1442-43. The plaintiffs in both cases raised direct First Amendment claims because they challenged the *validity of the taxes* as either directly burdensome on speech or creating impermissible dangers of governmental censorship. In contrast, the position taken by LCB demonstrates that its sole *constitutional* concern is that the must-carry provisions fail to provide LPTV with the protection from anti-competitive practices that has been provided to full power broadcasters.

[84] LCB's equal protection claim is based entirely on the somewhat esoteric fundamental rights line of equal protection jurisprudence. Although LCB indicates that LPTV operations are often run by minority groups, there is no allegation that LPTV operators are a suspect class.

LPTV was conceived and created as a secondary service, and has never enjoyed rights coextensive with full power television. *See 1982 LPTV Inquiry, supra* note 4. Congress's treatment of LPTV is consistent with the government's treatment of LPTV since its inception. Once again, in the absence of any reason to suspect Congress of message-regulation, the Court must uphold Congress' decision not to equalize the free speech rights of LPTV with full power broadcasting unless it is irrational. *Regan*, 461 U.S. at 548. Nothing at all appears to be irrational about a legislative policy judgment to treat LPTV as a lesser player in the television market, as it has always been, no matter how innovative, imaginative, or deserving the Court might find LPTV to be.

CONCURRING OPINION

STANLEY SPORKIN, District Judge.

I concur. I believe that Plaintiffs have not made a case under the First Amendment that would invalidate the must-carry provisions of the 1992 Cable Act. Congress has acted in a highly reasonable and responsible way without trampling the constitutional rights of this nation's citizens. I write separately to emphasize that, because any burden imposed by the 1992 Cable Act on speech is so remote and incidental to the purpose and effect of the 1992 Cable Act, I do not find that the must-carry provisions of the Cable Act of 1992 implicate the First Amendment to the extent to which Plaintiffs claim.

For many years, Congressional policy regarding the telecommunications industry has had a consistent goal: To foster public access to a diverse array of information and views. Congress has found that, to a significant degree because of federal and local governmental decisions in prior years, the cable industry threatens to achieve monopolistic control over the telecommunications market. Thus, a competitive imbalance between the cable and broadcast industries has developed, threatening this important goal.

Congress' finding is based on an exhaustive Congressional record, and deserves the Court's deference. Plaintiffs, under the guise of the First Amendment, would have this Court strike down a statute enacted by Congress in an effort to reign in cable companies' growing economic might and to restore competitive balance in the telecommunications industry. However, this case is not about protecting free speech and the First Amendment. This case is about market domination and control.

I

This case involves two young industries which are essentially less than a half century old. It might be said that invention of television was the first shot fired in the technology revolution, which continues even at this time at an unprecedented pace. From early on, because of the space limitations of the broadcast spectrum, a means had to be devised for allocating stations on a reasonable and fair basis. Congress determined that market forces alone could not make the proper allocation. Thus, right from the start this infant industry was born into a system of heavy regulation.[1]

The cable industry dates back to 1947, when it first emerged as a satellite system. Cable originated as a device to facilitate transmission of television broadcast signals to remote areas.[2] Recognizing the potential of the

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[1] The FCC, created in 1934, became the principal vehicle for overseeing the television industry. That agency was given jurisdiction to allocate space on the broadcast band by awarding licenses to those desiring to become broadcasters. These were highly lucrative licenses, which in effect were being given away by the government. Here in this nation of free markets we had a paradox of sorts, namely a mix of government regulation and private enterprise, being dictated by the scarcity of a much sought-after commodity that would confer rights on those selected to receive a "free" Government license to broadcast.

[2] John Walson, Sr., is credited as being the founder of cable television. Mr. Walson recently passed away. In his obituary, the following is recounted:

> In 1947, Mr. Walson was the owner of an appliance store in Mahanoy City, near Allentown, when he discovered he had trouble selling televisions because the mountains of eastern Pennsylvania interfered with reception.
>
> He erected an antenna tower atop New Boston Mountain overlooking Mahanoy City and ran wire to television sets in his store window. He added amplifiers to the system the next

technology to serve the interests of rural America. Congress began to explore ways to protect and foster the nascent industry.

For several decades, while studying the issue, Congress left regulation of the cable industry to the FCC. In part because of its origin as an adjunct to broadcasting, cable became cloaked in much of the regulatory culture enveloping the broadcast industry.

In the mid-1970s, Congress determined that a number of regulatory and marketplace obstacles had prevented the cable industry from achieving its full potential. To enhance cable's development as a competitive force in the telecommunications market, Congress enacted several laws to support the growth of the industry.

In 1976 Congress passed legislation granting cable systems' copyright licenses to retransmit over-the-air broadcast stations. Public Law No. 94-553, Title I, § 101 (1976), *codified at* 17 U.S.C. § 111. In 1978, in response to cable operators' claim that utility companies were exacting unreasonable rates for the operators' use of utility poles and underground conduits, Congress passed legislation authorizing the FCC to resolve pole attachment disputes between the operators and utility companies. Public Law No. 95-234, § 6 (1978), *codified as amended at* 47 U.S.C. § 224. Through the pole attachment legislation, Congress sought "to minimize the effect of unjust or unreasonable pole attachment practices on the

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spring, then persuaded residents to hook up for a $100 installation fee and $2 a month.

His company, called Service Electric Cable TV, now has more than 400 employees and serves subscribers in eastern and central Pennsylvania and northwestern New Jersey.

Mr. Walson made cable television history again in 1972, when his company became the first to offer the cable channel Home Box Office to customers. HBO recently presented him with an award recognizing that distinction.

wider development of cable television service to the public." [a]

Meanwhile, since cable often required use of local telephone lines, state and municipal authorities developed local franchise and license systems further regulating cable in their respective markets. Thus, in some ways, regulation of the cable industry was even more pervasive than that of the broadcast industry in general, often to the detriment of both the industry and its subscribers.

Perceiving a need to establish a national policy for cable television, Congress passed the Cable Communications Policy Act of 1984. Consistent with Congress' longstanding policy regarding the telecommunications market as a whole, the 1984 Act aimed to "promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems." Public Law No. 98-549, § 2 (1984), *codified at* 47 U.S.C. § 521(6).

The 1984 Cable Act contained several provisions to support cable's competitive position. With regard to local franchising authorities, the Act (1) restricted their ability to regulate rates, allowing them to do so only where there was a lack of effective competition, to be defined by the FCC, (2) limited the obligations they could impose on cable companies and (3) limited their authority to deny renewal of cable franchises.

At the same time, Congress took steps to assure that cable would contribute to the diversity of information available to the public. To thwart the development of local media monopolies and to encourage diversity of ownership of communications outlets, the 1984 Act prohibited ownership of a cable company by the owner of a television broadcast license or telephone company. And

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[a] S. Rep. No. 580, 95th Cong., 1st Sess. 14 (1977), reprinted in 1978 U.S.C.C.A.N. 109, 122.

to foster a broad diversity of information sources, the Act permitted cities to continue to require in cable franchises that certain cable channel capacity be devoted to public, educational and governmental channels.

As a result of technological innovation and creativity and supported by federal legislation, the cable industry has come a long way in its less than 50 years' existence. Indeed, there is little resemblance between the cable industry of 1947 and that of today. Cable has expanded television communications beyond the wildest imagination of its discoverers. It has virtually eliminated the original problems caused by the space limitation of the broadcast spectrum. Instead of providing access to television broadcasting as it main objective, through creativity and vision, cable now has a free standing existence. It has developed from being the dog's tail to being the tail that wags the dog.

Although cable has brought about much good, there have been excesses which, over the years, Congress has felt compelled to alleviate. In particular, Congress has found that certain anticompetitive monopolistic behavior on the part of cable companies has accompanied their success, behavior which threatens the vitality of broadcast programming and, therefore, the public interest in access to a wide range of information and views.[4] Thus, while cable has virtually eliminated the problems caused by scarcity on the broadcast spectrum, it has created another scarcity—namely access to the channels on cable systems themselves.

In finding that the must-carry provisions of the Cable Act do not violate the First Amendment, several points merit special emphasis. First, local and federal government regulation played an important role in allowing cable

[4] *See* Judge Jackson's Opinion, supra, for a discussion of the Congressional findings in this regard and the voluminous record supporting them.

to achieve the position it has today. In addition to the support provided by federal legislation in the 1970s and by the Cable Act of 1984, all too often local franchising authorities granted cable companies an exclusive franchise in their local market.

Second, cable companies enjoying such de facto monopolies wield enormous power over programming in the telecommunications market as a whole. Cable operators can require programmers to provide the operator exclusive carriage rights or a financial interest in the programming as a condition of carriage, and some have done so. The substantial negative impact such conditions have on broadcast stations and television distributors is clear.

Third, as an increasing proportion of the public subscribed to cable (now 60% of American households owning a television set), broadcast stations have become increasingly dependent on cable to reach their television audiences. As cable has become the primary means for transmission of all broadcast signals in a locality, it has become imperative for broadcasters to obtain retransmission of their signals by the local cable company. Otherwise, the broadcaster will face a greatly diminished audience. Since it is often the case that cable and broadcast companies are in direct competition for advertising revenues, cable companies have a powerful means by which to adversely affect the financial interests of broadcast stations by refusing to carry or even terminating its broadcast clients.

Congress specifically found that broadcast stations, by being part of the local community, continue to be an important source of local news, public and educational programming and other services critical to an informed electorate. The cable industry's growing monopolistic hold on the telecommunications industry, Congress reasoned, threatens the viability of its only current competition—local broadcasters. Congress concluded that, should

local broadcasters be forced off the air, the public interest in being able to obtain access to a broad selection of local news and public and educational programming would be endangered.

II

Sections 4 and 5 of the Cable Act of 1992 are a form of regulation, designed to lessen the monopolistic threat posed by cable to the telecommunications industry. Contrary to the arguments of Plaintiffs that the 1992 Act limits First Amendment rights on its face, the Act's objective is to enhance the diversity of television voices protected by the First Amendment by neutralizing the adverse effects of cable companies' monopolistic behavior and securing the position of broadcasters' programs. As an interim measure to accomplish this end, "must-carry" is an integral part of the solution to the problems identified by Congress.[8]

Plaintiffs have come before this Court, not because their freedom of speech is seriously threatened, but because their profits are; to dress up their complaint in First Amendment garb demeans the principles for which

[8] At some point, technological innovation will enable cable systems to accommodate all broadcasters requesting carriage, thereby rendering "must carry" a problem of the past. Indeed, according to a April 6, 1993 article in the *Washington Post*, Telecommunication's Inc., the nation's largest cable television company, is about to "unveil an ambitious plan to rewire many of its cable systems with 7,000 miles of high-capacity, fiber-optic lines" over the next four years, which eventually will "enable TCI to deliver hundreds of TV channels [and] 'video-on-demand' programming" to its subscribers.

However, while fiber-optic and other technological innovations may be on the verge of a break through which may well cast a different light on Plaintiffs' First Amendment claims, such innovations have not yet realized their potential in the marketplace. In the context of today's technological landscape, the Cable Act of 1992 must be viewed as regulation designed to alleviate the adverse impact of the cable industries' growing monopolistic hold over the telecommunications industry.

the First Amendment stands and the protections it was designed to afford. To the extent to which the First Amendment is implicated, I agree with Judge Jackson that the minimal level of scrunity outlined in *United States v. O'Brien*, 391 U.S. 367 (1968) and *Ward v. Rock Against Racism*, 491 U.S. 781 is the standard the Court should apply.

Plaintiffs raise two arguments in support of their claim. First, the cable operators argue that the must-carry provisions are content-based restrictions compelling them to carry the speech of broadcast stations, and as such run afoul of the First Amendment. Second, the cable programmers argue that the must-carry provisions unfairly prefer the "speech" of broadcasters over their First Amendment rights. Both of these arguments fail.

A. *Operators' Claim*

It is well-established that under the protections afforded by the First Amendment individuals enjoy the right to speak or not to speak. The government cannot compel an individual to speak. *See*, e.g., *Wooley v. Maynard*, 430 U.S. 705, 97 S.Ct. 1428 (1977). The Supreme Court has extended this principle to apply to newspapers and to privately-owned newsletters in *Miami Herald Publishing Company v. Tornillo*, 94 S.Ct. 2831 (1974) and *Pacific Gas & Elec. v. P.U.C. of California*, 106 S.Ct. 903 (1986), respectively.

While the plaintiffs would have the Court extend the coverage of *Tornillo* and *Pacifis Gas & Elec.* to the case at bar, these cases are inapposite to the arguments raised by Plaintiffs.

Tornillo broadly recognized the free speech rights of newspapers. *Tornillo* involved state action which penalized identifiable content-based speech and compelled transmission of a particular message. In that case, the Supreme Court once again made it clear that a statute

which infringes on a newspaper's editorial rights is highly suspect under the First Amendment.

A continuum exists between compelled speech which is content based and that which incidentally relates to speech. While conflicting signals can be discerned from the case law on when regulations of business enterprises are content-based and when they are not, some First Amendment challenges lend themselves to the following maxim: You know it when you don't see it. This is such a case.

"Content-neutral" regulations are those that "are justified without reference to the content of the regulated speech." *City of Renton v. Playtime Theaters, Inc.*, 106 S.Ct. 925, 929 (1986). In *Renton*, the Court found that a city zoning ordinance restricting the location of adult theaters was not aimed at the content, but rather at the secondary effects such theaters had on the surrounding community.

Perhaps more similar to the case at bar is *Regan v. Taxation with Representation*, 103 S.Ct. 1997 (1983). In that case, the Supreme Court found § 501(c)(3) of the Internal Revenue Code, which grants tax-exempt status to organizations organized and operated exclusively for certain statutorily-prescribed purposes, is constitutional. Like must-carry's distinction between cable programmers and broadcasters, § 501(c)(3) clearly makes a statutory distinction between different groups of speakers. Finding "no indication that the statute was intended to suppress any ideas", the Court found that § 501(c)(3) is not a content-based restriction on speech.[6]

[6] Section 501(c)(3) grants tax-exempt status to organizations "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition . . . , or for the prevention of cruelty to animals[,]" provided that no substantial part of the activities of which consists attempting to influence legislation or supporting political candidates. 26 U.S.C. § 501(c)(3).

Like the ordinance in *Renton* and the statute in *Regan v. Taxation With Representation*, the must-carry provisions plainly "are justified without reference to the content of the regulated speech" and there is "no indication that the statute was intended to suppress any ideas[.]" Must carry simply does not constitute a content-based restriction on cable operators' speech.

The right-of-reply statute in *Tornillo* and the California Public Utilities Commission's directive in *Pacific Gas & Elec.* plainly were based on the content of the regulated speech. But unlike the governmental actions involved in *Tornillo* and *Pacific Gas & Electric*, the must-carry provisions of the Cable Act of 1992 neither "penaliz[e] the expression of particular points of view [nor] force[] speakers to alter their speech to conform to an agenda which they do not set." *Pacific Gas & Elec*, 106 S.Ct. at 908. The must-carry provisions do not "restrict [Plaintiffs'] speech to certain topics or views or [] force [them] to respond to views that others may hold." *Id.*, at 909. Must-carry will not "impermissibly require [Plaintiffs] to associate with speech with which [they] may disagree" nor make them "feel compelled to respond to arguments and allegations made by [a local broadcaster] in its messages to [Plaintiffs'] customers." *Id.*, at 911.

Cable operators are left with ample channels to disseminate their own views, and there is nothing about sections 4 and 5 of the 1992 Cable Act which might cause a cable operator to "conclude that, under these circumstances, the safe course is to avoid controversy, thereby reducing the free flow of information and ideas." *Id.*, at 910 (citation omitted). Finally, "if experience with [the must-carry provisions] indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications." *Red Lion Broadcasting Co. v. F.C.C.*, 89 S.Ct. 1794, 1808 (1969).

Plaintiffs argue that the prohibition outlined in *Tornillo* and *Pacific Gas & Elec.* against governmental intrusion into the province of editorial discretion provides an independent basis leading the Court to apply strict First Amendment scrutiny to this case. In those cases, the clear content-triggered operation of the governmental regulation threatened to alter the mix of information chosen by the newspaper or newsletter at issue. Since neither a newspaper nor a newsletter is "a passive receptacle or conduit for news, comment, and advertising", *Tornillo,* 94 S.Ct. at 2840, such interference with the editor's function triggered heightened scrutiny.

While cable operators do exercise some control and judgment about the mix of overall programming they provide, such judgment does not entail the detail-oriented, content-based decisions made by the editors of newsletters, newspapers or other published sources of information. If the Cable Act compelled the cable programmers to carry the broadcasters' speech, or compelled the operators to relay a particular message, the Act undoubtedly would run afoul of the First Amendment. But that is not what is presented in this case. Requiring Cable operators to carry the programs of broadcasters, whatever the content of those programs may be, simply does not rise to the level of interference with editorial discretion which impinges on free speech or threatens to alter the mix of information available to the public.

B. *Programmers' Claim*

Plaintiff programmers challenge the must-carry provisions as impermissibly favoring the speech of broadcaster stations over that of cable programmers.

"Generally, statutory classifications are valid if they bear a rational relation to a legitimate governmental purpose. Statutes are subject to a higher level of scrutiny if they interfere with the exercise of a fundamental right,

such as freedom of speech, or employ a suspect classification." *Regan v. Taxation Wtih Representation,* 103 S.Ct. at 2001-2002. Programmers and broadcasters clearly are not constitutionally protected groups. And, having found that must-carry does not violate the First Amendment, heightened scrutiny is not warranted in this case.[7] Since I agree with Judge Jackson that the 1992 Cable Act passes muster under the rational relations standard of review, this argument fails.

Finally, it must be pointed out that the only challenge before this Court is provided under the First Amendment. No challenge has been made under the taking provision of the Fifth Amendment or any other legal provision. Upholding the 1992 Act against Plaintiff's First Amendment challenge should in no way be taken as an endorsement of the legislation. Indeed, it may be preferable that the market be permitted to regulate itself. Of course, even the most avid proponents of free competition recognize that there cannot be effective free market competition without first eliminating the natural and not so natural monopolies that too many cable companies now enjoy.

III

Plaintiffs' attempt to substitute Congress' regulation of the cable industry with regulation by the First Amendment is mischievous. It is inconceivable that our forefathers at any time contemplated that the First Amendment would be used to regulate an industry that came into existence over 150 years after the Bill of Rights was adopted.

Here, the Government has steppped aside to allow the private sector to perform signal transmission and alloca-

[7] Moreover, a requirement that cable *operators* carry broadcast programming cannot be said to compel speech on the part of cable programmers. Thus, even if the First Amendment was implicated in this case, it is not clear that the programmers would have standing to assert this claim.

tion functions that the Government itself could have reserved for itself, without facing any conceivable First Amendment challenge by broadcasters or other programmers because of the regulatory method chosen. To the extent to which cable is performing a "public utility" function which the Government itself could perform, Congress certainly has the right to adopt reasonable regulations.

Congress has determined that cable companies' growing anti-competitive behavior and monopolistic power threatens the broadcast industry and the public's access to a wide array of local, public and educational programming. Congress decided to address this danger by enacting the Cable Act of 1992. In so doing, Congress was not motivated by a desire to stifle the speech of cable operators or programmers—indeed, ample channels remain open for their use—but by a desire to alleviate the effects of cable companies' monopolies and to preserve the diversity of voices represented by local, public and educational broadcasters. Whether there were other preferable ways of accomplishing Congress' objective is not for the Court to decide. So long as the method adopted by Congress is an appropriate one, it must stand and may not be second guessed by the judiciary. Consequently, I find that the Cable Act of 1992 does not run afoul of the First Amendment.

DATE 4/8/93

/s/ Stanley Sporkin
STANLEY SPORKIN
U.S. District Judge

For the foregoing reasons, it is, this 8th day of April, 1993,

ORDERED, that the plaintiffs' motions for summary judgment on the must-carry claims are denied; and it is,

FURTHER ORDERED, that the federal defendants' motion to dismiss the must-carry claims are granted; and it is,

FURTHER ORDERED, that the motion of intervenor-defendant Local Community Broadcasters for summary judgment on a cross-claim is denied; and it is

FURTHER ORDERED, that the complaints of the plaintiffs and the intervenor-plaintiffs, insofar as they challenge as unconstitutional sections 4 and 5 of the 1992 Cable Act, are dismissed with prejudice; and it is

FURTHER ORDERED, that the complaints of the plaintiffs, insofar as they challenge section 6 of the 1992 Cable Act as not severable from purportedly unconstitutional provisions of that Act, are dismissed with prejudice; and it is

FURTHER ORDERED, that the cross-claim of intervenor-defendant Local Community Broadcasters is dismissed with prejudice; and it is

FURTHER ORDERED, that all other pending motions relating to the constitutionality of sections 4 and 5 of the 1992 Cable Act are denied and dismissed as moot.

/s/ Thomas Penfield Jackson
THOMAS PENFIELD JACKSON
U.S. District Judge

/s/ Stanley Sporkin
STANLEY SPORKIN
U.S. District Judge

DISSENTING OPINION

WILLIAMS, *Circuit Judge*, dissenting: The must-carry provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Act") are ably set forth by the majority at pp. 3-6. In essence, they require cable operators to set aside just over a third of their channels for local broadcast stations. (The one-third-plus figure comprises both the commercial stations protected under §4 of the Act and the non-commercial stations protected under § 5.) In addition, each privileged broadcast station has a right to its specific "channel position" on the cable system. 1992 Act at §§ 4(b)(6) and 5(g)(5).

In considering cable, Congress confronted a very real problem—one for which it has an easy remedy entirely consistent with the First Amendment. The problem is that cable systems control access "bottlenecks" to an important communications medium. In fact, while there are several thousand cable operators in the United States, only 53 communities are served by more than one operator. Debates, 138 Cong. Rec. S400, S436 (comments of Senator Gorton). There are well-developed regulatory responses to this sort of situation. The "bottleneck" holder may be ordered to serve all parties that meet neutral criteria for service. The Federal Communications Commission itself administers just such regulations in assuring that interstate long-distance telephone companies have access to local telephone networks. 47 U.S.C. § 202; and see, e.g., *MTS and WATS Market Structure Phase III*, 100 FCC 2d 860, 861 (1985) (adopting rules and policies relating to access). Indeed, courts have sometimes taken on the supervision of such compulsory access under the "essential facilities" doctrine of the antitrust laws. *United States v. Terminal Railroad Ass'n*, 224 U.S. 383 (1912). These solutions are, of course, im-

perfect; for example, they pose tricky pricing issues.[1] But mandatory access rules of this sort give no special privilege to one set of access seekers over another.

In fact, in 1984 Congress adopted provision for neutral, compulsory access to cable in § 612 of the Cable Communications Policy Act of 1984 ("1984 Act"), 47 U.S.C. § 532, a solution somewhat refined in § 9 of the 1992 Act. This provision entitles independent programmers to lease access on cable systems, at reasonable prices to be set by the FCC. Although the channels available for lease under § 612 are limited to a specified proportion of each operator's channels (depending on the total number that the operator possesses, 47 U.S.C. §§ 532(b)(1)(a)-d)), Congress remains free to expand the fraction of channels available. The only programmers excluded from the benefits of § 612 are those affiliated with the cable operator, i.e., the very ones who would be the likely beneficiaries of operator discrimination and who are therefore in no need of the law's intervention.

The must-carry provisions, by contrast, extend the privilege of access only to a special class of unaffiliated programmers—local commercial and non-commercial television stations. Congress rested its decision to promote these stations in part, but quite explicitly, on a finding about their content—that they were "an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate." See 1992 Act, § 2(a)(11). Moreover, because of FCC licensing requirements, *every* such local broadcaster is legally bound to "provide programming responsive to issues of concern to its community." *Report and Order*, MM Docket No. 83-670, 98 FCC 2d 1076,

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[1] See, e.g., William J. Baumol, "Deregulation and Residual Regulation of Local Telephone Service", Ch. VII, American Enterprise Institute Studies in Telecommunication Deregulation (draft, March 8, 1993).

1091-92 (1984). See also National Association of Broadcasters ("NAB") Corrected Memorandum at 24-25 (emphasizing force of mandate to carry local content). In other words, by virtue of provisions of law outside the 1992 Act, the term used by the Act to define the benefitted class *automatically* entails content requirements.

A number of parties challenge these mandates, among them the cable operators who must carry local broadcast stations in place of their own choice of programming, and, even more significantly, the unaffiliated cable programmers, such as Discovery Network, producer of the Discovery and Learning Channels, whose programming will be supplanted. I shall apply current First Amendment analysis to their claims, but before doing so I think it useful to imagine a few hypothetical cases outside the area of cable. If the answers to those hypotheticals are as clear as I think they are, then—unless there is something terribly special about cable, apart from the bottleneck issue addressed by § 612 of the 1984 Act—the must-carry provisions must fall.

1. The Washington Post develops and patents a special "paper-springer" that enables it to deliver papers at a tiny fraction of others' costs. Assume that paper delivery costs represent a very large share of total costs, so that this technology is a source of overwhelming monopoly power. Congress decrees that The Post must license the paper-springer—but only to publishers of local, neighborhood papers (i.e., not citywide ones). This cuts out The Washington City Paper, The Washington Informer, and the Washington Times.

2. A state is concerned that large shopping centers represent a vital gathering places of citizens and that center owners may not willingly allow the sort of leafletting or soap-box oratory associated with a vibrant democracy. Accordingly it requires owners

to allow such leafletting and oratory regardless of the leafletters' or speakers' message. See *PruneYard Shopping Center v. Robbins*, 447 U.S. 74 (1980). But finding that *local* residents are an especially important source of this vibrant debate, it limits the privilege to persons living within four miles of each shopping center. This excludes the proverbial "outside agitator".

These scenarios are in fact *less* troublesome under the First Amendment than the must-carry rules; the parties selected to benefit from the bottleneck-breaking rules are defined in content-neutral terms. Here, by contrast, the beneficiaries are local stations that are required by government to include specific content that the government has deemed especially worthy.[2]

Standard of Review. The standard of review in First Amendment cases usually depends on whether the regulation is content-based, leading to "strict scrutiny", *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987); *Carey v. Brown*, 447 U.S. 455, 461-62 (1980), or content-neutral, leading to more relaxed scrutiny under the formula of *United States v. O'Brien*, 391

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[2] Government line-drawing in First Amendment cases can be analyzed both in terms of the distinction between content-based and content-neutral rules, and in terms of underinclusiveness. An underinclusiveness claim, when the classification is not content-based, is extremely weak; typically the law's challenger is saying in essence that the law should fall because it burdens *too little* speech. See, e.g., *Walsh v. Brady*, 927 F.2d 1229, 1236 (D.C. Cir. 1991). This seems counterintuitive, and such claims rarely prevail. See, e.g., *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). Here, however, the operators, and especially the independent cable programmers, do not say that the law fails because the burden is too narrow; they say it fails because the *beneficiaries* are so narrowly defined, and that the underinclusiveness thwarts rather than furthers the legitimate purpose of diversity. Even apart from the content-based character of the provision, then, the claim is stronger than the usual one of underinclusiveness.

U.S. 367 (1968), as modified in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). Here the statute is content-based under controlling precedent. The must-carry provisions mandate speech: they require cablecasters to carry the speech of local broadcast stations. As the Supreme Court held in *Riley v. Nat'l Fed. of the Blind of North Carolina*, 487 U.S. 781 (1988), "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech. We therefore consider the Act [mandating certain disclosures by charitable solicitors] as a content-based regulation of speech." *Id.* at 795. This alteration of content is equally certain here; under the must-carry mandate, cablecasters must replace the programs they would have chosen, regardless of origin, with programs selected by local broadcasters.

The *Riley* Court did *not*, however, immediately proceed to apply strict scrutiny. Rather, addressing a claim that the speech was basically commercial, the Court rejected that view on the ground that the commercial elements were "inextricably intertwined" with fully protected non-commercial speech. *Id.* at 796. More generally, it said that the Court's "lodestars in deciding what level of scrutiny to apply to a compelled statement must be the nature of the speech taken as a whole and the effect of the compelled statement thereon." *Id.* While here we have no issue of commercial speech, I read the *Riley* analysis as a caution against assuming that all compulsions of speech, even fully protected speech, must receive strict scrutiny. We must look further.

Where a government regulation of *conduct* has an "incidental" burden on speech, the Court looks to whether the *interest* asserted by the government "is unrelated to the suppression of free expression", *Texas v. Johnson*, 491 U.S. 397, 407 (1989) (internal quotations omitted), or, as the Court expressed it later on the page, "unconnected to expression", *id.* Application of a test for "incidental" burdens on speech seems highly artificial here.

Given the finite number of cable channels,[3] replacement of the cablecaster's choice of programs with those of local broadcasters suppresses the alternative programs as completely as if Congress had ordered them shut down; there is nothing "incidental" about the burden. Further, one of the interests explicitly asserted by Congress was the benefit of "local news and public affairs programming", 1992 Act, § 2(a)(11); and indeed the class of chosen beneficiaries is defined by other legal provisions as persons *bound* to include some minimum level of local programming content. Moreover, the Court applies strict scrutiny to rules that control editorial discretion, *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974), which surely comprises the choice of programs. See *Leathers v. Medlock*, 111 S. Ct. 1438, 1442 (1991) (noting that cable "is engaged in 'speech' under the First Amendment, and is, in much of its operation, part of the 'press' "); see also *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986) (noting that cable operators exercise significant editorial discretion).

On the other hand, in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), the Court assessed mandated speech without any explicit reference to strict scrutiny. The case hardly establishes that speech mandates need not pass such scrutiny, however. Free speech was on both sides of the balance in *PruneYard*, for the challenged state rule entitled *anyone* to engage in various expressive activities such as speaking and leafletting at shopping centers. The owner's only First Amendment claim was its right to silence, and the Court found that interest of little weight in context: the owner had dedicated the property to commercial use open to the public;

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[3] There is uncontroverted evidence that 2000 cable systems, serving one-third of all subscribers, have no excess channel capacity. NCTA Statement of Material Facts at ¶ 6. It is further undisputed that there are many unaffiliated, non-broadcast programmers seeking access, but who will lose out because of the preferential treatment of broadcasters. *Id.* at ¶ 8; Klein Affidavit at ¶ 6.

it could readily disassociate itself from the ideas expressed; and the rule made no inroad into editorial functions. *Id.* at 87-88. While the Court did not use the language of strict scrutiny, the rule would likely have survived such review, given the state's purpose of assuring expressive opportunities on a completely nondiscriminatory basis, and the weakness of the shopping center's competing speech interests. Thus *PruneYard* cannot reasonably be taken to allow speech mandates to escape strict scrutiny.

The Supreme Court has also developed rules governing the First Amendment evaluation of taxes on the media. While the must-carry regulations are not in form taxes, they are in substance indistinguishable from a tax-subsidy combination—a tax falling exclusively on cable-casters, in an amount large enough to fund a subsidy for local broadcasters to enable them to lease cable channels. The Court has insisted on a "compelling justification" for any use of the taxing power "to single out the press". *Leathers*, 111 S. Ct. at 1443; see also *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983). Where a tax not only singles out the press but "targets a small group of newspapers", even by entirely content-neutral categories, the government must carry a "heavy burden" to sustain the distinction. *Id.* at 591, 592-93. See also *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (imposing "heavy burden" of justification for tax that singles out a subset of the press for a special tax, based on broad content categories).

Leathers itself, of course, upheld a tax statute that distinguished between cable operators and broadcasters, and indeed specified that in the context of a generally applicable tax the distinction was *not* subject to heightened scrutiny. 111 S. Ct. at 1444-47. Although the Court observed broadly that "differential taxation of speakers, even members of the press, does not implicate

the First Amendment unless the tax is directed at, or presents the danger of suppressing, particular ideas", *id.* at 1447, the observation was in the context of a "broad-based, content-neutral sales tax" that fell on virtually every good or service sold in Arkansas, *id.* The treatment of First Amendment values as irrelevant cannot be transported to the context of a burden imposed on one set of speakers for the direct and explicit advantage of a limited class of their competitors—a class whose programming must, as a matter of law, include content of a type specified by the government. Accordingly, I conclude that the proper test is strict scrutiny.

Application of the test. To survive strict scrutiny, regulation of speech must serve a "compelling" governmental purpose and its "means must be carefully tailored to achieve those ends." *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989). First we must identify the government's interests, and then assess the fit between each of those interests and the must-carry requirements.

The Senate Report articulated the congressional interests as follows:

> (1) preserving the benefits of local television service, particularly over-the-air television service; (2) promoting the widespread dissemination of information from diverse sources; and (3) promoting fair competition in the video marketplace.

S. Rep. 102-92 at 58. These purposes are reflected in §§ 2(6)-(15) of the Act. Because this statement of purposes involves some overlap, the analysis will be clearer if we reformulate them as follows: (A) preservation of open access to cable in order to assure diverse programming (see purposes (2) and (3) above); and (B) preservation of local broadcasting (see purposes (1) and (3) above). This second reason involved not only a desire to promote "local news and public affairs programming", see § 2(a)(11) of the Act, but also a wish

to assure that local broadcasters could continue to serve those persons who either did not, or could not, subscribe to cable. I address diversity first, then the preservation of local broadcasters.

Open Access for Diverse Programming

I assume that, at least at some level of abstraction, the interest in promoting diversity of views on cable is compelling. With regard to the broadcast spectrum the Court has characterized programming diversity as an "important governmental objective", *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997, 3011 (1990), and a lengthy passage in *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. at 247-54, though inconclusive, appears to regard the interest in correcting newspaper monopolies as extremely valuable. In *Tornillo*, however, the Court balked at the state's remedy—a right-of-reply statute—on the ground that it would interfere with editorial discretion. The interference took two forms: *first*, the statute compelled "editors or publishers to publish that which reason tells them should not be published", *id.* at 256 (internal quotations omitted), and *second*, it tended to dissuade editors from publishing those controversial statements that would trigger the right of reply, *id.* at 257. Framing the case in modern doctrine, the Court may be said to have found the solution too instrusive to satisfy the requirement of careful "tailoring".

Here, too, the fit between the interest and the regulation is extremely weak. It is far from clear that giving local broadcasters an entitlement to be carried will increase program diversity *at all*. Because cablecasters now carry the vast majority of local stations (as explained further below), the must-carry rules may have little effect, but where they have any, it will be only to replace the mix chosen by cablecasters—whose livelihoods depend largely on satisfying audience demand—with a mix derived from congressional dictate.

Moreover, in considering "fit" one must look at the available alternatives. As the Court said recently in assessing the fit of a statute that burdened commercial speech, "[I]f there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable." *City of Cincinnati v. Discovery Network, Inc.*, 61 U.S.L.W. 4272, 4274 n.13 (U.S. March 24, 1993). Here, one obvious alternative is expansion of the access provisions of § 612 of the 1984 Act. Those access provisions are far less burdensome—in the critical sense of minimizing government interference in the choice of *who* will have access to cable. Under § 612, *all* programmers are eligible for leased access except the ones that don't need it—the affiliates of a cable operator. 47 U.S.C. § 532(b)(1).

Even neutral remedies such as § 612 are subject to challenge under *Tornillo*, as they replace the cablecaster's speech with that of others. But a number of distinguishing factors argue for upholding the leased access solution. First, a relatively large number of channels is available (ranging from the teens up to 40, 50 and more), so that the scope of the monopolization is greater than in *Tornillo*. Second, the channels are discrete, so that viewers will be less likely to attribute all speech on all channels to the cablecaster. And there is no chilling effect on the cablecaster's programming of the remaining channels. Finally, the benefitted group precisely fits the legislative concern— all unaffiliated programmers.

The last is conspicuously missing from must-carry. The difference between the two is the difference between the state rule upheld in *PruneYard Shopping Center* and the hypothetical set forth at the start of this opinion—a *PruneYard*-type entitlement limited to a specific class of would-be speakers defined in terms of their location. Indeed, the must-carry requirements are worse than the

PruneYard hypothetical, for admission to the privileged class requires, as a matter of law, the carrying of specific program content.

It is quite true, of course, that Congress found in 1992 that leased access under § 612 has not been as effective as predicted in 1984, pointing to cumbersome enforcement procedures and undue cablecaster control over prices and other conditions of access. See H. Rep. 102-628 at 39-40. But the Report went on to "restate[]" the Committee's "belief that access requirements establish a form of content-neutral structural regulation 'which will foster the availability of a diversity of viewpoints to the listening audience'." *Id.* at 40. More important, to the extent that Congress spotted defects in § 612, it set out to correct them. The 1992 Act amends § 612 by clarifying and broadening the FCC's authority to set maximum reasonable rates and other reasonable terms and conditions for access. See 1992 Cable Act, § 9. Given § 612, and Congress's authority to expand its scope, the must-carry rules do not provide a reasonable fit with the diversity rationale.

Preservation of Local Broadcasting

The second interest that Congress has invoked is the preservation of local broadcasting. Section 2(a)(10) of the Act is explicit: "A primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming. There is a substantial governmental interest in ensuring its continuation." In part this interest derived from the local content of such broadcasting—"an important source of local news and public affairs programming." 1992 Cable Act § 2(a)(11). But in addition the interest derived from an indirect concern for the households not served by cable—both those unwilling or unable to pay for the service and the 10% for whom such service is physically unavailable. Here Congress reasoned that if broadcast stations ever lost the advertising revenues attributable to

the audiences they reach through cable service, they would be driven from business and thus be unable to provide service for those without cable. There was also special concern that local broadcast stations were exceptionally vulnerable as potential victims of cablecaster bottleneck control, because of their competition with cable for advertising revenue. See 1992 Act, § 2(a)(14)-(16). I will first address the issue of local content, then the preservation of over-the-air service.

Local content. It seems extremely doubtful that forcing local affairs content on First Amendment speakers could ever qualify as a compelling interest (at least outside the special preserve of broadcasting itself, to which I return below). If government "may not select which issues are worth discussing or debating in public facilities", *Police Department of Chicago v. Mosley*, 408 U.S. 92, 96 (1972), it is hard to see why it may do so on private facilities.

Even if by some stretch an interest in local content were "compelling", far less restrictive means are readily available. Congress is free to subsidize favored speech if the market is too weak to sustain the quantity that Congress seeks. See, e.g., *Rust v. Sullivan*, 111 S.Ct. 1759, 1774 (1991); cf. *Regan v. Taxation with Representation*, 461 U.S. 540, 544-48 (1983); compare *Arkansas Writers' Project* (striking down content-based tax burden). Given those means, Congress cannot advance specific content by requiring a competing class of First Amendment speakers to carry the favored speech. "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment". *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

Preserving over-the-air TV service. I assume that as an abstract matter government has a compelling interest in assuring access to TV for those unwilling or unable to

subscribe to cable, and especially those beyond cable's physical reach. The first difficulty with the argument here is that there is no evidence that this access is in jeopardy. The interest, as the Court said of a concern for breaches of the peace in *Texas v. Johnson*, 491 U.S. 397 (1989), simply "is not implicated on this record". *Id.* at 407.

The most plausible evidence would be of local TV stations going under and of licensees turning in their licenses. Nothing remotely like that is in sight—the facts show quite the opposite. Plaintiff National Cable Television Association asserts (without contradiction) that in the years since the D.C. Circuit Court of Appeals invalidated the FCC's first effort at must-carry, *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), the number of commercial broadcast stations has *increased* by 22% (from 919 to 1118), the number of educational broadcast stations by 15% (from 316 to 363), and the number of cities receiving broadcast television by 16% (from 514 to 594). NCTA's Statement of Material Facts ¶¶ 12-14. Thus, not only are licenses not being turned in for want of profitable opportunities, but evidently entrepreneurs continue to seek the additional licenses that the FCC makes available. As a result, they are both deepening and spreading the coverage of over-the-air TV. Whatever risk there may be in the abstract has completely failed to materialize.

Defendants and defendant-intervenors urge in response that this record means little; since *Quincy*, the shadow of possible congressional intervention has fallen across the cable industry, causing operators to be less ruthless than they would be if must-carry were invalidated. Remove the shadow, they claim, and the operators will show their true monopolist colors.

This argument is incurably flawed. If the constitutionally fatal aspect of the must-carry rules is the absence of evidence of any visible threat to the over-the-air TV in-

dustry, then the rules would become constitutional the minute the industry was visibly threatened. Accordingly, cablecasters would continue to operate under the same shadow of congressional intervention, and over-the-air TV would continue to thrive. Invalidation of must-carry for want of evidence would preserve the supposedly necessary threat.

Supporters of must-carry thus turn to evidence of (1) instances where cablecasters have actually dropped broadcast stations and (2) structural relationships in the industry, which, they say, indicate the threat is real. Indeed, in its findings, Congress noted a "marked shift in market share from broadcast television to cable television", 1992 Act, § 2(a)(13), and also endorsed the structural argument, *id.* at §§ 2(a)(12) (14-15).

The congressional finding on *actual* effects is not disputed—nor is it supportive of must-carry. That cable has grown faster than broadcast does not in the slightest suggest that broadcast is in peril.

The record before Congress did, however, include evidence of some cable operators' dropping broadcast channels. Specifically, the Senate Report cites evidence that, of 4303 cable systems disclosing data, 869 had dropped one or more local stations in a total of 1,820 instances.[4] S. Rep. 102-92 at 43. Because only half of the more than 8000 cable systems disclosed data, the committee extrapolated to find that approximately 1700 cable systems have denied carriage in approximately 3600 instances. *Id.*

These facts do not support an inference that over-the-air TV is at risk. First, they indicate (by simple subtraction) that 80% of cable systems have never dropped

[4] Clearly some stations were dropped on more than one occasion, indicating that being dropped must in many instances have been temporary. We have not been directed to any evidence of how many stations may have been permanently dropped.

a single local broadcaster. Second, it is impossible to know what to make of the 3600 estimated instances of dropping when we do not know either the percentage of total broadcasters that the figure represents or the character of the broadcast channels dropped. What pertinent data there is on the record states that the average cable system in 1990 carried just over eight local broadcast signals (7% *more* than were carried in 1985). Klein Affidavit at ¶ 13. Taking Congress' figure of over 8000 cable systems, this would indicate that there are at least 64,000 local broadcast signals being carried on cable systems (clearly this figure counts single stations multiple times, just as does the raw figure on drops). Next to this figure, the 3600 instances of droppage[5] do not support an inference of peril to the broadcast industry or even any segment of that industry. In fact, plaintiff NCTA submits further, uncontradicted evidence that in 1988, well after the FCC must-carry rules had been struck down, 98% of all the broadcast stations that would have qualified for mandatory carriage were still being carried despite the absence of such a requirement. Klein Affidavit at ¶ 12.

There is furthermore no information about the characteristics of the broadcasters actually dropped. Such distinctions are important. Plaintiff Time-Warner Entertainment ("TWE") alleges without contradiction that the must-carry rules will require it to carry, in its Staten Island, New York line-up, not one but *two* stations from Bridgeport, Connecticut. TWE Memorandum in Support of Motion for Summary Judgment at 12. If many of the stations dropped have as remote a link to the dropping cablecaster's market as do these Bridgeport stations, it would explain why the cable operators' right to drop has coexisted with the broadcast industry's continued growth.

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[5] The record doesn't indicate the time frame within which these drops occurred. If it was a period of years, this even further weakens the inferential chain.

Thus we have *nothing* to connect the limited evidence of cable operators' actual conduct with any inference that a threat to broadcast is imminent or serious.

The structural argument is that the competition between cable and broadcast for advertising revenue gives cable operators an incentive to drop broadcast stations. See 1992 Act, §§ 2(a)(12), (14-15). (Taken at its best, this theory would lend *no* support to § 5 of the Act (relating to noncommercial TV), as the educational stations do not advertise.) The evidence cited in the Senate Report consists of a projected 17% growth rate in cable advertising revenues. S. Rep. 102-92 at 44. Yet rapid growth in advertising seems easily attributable to the growth of cable, and perhaps some branching into advertising-supported programs. In itself, it shows neither a purpose to undermine broadcast TV nor the start of a campaign to do so. Broadcast television evidently still acounts for 92% of all television advertising revenues. See Hendricks Declaration at ¶ 22(d).[6]

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[6] The National Association of Broadcasters points to evidence before Congress that on some occasions cablecasters repositioned broadcast channels and placed less popular programs at the former broadcast position. NAB Corrected Memorandum, etc. at 22. This is urged as confirmation that cable operators will pursue advertising revenue at the expense of viewer satisfaction. At oral argument cable representatives noted in response that the data referred to periods immediately after the switch, when the new programs had little or no reputation with audiences. In any event, the reasoning of the broadcasters is hard to follow, and seems especially ironic coming from firms that depend exclusively on advertising revenues. Broadcasters might well increase their audiences by dropping advertisements, but no one expects them to do so; it is recognized that they accept detriments to audience satisfaction where justified by increases in net revenue. That cable operators may make some such calculations is no evidence of anticompetitive purpose. In fact, because cable operators' revenues are overwhelmingly due to subscription fees, see below, advertising seems likely to be less common on cable.

Further, cable television appears to continue to be dependent on local broadcasters as critical suppliers of programming. Congress explicitly found that "broadcast programming that is carried remains the most popular programming on cable systems, and a substantial portion of the benefits for which consumers pay cable systems is derived from carriage of the signals of network affiliates, independent television stations, and public television stations." 1992 Act, § 2(a)(19). In fact, local broadcaster programming accounts for approximately two-thirds of total cable viewing hours. S. Rep. 102-92 at 35. Moreover, the ratio of cable subscription fee revenues to advertising revenue is evidently 25:1. TWE Reply Memorandum in Support of Motions for Summary Judgment at 15. So long as local broadcast programs continue to be so popular, it appears that cable simply cannot afford to drop broadcast channels to any significant degree.

Finally, even if local broadcasters were in perceptible peril, it would not follow that Congress could secure their survival by must-carry provisions. Again, less intrusive alternatives are obvious. First, if evidence of any risk should appear, Congress could get broadcast TV into the homes of cable viewers (and thus preserve the stations' advertising revenues) by expanding leased access under the neutral provisions of § 612 of the 1984 Act. Second, if broadcasters' programs were not popular enough to enable them to pay the leasing fees set by the FCC, Congress could subsidize the difference to the extent necessary. Compare *Rust v. Sullivan*, 111 S. Ct. at 1774.

In reaching these conclusions, I do not question Congress's power to engage in critical fact-finding. The degree of deference that we owe such findings is hotly disputed between the parties. *Compare* NCTA Reply Memorandum at 41-42 (citing *Sable Communications of California v. FCC*, 492 U.S. 115, 129 (1989); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843-44 (1978), *with* DOJ Answer at 37 (citing *Metro Broad-*

casting, Inc. v. FCC, 497 U.S. 547, 572 (1990). My view does not turn on any resolution of that dispute, because the legislative findings simply do not support the inferences needed to sustain must-carry. The problems are that (1) there is *no* finding of any present or imminent harm; (2) the evidence of some dropping of broadcast channels in itself fails to show any widespread problem; (3) the proliferation of local broadcast stations since the end of the FCC's must-carry rules undermines any inference of a problem; (4) the findings as to structure and incentives, taken together with the evidence of cable's dependence on broadcasting, fail to raise the concern beyond the level of speculation; and (5), even if the hazard were perceptible, the record does not address the less intrusive alternatives. If findings as scantily connected to the conclusion as these can justify must-carry, then the door is open—even in the area of First Amendment rights—to exercise of the most naked interest-group preferences. Cf. Cass R. Sunstein, "Naked Preferences and the Constitution", 84 Colum. L. Rev. 1689 (1984).

Thus I conclude that—unless the analysis of First Amendment issues in the special context of *broadcast* for some reason supervenes—the must-carry provisions violate the First Amendment.

Proposed Use of Broadcast Analysis

Some defendants urge the court to use the sort of diluted First Amendment analysis applied to broadcasting in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). DOJ Answer at 26; NAB Corrected Memorandum, etc. at 46. Use of the broadcast standards would be completely inappropriate.

The weakened status of broadcasters under the First Amendment arose from the Supreme Court's conclusion that discretionary government allocation of channels was necessary for the orderly use of the broadcast medium—

or at any rate that such allocation was not materially more intrusive on First Amendment values than any visible alternative. In *National Broadcasting Co. v. U.S.*, 319 U.S. 190 (1943), the Court upheld the FCC's so-called "Chain Broadcasting" regulations (aimed at preventing monopolization of radio licenses) against a variety of statutory challenges and a First Amendment claim. "[R]adio inherently is not available to all." *Id.* at 226. "That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation." *Id.* Thus, "The right to free speech does not include . . . the right to use the facilities of radio without a license." *Id.* at 227.

Although the precise question was not before it, the Court appeared to assume that these factors logically entailed discretionary government allocation of licenses, so that such allocation presented no First Amendment problem so long as the choice was not openly based on the applicants' "political, economic or social views, or upon any other capricious basis." *Id.* at 226.[7] This of course overlooked content-neutral bases for handling the problems, such as (1) the rule of first possession, which in fact preceded government allocation and tracked the doctrine of prior appropriation,[8] (2) auctions, and (3) lotteries.[9] These content-neutral alternatives evidently went by default, as those raising the First Amendment claims —the incumbent broadcasters—had no incentive to undermine the system under which they held their own quasi-monopoly licenses. *NBC* of course paved the way

[7] I use the qualifying adverb "openly" advisedly. Careful research suggests, as anyone would expect, that often the political allegiance of applicants has been critical in license allocation. See, e.g., Lucas A. Powe, Jr., American Broadcasting and the First Amendment 68-84 (1987).

[8] See Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J. L. & Econ. 133, 147-52, 163 (1990).

[9] Cf. 47 U.S.C. § 309(i).

for *Red Lion*, which upheld, for the broadcast medium, the sort of government-managed right to respond that the Court later struck down for the print media in *Tornillo*. *Compare Red Lion*, 395 U.S. at 386-401, *with Tornillo*, 418 U.S. at 247-58. Here, of course, not even the defendants or defendant-intervenors suggest that discretionary allocation of channels is necessary or even appropriate to preserve access to cable. In the face of § 612, such a claim would be untenable.

Defendants and defendant-intervenors, however, seeking to deny cable operators full First Amendment protection, point to three special characteristics of cable that in their view justify government management of the channels: (1) the cable operators' need for rights-of-way, along or under city streets, in order to lay their cable; (2) the cable industry's prior enjoyment of special government privileges; and (3) the ability of cable operators to engage in "private censorship" against the speech of broadcasters. Neither alone nor in the aggregate do these justify subjecting cable to diminished First Amendment protection.

Rights-of-way. State, city and county governments have property interests in the streets, so that the placement of cable commonly requires government consent. There may also be instances where the federal government holds a proprietary interest essential to the laying of cable. These governments may seek to condition their consents on the operators' waiver or abandonment of their First Amendment rights. If so, courts would presumably assess these efforts under the doctrine of unconstitutional conditions. *Elrod v. Burns*, 427 U.S. 347, 357-60 (1976); *Perry v. Sindermann*, 408 U.S. 593, 596-98 (1972); *Western Oil & Gas Ass'n v. Cory*, 726 F.2d 1340 (9th Cir. 1984) (state method of calculating charges for use of right-of-way invalidated under negative commerce clause), aff'd 471 U.S. 81 (1985); *Omega*

Satellite Products Co. v. City of Indianapolis, 694 F.2d 119, 128-29 (7th Cir. 1982). We need not speculate on how such cases would work out. Here the federal government is not attaching conditions to the grant of a property interest; it is acting in a purely regulatory role. It cannot lean on proprietary powers that are out of the picture.

Prior benefits. Defendants argue that cable's initial growth depended, perhaps essentially, on government assistance in securing the right to retransmit the programs of broadcast channels, free of charge. See 17 U.S.C. § 111, as amended (compulsory copyright access); see DOJ Memorandum in Support of Motion to Dismiss at 27-28. This history seems completely irrelevant. If the Union Pacific Railroad were to own a newspaper, its history as a recipient of government largesse on a grand scale would surely not condemn it to second-class First Amendment protection. Of course *current* federal government benefits would provide an opportunity for attachment of conditions; but again, just what conditions might prove justifiable in the face of the unconstitutional conditions doctrine is not before us. With the adoption of § 6 of the 1992 Act, Congress gave broadcast stations an unequivocal right to withhold consent to retransmission.

Cablecasters' power to censor. Finally, intervenor-defendant NAB argues that cable operators can use their position to censor broadcasters. NAB Corrected Memorandum at 46. This argument amounts to nothing more than a reiteration of the fact that cable operators control a bottleneck. The mere fact that such control might force some programmers to find different ways to reach the public (which all programmers have via § 612, and which broadcasters uniquely have via the airwaves) does not give the government any right to force access on behalf of a preferred class of speakers. This follows *a fortiori* from *Tornillo*.

In short, the special character of cable is limited to one feature: bottleneck control of access to an important medium. A straightforward, speech-neutral solution to that problem exists and has already been employed by Congress in § 612 of the 1984 Act, as amended by § 9 of the 1992 Act. I see no constitutional obstacle to the expansion of that solution if Congress should deem it appropriate. Given the availability of that remedy (together with such subsidies as Congress might find suitable), I do not see how Congress can constitutionally deny cable operators the ordinary rights of any First Amendment speaker.[10]

---

[10] Because of my conclusion on the First Amendment challenge to the must-carry provisions, I do not reach the contention of TWE and Daniels that those provisions also represent an unconstitutional taking of cablecasters' property in violation of the Fifth Amendment. I do not, however, regard the claim as frivolous. The creation of an entitlement in some parties to use the facilities of another, *gratis*, would seem on its face to implicate *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), where the Court struck down a statute entitling cable companies to place equipment in an owner's building so that tenants could receive cable television. The NAB responds that *Loretto* is limited to "physical" occupations of "real property". See NAB Opposition at 33. But the insertion of local stations' programs into a cable operator's line-up presumably is not a metaphysical act, and presumably takes place on real property.

NAB also argues that cable operators have no "historically rooted expectation of compensation" for the right to use their cable services, see *Loretto*, 458 U.S. at 441, evidently because of (1) local governments' practices of imposing carriage requirements as a condition of granting franchises and right-of-way access, and (2) prior similar federal impositions, seemingly granted in exchange for privileged entitlements to retransmit broadcasters' signals. Both seem of limited relevance for the reasons discussed above in connection with the parallel *Red Lion* theories: the local governments are not involved here, and the federal government has removed the quid for which it now seeks a quo.

Conclusion

The must-carry regulations in the 1992 Cable Act clearly burden the protected speech of cable operators, in favor of local broadcasters whose programming content is in material part specified by law. In requiring cable systems to carry a special group of competing speakers, Congress directly, not incidentally, restricts the cable operators' exercise of editorial discretion. None of the interests advanced by Congress supports such a burden. The diversity rationale fits poorly with mandatory carriage of a specific group of programmers, being served with neutrality by § 612's provision for leased access. Although the interest in protecting over-the-air TV for non-cable-subscribers may be compelling in the abstract, the findings in the record neither indicate any real threat nor suggest any flaw in the less burdensome and obvious means for addressing any such threat. For these reasons, I respectfully dissent, and would declare the must-carry provisions to be unconstitutional abridgments of the First Amendment rights of cable operators and unaffiliated programmers.

/s/ Stephen F. Williams
STEPHEN F. WILLIAMS
United States Circuit Judge

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 92-2495
(SFW, TJP, SS)

NATIONAL CABLE TELEVISION ASSOCIATION,
Plaintiff,
v.

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION,
Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that National Cable Television Association hereby appeals to the Supreme Court of the United States from the April 8, 1993 Memorandum and Order of the three-judge district court, dismissing the complaint with prejudice. This appeal is taken pursuant to 28 U.S.C. § 1253.

Respectfully submitted,

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Dated: May 3, 1993

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 92-2494
(SFW, TPJ, SS)

TIME WARNER ENTERTAINMENT COMPANY, L.P.,
Plaintiff,

- against -

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Pursuant to Rule 18 of the Rules of the Supreme Court of the United States and Section 23 of the Cable Television Consumer Protection and Competition Act of 1992, Public Law 102-385, 106 Stat. 1460, and 28 U.S.C. § 1253, notice is hereby given that Time Warner Entertainment Company, L.P., hereby appeals to the Supreme Court of the United States from the April 8, 1993, Memorandum and Order (entered April 12, 1993) of the three judge district court convened in the above-captioned action (which was consolidated with Civil Actions No. 92-2247, 92-2292, 92-2495, and 92-2558) denying TWE's motion for summary judgment and granting the defendants' motion to dismiss with respect to Sections 4, 5, and 6 of the Cable Television Consumer Protection and Competition Act of 1992, Public Law 102-385, 106 Stat. 1460 (the "Act"), and holding that Sections 4 and 5 of the Act do not violate the First Amendment and that Section 6 of the Act need not be stricken as unseverable from Sections 4 and 5.

Simultaneously with this appeal, TWE is noticing a protective appeal to the United States Court of Appeals for the District of Columbia Circuit only for the purpose of protecting TWE should it ultimately be determined that the Circuit Court, rather than the Supreme Court, has jurisdiction of TWE's appeal from the order of the three-judge district court.

Respectfully submitted,

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DATED: Washington, D.C.
May 3, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 92-2247
(Three-Judge Court)

TURNER BROADCASTING SYSTEM, INC., ARTS & ENTERTAINMENT NETWORK, BLACK ENTERTAINMENT TELEVISION, INC., E! ENTERTAINMENT TELEVISION, INC., HEARST/ABC-VIACOM ENTERTAINMENT SERVICES, INTERNATIONAL FAMILY ENTERTAINMENT, INC., NATIONAL CABLE SATELLITE CORPORATION, QVC NETWORK, INC., THE TRAVEL CHANNEL, INC., and USA NETWORKS,

Plaintiffs,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Defendants.

AND CONSOLIDATED ACTIONS

Civil Action Nos. 92-2292, 92-2494, 92-2495
and 92-2558
(Three-Judge Court)

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Turner Broadcasting System, Inc., Arts & Entertainment Network, Black Entertainment Television, Inc., E! Entertainment Television, Inc., Hearst ABC-Viacom Entertainment Services, International Family Entertainment, Inc., National Cable

Satellite Corporation, QVC Network, Inc., The Travel Channel, Inc., and USA Networks, the plaintiffs above-named in Civil Action No. 92-2247, hereby appeal to the Supreme Court of the United States from the April 8, 1993 Memorandum and Order of the three-judge district court, dismissing the complaint with prejudice.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Respectfully submitted,

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Dated: May 3, 1993

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 92-2292
(SFW, TPJ, SS)

DANIELS CABLEVISION, INC.,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

AND CONSOLIDATED ACTIONS

Civil Actions No. 92-2247, 92-2494, 92-2495,
and 92-2558 (SFW, TPJ, SS)

NOTICE OF APPEAL

Pursuant to Rule 18 of the Rules of the Supreme Court of the United States and Section 23 of the Cable Television Consumer Protection and Competition Act of 1992, Public Law 102-385, 106 Stat. 1460, and 28 U.S.C. § 1253, notice is hereby given that plaintiff Daniels Cablevision, Inc. ("Daniels") appeals to the Supreme Court of the United States from the April 8, 1993, Memorandum and Order of the three-judge District Court convened in the above-captioned action denying Daniels' motion for summary judgment and granting the defendant's motion to dismiss with respect to Sections 4, 5, and 6 of the Cable Television Consumer Protection and Competition Act of 1992, Public Law 102-385, 106 Stat. 1460 (the "Act"), in the above-captioned action and

holding that Sections 4 and 5 of the Act do not violate the First Amendment and that Section 6 of the Act need not be stricken as unseverable from Sections 4 and 5. Daniels also appeals from the failure of the District Court to pass upon its claims that Sections 4 and 5 of the Act violate the Fifth Amendment.

Respectfully submitted,

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May 3, 1993

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 92-2558
(SFW, TPJ, SS)

DISCOVERY COMMUNICATIONS, INC. and
THE LEARNING CHANNEL, INC.,
Plaintiffs,

v.

UNITED STATES OF AMERICA, *et al.*,
Defendants.

AND CONSOLIDATED ACTIONS

Civil Actions Nos. 92-2247 92-2292, 92-2494,
and 92-2495 (SFW, TPJ, SS)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Pursuant to 28 U.S.C. § 1253, Section 23 of the Cable Television Consumer Protection and Competition Act of 1992 (the "Act"), Pub. L. No. 102-385, 106 Stat. 1460, and Rule 18 of the Supreme Court Rules, notice is hereby given that Discovery Communications, Inc., and The Learning Channel, Inc., hereby appeal to the Supreme Court of the United States from the memorandum and order of the three-judge district court filed April 8, 1993 (entered April 12, 1993), denying plaintiffs' motion for summary judgment, granting defendants' motion to dismiss with respect to Sections 4, 5, and 6 of the Act, holding that Sections 4 and 5 of the Act do not violate

the First Amendment, and holding that Section 6 of the Act need not be stricken as unseverable from Sections 4 and 5. Simultaneously with this appeal, plaintiffs are noticing a protective appeal to the United States Court of Appeals for the District of Columbia Circuit for the sole purpose of protecting plaintiffs should it ultimately be determined that the Court of Appeals, rather than the Supreme Court, has jurisdiction of this appeal.

Respectfully submitted,

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DATED: May 3, 1993

APPENDIX C

PUBLIC LAW 102-385 [S. 12]: October 5, 1992

CABLE TELEVISION CONSUMER PROTECTION AND COMPETITION ACT OF 1992

An Act to amend the Communications Act of 1934 to provide increased consumer protection and to promote increased competition in the cable television and related markets, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Cable Television Consumer Protection and Competition Act of 1992".

SEC. 2. FINDINGS; POLICY; DEFINITIONS.

(a) FINDINGS.—The Congress finds and declares the following:

(1) Pursuant to the Cable Communications Policy Act of 1984, rates for cable television services have been deregulated in approximately 97 percent of all franchises since December 29, 1986. Since rate deregulation, monthly rates for the lowest priced basic cable service have increased by 40 percent or more for 28 percent of cable television subscribers. Although the average number of basic channels has increased from about 24 to 30, average monthly rates have increased by 29 percent during the same period. The average monthly cable rate has increased almost 3 times as much as the Consumer Price Index since rate deregulation.

(2) For a variety of reasons, including local franchising requirements and the extraordinary expense of constructing more than one cable television system to serve a particular geographic area, most cable television subscribers have no opportunity to select between competing cable systems. Without the presence of another multichannel video programming distributor, a cable system faces no local competition. The result is undue market power for the cable operator as compared to that of consumers and video programmers.

(3) There has been a substantial increase in the penetration of cable television systems over the past decade. Nearly 56,000,000 households, over 60 percent of the households with televisions, subscribe to cable television, and this percentage is almost certain to increase. As a result of this growth, the cable television industry has become a dominant nationwide video medium.

(4) The cable industry has become highly concentrated. The potenial effects of such concentration are barriers to entry for new programmers and a reduction in the number of media voices available to consumers.

(5) The cable industry has become vertically integrated; cable operators and cable programmers often have common ownership. As a result, cable operators have the incentive and ability to favor their affiliated programmers. This could make it more difficult for noncable-affiliated programmers to secure carriage on cable systems. Vertically integrated program suppliers also have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies.

(6) There is a substantial governmental and First Amendment interest in promoting a diversity

of views provided through multiple technology media.

(7) There is a substantial governmental and First Amendment interest in ensuring that cable subscribers have access to local noncommercial educational stations which Congress has authorized, as expressed in section 396(a)(5) of the Communications Act of 1934. The distribution of unique noncommercial, educational programming services advances that interest.

(8) The Federal Government has a substantial interest in making all nonduplicative local public television services available on cable systems because—

(A) public television provides educational and informational programming to the Nation's citizens, thereby advancing the Government's compelling interest in educating its citizens;

(B) public television is a local community institution, supported through local tax dollars and voluntary citizen contributions in excess of $10,800,000,000 since 1972, that provides public service programming that is responsive to the needs and interests of the local community;

(C) the Federal Government, in recognition of public television's integral role in serving the educational and informational needs of local communities, has invested more than $3,000,000,000 in public broadcasting since 1969; and

(D) absent carriage requirements there is a substantial likelihood that citizens, who have supported local public television services, will be deprived of those services.

(9) The Federal Government has a substantial interest in having cable systems carry the signals of

local commercial television stations because the carriage of such signals is necessary to serve the goals contained in section 307(b) of the Communications Act of 1934 of providing a fair, efficient, and equitable distribution of broadcast services.

(10) A primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming. There is a substantial governmental interest in ensuring its continuation.

(11) Broadcast television stations continue to be an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate.

(12) Broadcast television programming is supported by revenues generated from advertising broadcast over stations. Such programming is otherwise free to those who own television sets and do not require cable transmission to receive broadcast signals. There is a substantial governmental interest in promoting the continued availability of such free television programming, especially for viewers who are unable to afford other means of receiving programming.

(13) As a result of the growth of cable television, there has been a marked shift in market share from broadcast television to cable television services.

(14) Cable television systems and broadcast television stations increasingly compete for television advertising revenues. As the proportion of households subscribing to cable television increases, proportionately more advertising revenues will be reallocated from broadcast to cable television systems.

(15) A cable television system which carries the signal of a local television broadcaster is assisting

the broadcaster to increase its viewership, and thereby attract additional advertising revenues that otherwise might be earned by the cable system operator. As a result, there is an economic incentive for cable systems to terminate the retransmission of the broadcast signal, refuse to carry new signals, or reposition a broadcast signal to a disadvantageous channel position. There is a substantial likelihood that absent the reimposition of such a requirement, additional local broadcast signals will be deleted, repositioned, or not carried.

(16) As a result of the economic incentive that cable systems have to delete, reposition, or not carry local broadcast signals, coupled with the absence of a requirement that such systems carry local broadcast signals, the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized.

(17) Consumers who subscribe to cable television often do so to obtain local broadcast signals which they otherwise would not be able to receive, or to obtain improved signals. Most subscribers to cable television systems do not or cannot maintain antennas to receive broadcast television services, do not have input selector switches to convert from a cable to antenna reception system, or cannot otherwise receive broadcast television services. The regulatory system created by the Cable Communications Policy Act of 1984 was premised upon the continued existence of mandatory carriage obligations for cable systems, ensuring that local stations would be protected from anticompetitive conduct by cable systems.

(18) Cable television systems often are the single most efficient distribution system for television programming. A Government mandate for a substantial societal investment in alternative distribution systems for cable subscribers, such as the "A/B" input selector antenna system, is not an enduring or feasible method of distribution and is not in the public interest.

(19) At the same time, broadcast programming that is carried remains the most popular programming on cable systems, and a substantial portion of the benefits for which consumers pay cable systems is derived from carriage of the signals of network affiliates, independent television stations, and public television stations. Also cable programming placed on channels adjacet to popular off-the-air signals obtains a larger audience than on other channel positions. Cable systems, therefore, obtain great benefits from local broadcast signals which, until now, they have been able to obtain without the consent of the broadcaster or any copyright liability. This has resulted in an effective subsidy of the development of cable systems by local broadcasters. While at one time, when cable systems did not attempt to compete with local broadcasters for programming, audience, and advertising, this subsidy may have been appropriate, it is so no longer and results in a competitive imbalance between the 2 industries.

(20) The Cable Communications Policy Act of 1984, in its amendments to the Communications Act of 1934, limited the regulatory authority of franchising authorities over cable operators. Franchising authorities are finding it difficult under the current regulatory scheme to deny renewals to cable systems that are not adequately serving cable subscribers.

(21) Cable systems should be encouraged to carry low-power television stations licensed to the communities served by those systems where the low-power station creates and broadcasts, as a substantial part of its programming day, local programming.

* * * *

SEC. 4. CARRIAGE OF LOCAL COMMERCIAL TELEVISION SIGNALS.

Part II of title VI of the Communications Act of 1934 is amended by inserting after section 613 (47 U.S.C. 533) the following new section:

"SEC. 614. CARRIAGE OF LOCAL COMMERCIAL TELEVISION SIGNALS.

"(a) CARRIAGE OBLIGATIONS.—Each cable operator shall carry, on the cable system of that operator, the signals of local commercial television stations and qualified low power stations as provided by this section. Carriage of additional broadcast television signals on such system shall be at the discretion of such operator, subject to section 325(b).

"(b) SIGNALS REQUIRED.—

"(1) IN GENERAL.—(A) A cable operator of a cable system with 12 or fewer usable activated channels shall carry the signals of at least three local commercial television stations, except that if such a system has 300 or fewer subscribers, it shall not be subject to any requiremens under this section so long as such system does not delete from carriage by that system any signal of a broadcast television station.

"(B) A cable operator of a cable system with more than 12 usable activated channels shall carry the signals of local commercial television stations, up to one-third of the aggregate number of usable activated channels of such system.

"(2) SELECTION OF SIGNALS.—Whenever the number of local commercial television stations exceeds the maximum number of signals a cable system is required to carry under paragraph (1), the cable operator shall have discretion in selecting which such stations shall be carried on its cable system, except that—

"(A) under no circumstances shall a cable operator carry a qualified low power station in lieu of a local commercial television station; and

"(B) if the cable operator elects to carry an affiliate of a broadcast network (as such term is defined by the Commission by regulation), such cable operator shall carry the affiliate of such broadcast network whose city of license reference point, as defined in section 76.53 of title 47, Code of Federal Regulations (in effect on January 1, 1991), or any successor regulation thereto, is closest to the principal headend of the cable system.

"(3) CONTENT TO BE CARRIED.—(A) A cable operator shall carry in its entirety, on the cable system of that operator, the primary video, accompanying audio, and line 21 closed caption transmission of each of the local commercial television stations carried on the cable system and, to the extent technically feasible, program-related material carried in the vertical blanking interval or on subcarriers. Retransmission of other material in the vertical blanking internal or other nonprogram-related material (including teletext and other subscription and advertiser-supported information services) shall be at the discretion of the cable operator. Where appropriate and feasible, operators may delete signal enhancements, such as ghost-canceling, from the broadcast signal and employ such enhancements at the system headend or headends.

"(B) The cable operator shall carry the entirety of the program schedule of any television station carried on the cable system unless carriage of specific programming is prohibited, and other programming authorized to be substituted, under section 76.67 or subpart F of part 76 of title 47, Code of

Federal Regulations (as in effect on January 1, 1991), or any successor regulations thereto.

"(4) SIGNAL QUALITY.—

"(A) NONDEGRADATION; TECHNICAL SPECIFICATIONS.—The signals of local commercial television stations that a cable operator carries shall be carried without material degradation. The Commission shall adopt carriage standards to ensure that, to the extent technically feasible, the quality of signal processing and carriage provided by a cable system for the carriage of local commercial television stations will be no less than that provided by the system for carriage of any other type of signal.

"(B) ADVANCED TELEVISION.—At such time as the Commission prescribes modifications of the standards for television broadcast signals, the Commission shall initiate a proceeding to establish any changes in the signal carriage requirements of cable television systems necessary to ensure cable carriage of such broadcast signals of local commercial television stations which have been changed to conform with such modified standards.

"(5) DUPLICATION NOT REQUIRED.—Notwithstanding paragraph (1), a cable operator shall not be required to carry the signal of any local commercial television station that substantially duplicates the signal of another local commercial television station which is carried on its cable system, or to carry the signals of more than one local commercial television station affiliated with a particular broadcast network (as such term is defined by regulation). If a cable operator elects to carry on its cable system a signal which substantially duplicates the signal of another local commercial television station carried on the cable system, or to carry on its system the

signals of more than one local commercial television station affiliated with a particular broadcast network, all such signals shall be counted toward the number of signals the operator is required to carry under paragraph (1).

"(6) CHANNEL POSITIONING.—Each signal carried in fulfillment of the carriage obligations of a cable operator under this section shall be carried on the cable system channel number on which the local commercial television station is broadcast over the air, or on the channel on which it was carried on July 19, 1985, or on the channel on which it was carried on January 1, 1992, at the election of the station, or on such other channel number as is mutually agreed upon by the station and the cable operator. Any dispute regarding the positioning of a local commercial television station shall be resolved by the Commission.

"(7) SIGNAL AVAILABILITY.—Signals carried in fulfillment of the requirements of this section shall be provided to every subscriber of a cable system. Such signals shall be viewable via cable on all television receivers of a subscriber which are connected to a cable system by a cable operator or for which a cable operator provides a connection. If a cable operator authorizes subscribers to install additional receiver connections, but does not provide the subscriber with such connections, or with the equipment and materials for such connections, the operator shall notify such subscribers of all broadcast stations carried on the cable system which cannot be viewed via cable without a converter box and shall offer to sell or lease such a converter box to such subscribers at rates in accordance with section 623(b)(3).

"(8) IDENTIFICATION OF SIGNALS CARRIED.—A cable operator shall identify, upon request by any person, the signals carried on its system in fullfillment of the requirements of this section.

"(9) NOTIFICATION.—A cable operator shall provide written notice to a local commercial television station at least 30 days prior to either deleting from carriage or repositioning that station. No deletion or repositioning of a local commercial television station shall occur during a period in which major television rating services measure the size of audiences of local television stations. The notification provisions of this paragraph shall not be used to undermine or evade the channel positioning or carriage requirements imposed upon cable operators under this section.

"(10) COMPENSATION FOR CARRIAGE.—A cable operator shall not accept or request monetary payment or other valuable consideration in exchange either for carriage of local commercial television stations in fulfillment of the requirements of this section or for the channel positioning rights provided to such stations under this section, except that—

"(A) any such station may be required to bear the costs associated with delivering a good quality signal or a baseband video signal to the principal headend of the cable system;

"(B) a cable operator may accept payments from stations which would be considered distant signals under section 111 of title 17, United States Code, as indemnification for any increased copyright liability resulting from carriage of such signal; and

"(C) a cable operator may continue to accept monetary payment or other valuable consideration in exchange for carriage or channel positioning of the signal of any local commercial television station carried in fulfillment of the requirements of this section, through, but not beyond, the date of expiration of an agreement thereon between a cable operator and a

local commercial television station entered into prior to June 26, 1990.

"(c) LOW POWER STATION CARRIAGE OBLIGATION.—

"(1) REQUIREMENT.—If there are not sufficient signals of full power local commercial television stations to fill the channels set aside under subsection (b)—

"(A) a cable operator of a cable system with a capacity of 35 or fewer usable activated channels shall be required to carry one qualified low power station; and

"(B) a cable operator of a cable system with a capacity of more than 35 usable activated channels shall be required to carry two qualified low power stations.

"(2) USE OF PUBLIC, EDUCATIONAL, OR GOVERNMENTAL CHANNELS.—A cable operator required to carry more than one signal of a qualified low power station under this subsection may do so, subject to approval by the franchising authority pursuant to section 611, by placing such additional station on public, educational, or governmental channels not in use for their designated purposes.

"(d) REMEDIES.—

"(1) COMPLAINTS BY BROADCAST STATIONS.—Whenever a local commercial television station believes that a cable operator has failed to meet its obligations under this section, such station shall notify the operator, in writing, of the alleged failure and identify its reasons for believing that the cable operator is obligated to carry the signal of such station or has otherwise failed to comply with the channel positioning or repositioning or other requirements of this section. The cable operator shall, within 30 days of such written notification, respond

in writing to such notification and either commence to carry the signal of such station in accordance with the terms requested or state its reasons for believing that it is not obligated to carry such signal or is in compliance with the channel positioning and repositioning and other requirements of this section. A local commercial television station that is denied carriage or channel positioning or repositioning in accordance with this section by a cable operator may obtain review of such denial by filing a complaint with the Commission. Such complaint shall allege the manner in which such cable operator has failed to meet its obligations and the basis for such allegations.

"(2) OPPORTUNITY TO RESPOND.—The Commission shall afford such cable operator an opportunity to present data and arguments to establish that there has been no failure to meet its obligations under this section.

"(3) REMEDIAL ACTIONS; DISMISSAL.—Within 120 days after the date a complaint is filed, the Commission shall determine whether the cable operator has met its obligations under this section. If the Commission determines that the cable operator has failed to meet such obligations, the Commission shall order the cable operator to reposition the complaining station or, in the case of an obligation to carry a station, to commence carriage of the station and to continue such carriage for at least 12 months. If the Commission determines that the cable operator has fully met the requirements of this section, it shall dismiss the complaint.

"(e) INPUT SELECTOR SWITCH RULES ABOLISHED.—No cable operator shall be required—

"(1) to provide or make available any input selector switch as defined in section 76.5(mm) of title

47, Code of Federal Regulations, or any comparable device; or

"(2) to provide information to subscribers about input selector switches or comparable devices.

"(f) REGULATIONS BY COMMISSION.—Within 180 days after the date of enactment of this section, the Commission shall, following a rulemaking proceeding, issue regulations implementing the requirements imposed by this section. Such implementing regulations shall include necessary revisions to update section 76.51 of title 47 of the Code of Federal Regulations.

"(g) SALES PRESENTATIONS AND PROGRAM LENGTH COMMERCIALS.—

"(1) CARRIAGE PENDING PROCEEDING.—Pending the outcome of the proceeding under paragraph (2), nothing in this Act shall require a cable operator to carry on any tier, or prohibit a cable operator from carrying on any tier, the signal of any commercial television station or video programming service that is predominantly utilized for the transmission of sales presentations or program length commercials.

"(2) PROCEEDING CONCERNING CERTAIN STATIONS.—Within 270 days after the date of enactment of this section, the Commission, notwithstanding prior proceedings to determine whether broadcast television stations that are predominantly utilized for the transmission of sales presentations or program length commercials are serving the public interest, convenience, and necessity, shall complete a proceeding in accordance with this paragraph to determine whether broadcast television stations that are predominantly utilized for the transmission of sales presentations or program length commercials are serving the public interest, convenience, and necessity. In conducting such proceeding, the Commission shall provide appropriate notice and opportu-

nity for public comment. The Commission shall consider the viewing of such stations, the level of competing demands for the spectrum allocated to such stations, and the role of such stations in providing competition to nonbroadcast services offering similar programming. In the event that the Commission concludes that one or more of such stations are serving the public interest, convenience, and necessity, the Commission shall qualify such stations as local commercial television stations for purposes of subsection (a). In the event that the Commission concludes that one or more of such stations are not serving the public interest, convenience, and necessity, the Commission shall allow the licensees of such stations a reasonable period within which to provide different programming, and shall not deny such stations a renewal expectancy solely because their programming consisted predominantly of sales presentations or program length commercials.

"(h) DEFINITIONS.—

"(1) LOCAL COMMERCIAL TELEVISION STATION.—

"(A) IN GENERAL.—For purposes of this section, the term 'local commercial television station' means any full power television broadcast station, other than a qualified noncommercial educational television station within the meaning of section 615(l)(1), licensed and operating on a channel regularly assigned to its community by the Commission that, with respect to a particular cable system, is within the same television market as the cable system.

"(B) EXCLUSIONS.—The term 'local commercial television station' shall not include—

"(i) low power television stations, television translator stations, and passive repeaters which operate pursuant to part

74 of title 47, Code of Federal Regulations, or any successor regulations thereto;

"(ii) a television broadcast station that would be considered a distant signal under section 111 of title 17, United States Code, if such station does not agree to indemnify the cable operator for any increased copyright liability resulting from carriage on the cable system; or

"(iii) a television broadcast station that does not deliver to the principal headend of a cable system either a signal level of —45dBm for UHF signals or —49dBm for VHF signals at the input terminals of the signal processing equipment, if such station does not agree to be responsible for the costs of delivering to the cable system a signal of good quality or a baseband video signal.

"(C) MARKET DETERMINATIONS.—(i) for purposes of this section, a broadcasting station's market shall be determined in the manner provided in section 73.3555(d)(3)(i) of title 47, Code of Federal Regulations, as in effect on May 1, 1991, except that, following a written request, the Commission may, with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section. In considering such requests, the Commission may determine that particular communities are part of more than one television market.

"(ii) In considering requests filed pursuant to clause (i), the Commission shall afford particular attention to the value of localism by taking into account such factors as—

"(I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;

"(II) whether the television station provides coverage or other local service to such community;

"(III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and

"(IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.

"(iii) A cable operator shall not delete from carriage the signal of a commercial television station during the pendency of any proceeding pursuant to this subparagraph.

"(iv) In the rulemaking proceeding required by subsection (f), the Commission shall provide for expedited consideration of requests filed under this subparagraph.

"(2) QUALIFIED LOW POWER STATION.—The term 'qualified low power station' means any television broadcast station conforming to the rules established for Low Power Television Stations contained in part 74 of title 47, Code of Federal Regulations, only if—

"(A) such station broadcasts for at least the minimum number of hours of operation required by the Commission for television broadcast stations under part 73 of title 47, Code of Federal Regulations;

"(B) such station meets all obligations and requirements applicable to television broadcast stations under part 73 of title 47, Code of Federal Regulations, with respect to the broadcast of nonentertainment programming; programming and rates involving political candidates, election issues, controversial issues of public importance, editorials, and personal attacks; programming for children; and equal employment opportunity; and the Commission determines that the provision of such programming by such station would address local news and informational needs which are not being adequately served by full power television broadcast stations because of the geographic distance of such full power stations from the low power station's community of license;

"(C) such station complies with interference regulations consistent with its secondary status pursuant to part 74 of title 47, Code of Federal Regulations;

"(D) such station is located no more than 35 miles from the cable system's headend, and delivers to the principal headend of the cable system an over-the-air signal of good quality, as determined by the Commission;

"(E) the community of license of such station and the franchise area of the cable system are both located outside of the largest 160 Metropolitan Statistical Areas, ranked by population, as determined by the Office of Management and Budget on June 30, 1990, and the population of such community of license on such date did not exceed 35,000; and

"(F) there is no full power television broadcast station licensed to any community within the county or other political subdivision (of a State) served by the cable system.

Nothing in this paragraph shall be construed to change the secondary status of any low power station as provided in part 74 of title 47, Code of Federal Regulations, as in effect on the date of enactment of this section.".

SEC. 5. CARRIAGE OF NONCOMMERCIAL STATIONS.

Part II of title VI of the Communications Act of 1934 (47 U.S.C. 531 et seq.) is further amended by inserting after section 614 (as added by section 4 of this Act) the following new section:

"SEC. 615. CARRIAGE OF NONCOMMERCIAL EDUCATIONAL TELEVISION.

"(a) CARRIAGE OBLIGATIONS.—In addition to the carriage requirements set forth in section 614, each cable operator of a cable system shall carry the signals of qualified noncommercial educational television stations in accordance with the provisions of this section.

"(b) REQUIREMENTS TO CARRY QUALIFIED STATIONS.—

"(1) GENERAL REQUIREMENT TO CARRY EACH QUALIFIED STATION.—Subject to paragraphs (2) and (3) and subsection (e), each cable operator shall carry, on the cable system of that cable operator, any qualified local noncommercial educational television station requesting carriage.

"(2)(A) SYSTEMS WITH 12 OR FEWER CHANNELS.—Notwithstanding paragraph (1), a cable operator of a cable system with 12 or fewer usable activated channels shall be required to carry the signal of one qualified local noncommercial educational television station; except that a cable operator

of such a system shall comply with subsection (c) and may, in its discretion, carry the signals of other qualified noncommercial educational television stations.

"(B) In the case of a cable system described in subparagraph (A) which operates beyond the presence of any qualified local noncommercial educational television station—

"(i) the cable shall import and carry on that system the signal of one qualified noncommercial educational television station;

"(ii) the selection for carriage of such a signal shall be at the election of the cable operator; and

"(iii) in order to satisfy the requirements for carriage specified in this subsection, the cable operator of the system shall not be required to remove any other programming service actually provided to subscribers on March 29, 1990; except that such cable operator shall use the first channel available to satisfy the requirements of this subparagraph.

"(3) SYSTEMS WITH 13 TO 36 CHANNELS.—(A) Subject to subsection (c), a cable operator of a cable system with 13 to 36 usable activated channels—

"(i) shall carry the signal of at least one qualified local noncommercial educational television station but shall not be required to carry the signals of more than three such stations, and

"(ii) may, in its discretion, carry additional such stations.

"(B) In the case of a cable system described in this paragraph which operates beyond the presence

of any qualified local noncommercial educational television station, the cable operator shall import and carry on that system the signal of at least one qualified noncommercial educational television station to comply with subparagraph (A)(i).

"(C) The cable operator of a cable system described in this paragraph which carries the signal of a qualified local noncommercial educational station affiliated with a State public television network shall not be required to carry the signal of any additional qualified local noncommercial educational television stations affiliated with the same network if the programming of such additional stations is substantially duplicated by the programming of the qualified local noncommercial educational television station receiving carriage.

"(D) A cable operator of a system described in this paragraph which increases the usable activated channel capacity of the system to more than 36 channels on or after March 29, 1990, shall, in accordance with the other provisions of this section, carry the signal of each qualified local noncommercial educational television station requesting carriage, subject to subsection (e).

"(c) CONTINUED CARRIAGE OF EXISTING STATIONS.—Notwithstanding any other provision of this section, all cable operators shall continue to provide carriage to all qualified local noncommercial educational television stations whose signals were carried on their systems as of March 29, 1990. The requirements of this subsection may be waived with respect to a particular cable operator and a particular such station, upon the written consent of the cable operator and the station.

"(d) PLACEMENT OF ADDITIONAL SIGNALS.—A cable operator required to add the signals of qualified local noncommercial educational television stations to a cable system under this section may do so, subject to approval by the franchising authority pursuant to section 611, by placing such additional stations on public, educational, or governmental channels not in use for their designated purposes.

"(e) SYSTEMS WITH MORE THAN 36 CHANNELS.—A cable operator of a cable system with a capacity of more than 36 usable activated channels which is required to carry the signals of three qualified local noncommercial educational television stations shall not be required to carry the signals of additional such stations the programming of which substantially duplicates the programming broadcast by another qualified local noncommercial educational television station requesting carriage. Substantial duplication shall be defined by the Commission in a manner that promotes access to distinctive noncommercial educational television services.

"(f) WAIVER OF NONDUPLICATION RIGHTS.—A qualified local noncommercial educational television station whose signal is carried by a cable operator shall not assert any network nonduplication rights it may have pursuant to section 76.92 of title 47, Code of Federal Regulations, to require the deletion of programs aired on other qualified local noncommercial educational television stations whose signals are carried by that cable operator.

"(g) CONDITIONS OF CARRIAGE.—

"(1) CONTENT TO BE CARRIED.—A cable operator shall retransmit in its entirety the primary video, accompanying audio, and line 21 closed caption transmission of each qualified local noncommercial educational television station whose signal is carried on the cable system, and, to the extent technically feasible, program-related material carried in the vertical blanking interval, or on subcarriers, that may be necessary for receipt of programming by handicapped persons or for educational or language pur-

poses. Retransmission of other material in the vertical blanking interval or on subcarriers shall be within the discretion of the cable operator.

"(2) BANDWIDTH AND TECHNICAL QUALITY.—A cable operator shall provide each qualified local noncommercial educational television station whose signal is carried in accordance with this section with bandwidth and technical capacity equivalent to that provided to commercial television broadcast stations carried on the cable system and shall carry the signal of each qualified local noncommercial educational television station without material degradation.

"(3) CHANGES IN CARRIAGE.—The signal of a qualified local noncommercial educational television station shall not be repositioned by a cable operator unless the cable operator, at least 30 days in advance of such repositioning, has provided written notice to the station and all subscribers of the cable system. For purposes of this paragraph, repositioning includes (A) assignment of a qualified local noncommercial educational television station to a cable system channel number different from the cable system channel number to which the station was assigned as of March 29, 1990, and (B) deletion of the station from the cable system. The notification provisions of this paragraph shall not be used to undermine or evade the channel positioning or carriage requirements imposed upon cable operators under this section.

"(4) GOOD QUALITY SIGNAL REQUIRED.—Notwithstanding the other provisions of this section, a cable operator shall not be required to carry the signal of any qualified local noncommercial educational television station which does not deliver to the cable system's principal headend a signal of good quality or a baseband video signal, as may be defined by the Commission.

"(5) CHANNEL POSITIONING.—Each signal carried in fulfillment of the carriage obligations of a cable operator under this section shall be carried on the cable system channel number on which the qualified local noncommercial educational television station is broadcast over the air, or on the channel on which it was carried on July 19, 1985, at the election of the station, or on such other channel number as is mutually agreed upon by the station and the cable operator. Any dispute regarding the positioning of a qualified local noncommercial educational television station shall be resolved by the Commission.

"(h) AVAILABILITY OF SIGNALS.—Signals carried in fulfillment of the carriage obligations of a cable operator under this section shall be available to every subscriber as part of the cable system's lowest priced service tier that includes the retransmission of local commercial television broadcast signals.

"(i) PAYMENT FOR CARRIAGE PROHIBITED.—

"(1) IN GENERAL.—A cable operator shall not accept monetary payment or other valuable consideration in exchange for carriage of the signal of any qualified local noncommercial educational television station carried in fulfillment of the requirements of this section, except that such a station may be required to bear the cost associated with delivering a good quality signal or a baseband video signal to the principal headend of the cable system.

"(2) DISTANT SIGNAL EXCEPTION.—Notwithstanding the provisions of this section, a cable operator shall not be required to add the signal of a qualified local noncommercial educational television station not already carried under the provision of subsection (c), where such signal would be considered a distant signal for copyright purposes unless such station indemnifies the cable operator for any

increased copyright costs resulting from carriage of such signal.

"(j) REMEDIES.—

"(1) COMPLAINT.—Whenever a qualified local noncommercial educational television station believes that a cable operator of a cable system has failed to comply with the signal carriage requirements of this section, the station may file a complaint with the Commission. Such complaint shall allege the manner in which such cable operator has failed to comply with such requirements and state the basis for such allegations.

"(2) OPPORTUNITY TO RESPOND.—The Commission shall afford such cable operator an opportunity to present data, views, and arguments to establish that the cable operator has complied with the signal carriage requirements of this section.

"(3) REMEDIAL ACTIONS; DISMISSAL.—Within 120 days after the date a complaint is filed under this subsection, the Commission shall determine whether the cable operator has complied with the requirements of this section. If the Commission determines that the cable operator has failed to comply with such requirements, the Commission shall state with particularity the basis for such findings and order the cable operator to take such remedial action as is necessary to meet such requirements. If the Commission determines that the cable operator has fully complied with such requirements, the Commission shall dismiss the complaint.

"(k) IDENTIFICATION OF SIGNALS.—A cable operator shall identify, upon request by any person, those signals carried in fulfillment of the requirements of this section.

"(l) DEFINITIONS.—For purposes of this section—

"(1) QUALIFIED NONCOMMERCIAL EDUCATIONAL TELEVISION STATION.—The term 'qualified noncommercial educational television station' means any television broadcast station which—

"(A)(i) under the rules and regulations of the Commission in effect on March 29, 1990, is licensed by the Commission as a noncommercial educational television broadcast station and which is owned and operated by a public agency, nonprofit foundation, corporation, or association; and

"(ii) has as its licensee an entity which is eligible to receive a community service grant, or any successor grant thereto, from the Corporation for Public Broadcasting, or any successor organization thereto, on the basis of the formula set forth in section 396(k)(6)(B); or

"(B) is owned and operated by a municipality and transmits predominantly noncommercial programs for educational purposes.

Such term includes (I) the translator of any noncommercial educational television station with five watts or higher power serving the franchise area, (II) a full-service station or translator if such station or translator is licensed to a channel reserved for noncommercial educational use pursuant to section 73.606 of title 47, Code of Federal Regulations, or any successor regulations thereto, and (III) such stations and translators operating on channels not so reserved as the Commission determines are qualified as noncommercial educational stations.

"(2) QUALIFIED LOCAL NONCOMMERCIAL EDUCATIONAL TELEVISION STATION.—The term 'qualified local noncommercial educational television station'

means a qualified noncommercial educational television station—

"(A) which is licensed to a principal community whose reference point, as defined in section 76.53 of title 47, Code of Federal Regulations (as in effect on March 29, 1990), or any successor regulations thereto, is within 50 miles of the principal headend of the cable system; or

"(B) whose Grade B service contour, as defined in section 73.683(a) of such title (as in effect on March 29, 1990), or any successor regulations thereto, encompasses the principal headend of the cable system.".

SEC. 6. RETRANSMISSION CONSENT FOR CABLE SYSTEMS.

Section 325 of the Communications Act of 1934 (47 U.S.C. 325) is amended—

(1) by redesignating subsections (b) and (c) as subsections (c) and (d), respectively; and

(2) by inserting immediately after subsection (a) the following new subsection:

"(b)(1) Following the date that is one year after the date of enactment of the Cable Television Consumer Protection and Competition Act of 1992, no cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station, or any part thereof, except—

"(A) with the express authority of the originating station; or

"(B) pursuant to section 614, in the case of a station electing, in accordance with this subsection, to assert the right to carriage under such section.

"(2) The provisions of this subsection shall not apply to—

"(A) retransmission of the signal of a noncommercial broadcasting station;

"(B) retransmission directly to a home satellite antenna of the signal of a broadcasting station that is not owned or operated by, or affiliated with, a broadcasting network, if such signal was retransmitted by a satellite carrier on May 1, 1991;

"(C) retransmission of the signal of a broadcasting station that is owned or operated by, or affiliated with, a broadcasting network directly to a home satellite antenna, if the household receiving the signal is an unserved household; or

"(D) retransmission by a cable operator or other multichannel video programming distributor of the signal of a superstation if such signal was obtained from a satellite carrier and the originating station was a superstation on May 1, 1991.

For purposes of this paragraph, the terms 'satellite carrier', 'superstation', and 'unserved household' have the meanings given those terms, respectively, in section 119(d) of title 17, United States Code, as in effect on the date of enactment of the Cable Television Consumer Protection and Competition Act of 1992.

"(3)(A) Within 45 days after the date of enactment of the Cable Television Consumer Protection and Competition Act of 1992, the Commission shall commence a rulemaking proceeding to establish regulations to govern the exercise by television broadcast stations of the right to grant retransmission consent under this subsection and of the right to signal carriage under section 614, and such other regulations as are necessary to administer the limitations contained in paragraph (2). The Commission shall consider in such proceeding the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier and shall ensure that the regulations prescribed under this subsection

do not conflict with the Commission's obligation under section 623(b)(1) to ensure that the rates for the basic service tier are reasonable. Such rulemaking proceeding shall be completed within 180 days after the date of enactment of the Cable Television Consumer Protection and Competition Act of 1992.

"(B) The regulations required by subparagraph (A) shall require that television stations, within one year after the date of enactment of the Cable Television Consumer Protection and Competition Act of 1992 and every three years thereafter, make an election between the right to grant retransmission consent under this subsection and the right to signal carriage under section 614. If there is more than one cable system which services the same geographic area, a station's election shall apply to all such cable systems.

"(4) If an originating television station elects under paragraph (3)(B) to exercise its right to grant retransmission consent under this subsection with respect to a cable system, the provisions of section 614 shall not apply to the carriage of the signal of such station by such cable system.

"(5) The exercise by a television broadcast station of the right to grant retransmission consent under this subsection shall not interfere with or supersede the rights under section 614 or 615 of any station electing to assert the right to signal carriage under that section.

"(6) Nothing in this section shall be construed as modifying the compulsory copyright license established in section 111 of title 17, United States Code, or as affecting existing or future video programming licensing agreements between broadcasting stations and video programmers.".

APPENDIX D

Time Warner Entertainment Company, L.P.'s Rule 29.1 List of Parent Companies and Subsidiaries

Each of the following general partners of Time Warner Entertainment Company, L.P. ("TWE") is a wholly owned subsidiary of Time Warner Inc.:

Home Box Office, Inc.
Warner Cable Communications, Inc.
Warner Communications, Inc.
Warner Bros., Inc.
American Television and Communications Corporation
Capital Cablevision Systems, Inc.
People's Cable Corporation
Memphis CATV, Inc.
Warner Cable Communications Company
SIFTA Milwaukee Cable Corp.
TA Milwaukee Cable Co., Inc.
Warner Cable of New York, Inc.
Time Warner Cable Inc.
Warner Entertainment Inc.

The following are limited partners of TWE:

C. Itoh Entertainment Inc.
A subsidiary of C. Itoh & Co. Ltd.

Toshiba American Entertainment, Inc.
A subsidiary of Toshiba Corporation

PLAINTIFFS IN CIVIL ACTION NO. 92-2247

Rule 29.1 List of Parent Companies and Subsidiaries

1. *Turner Broadcasting System, Inc.*

The following entities hold ownership interests in Turner Broadcasting System, Inc. ("TBS"): Time Warner, Inc.; and Tele-Communications, Inc.

The following are direct or indirect subsidiary companies, not wholly-owned, of TBS: SportsSouth Network, Ltd.; Checkout Channel, L.P., through its indirect wholly-owned subsidiary, COC Holdings, Inc.; Atlanta Hawks, Ltd.; and HB Entertainment Co., Inc.

2. *Arts & Entertainment Network*

The following entities hold ownership interests in Arts and Entertainment Network: Capital Cities/ABC Video Enterprises, Inc.; The Hearst Corporation; RCA Cable Inc.; and Radio City Music Hall Productions, Inc.

3. *Black Entertainment Television, Inc.*

BET Holdings, Inc. is the parent company of Black Entertainment Television, Inc. ("BET"). The following companies are subsidiaries, not wholly-owned, of BET: EMERGE Communications, Inc.; Haricom Advertising, Inc.; and United Image Entertainment.

4. *E! Entertainment Television, Inc.*

The following entities hold ownership interests in E! Entertainment Television, Inc.: Time Warner, Inc., through its wholly-owned subsidiary, Warner Communications, Inc.; Tele-Communications, Inc., through its subsidiaries, United Cable Television

Corp, Ltd. and United Cable Television Investments; Comcast Cable Communications, Inc.; Continental Cablevision, Inc., through its subsidiary, Continental Cablevision Investments, Inc.; Cox Enterprises, Inc., through its subsidiary, Cox Communications, Inc.; and Newhouse Broadcasting, through its subsidiary, NewChannels Corp.

5. *Hearst/ABC-Viacom Entertainment Services*

Hearst/ABC Viacom Entertainment Services is a partnership owned by The Hearst Corporation; Capital Cities/ABC Video Enterprises, Inc., a wholly owned subsidiary of Capital Cities/ABC Inc.; and Lifetime Holdings, Inc., a wholly owned subsidiary of Viacom International, Inc.

6. *International Family Entertainment, Inc.*

Liberty Programming Corp. is the parent company of International Family Entertainment.

7. *National Cable Satellite Corporation*

There are no parent companies or subsidiaries.

8. *QVC Network, Inc.*

The following entities have ownership interests in QVC Network in excess of 5% of the publicly traded stock: Liberty Media Corporation; Time Warner, Inc.; and Comcast Corporation.

9. *The Travel Channel, Inc.*

The following entities hold ownership interests in The Travel Channel, Inc.: Landmark Communications, Inc., through its wholly-owned subsidiaries, Landmark Television, Inc. and Landmark Broadcasting, Inc.; and TeleCable Corporation, through its subsidiaries, TeleCable Technologies, Inc., Telecable

Investment Corporation, TeleCable of Cleveland, Inc., and TC Partners, L.P.

10. *USA Networks*

The following entities have ownership interests in USA Networks: Paramount Communications, Inc., through its wholly-owned subsidiary, Eighth Century Corp.; Matsushita Electric Industrial Co., Ltd., through its wholly-owned subsidiaries, MCA, Inc. and MCA Cable Services, Inc.

Daniels Cablevision, Inc's
Rule 29.1 List of
Parent Companies and Subsidiaries

Daniels Cablevision, Inc. is a privately held corporation, with 100% of the stock held by Bill Daniels, and has no parent or subsidiary corporations within the meaning or context of Supreme Court Rule 29.1.

Discovery Communications, Inc.
and
The Learning Channel, Inc.

List of Parent Companies and Subsidiaries
Pursuant to Supreme Court Rule 29.1

The Learning Channel, Inc., is a wholly-owned subsidiary of Discovery Communications, Inc. The ultimate parent companies of Discovery Communications, Inc., are Tele-Communications, Inc., Cox Cable Communications, and Newhouse Broadcasting Corp. Neither The Learning Channel, Inc., nor Discovery Communications, Inc., has any other parent companies, or subsidiaries (other than wholly owned subsidiaries).

NATIONAL CABLE TELEVISION ASSOCIATION

List of Parent Companies and Subsidiaries
Pursuant to Supreme Court Rule 29.1

The National Cable Television Association is a trade association. It has no parent companies or subsidiaries (other than wholly owned subsidiaries).

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No. 93-44

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,
v.
FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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Appellee National Association of Broadcasters ("NAB"), representing commercial broadcast stations nationwide, respectfully moves to affirm the judgment of a three-judge district court rejecting a First Amendment challenge to Section 4 of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. §§ 531 *et seq.* (the "Act"), which requires cable operators to carry the signals of a limited number of local commercial television stations.[1] Plenary review is unwarranted because the district court correctly applied settled principles in upholding Section 4.

STATEMENT OF THE CASE

1. *The Act.* Congress found that cable operators exercise bottleneck monopoly control over access to the local video marketplace, and that carriage on cable systems is essential to the survival of free local broadcast television. Section 4, one of the so-called "must carry" provisions of the Act, addresses this problem by requiring cable operators to carry a limited number of local commercial television signals they would otherwise have substantial anticompetitive incentives to silence.[2]

By its terms and operation, Section 4 is content-neutral and viewpoint-neutral.[3] It does not prohibit cable operators from disseminating programming on any subject or from expressing any point of view. Must carry obligations are *not* triggered by the programming content of a cable system, and thus do not deter or penalize particular programming choices. Must carry rights are *not* dependent

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[1] NAB was granted leave to intervene as a defendant below. Appendix to the Jurisdictional Statement (hereafter "J.S. App."), at 3a.

[2] Section 4 is codified at 47 U.S.C. § 534. The other "must carry" provision—Section 5, 47 U.S.C. § 535—requires cable operators to carry the signals of certain *noncommercial* educational television stations. NAB does not address that provision.

[3] Congress stressed that "[t]he application of must carry rules . . . has nothing to do with the content of any speech and . . . is not intended to suppress any ideas." S. Rep. No. 92, 102d Cong., 1st Sess. 57 (1990) ("Senate Report").

on the programming content of local broadcasters, who may qualify for carriage pursuant to Section 4 without regard to the content of their programming. The Act leaves cable operators entirely free to disseminate any programming they choose on the substantial majority of their channels, and leaves cable programmers entirely free to compete for carriage on all of those channels. Moreover, the Act does not restrict cable operators' freedom to expand their channel capacity to accommodate an unlimited number of video programmers of their choice. The applicability of Section 4 depends solely on the *technology* used by speakers and their geographic *location.* Speakers who use over-the-air broadcast technology, and who originate their signals locally, are eligible to elect must carry rights under Section 4 regardless of the program content of those signals.[4]

The Act's narrowly tailored remedial plan is the result of years of comprehensive congressional study of the cable industry. Based on an extensive record, Congress found and sought to remedy substantial threats to competition arising from cable's status as a bottleneck monopoly exercising control over access to consumers of video programming. Findings ¶¶ 3, 13, 17.[5] Cable now serves approximately 60% of all American households with

[4] *See* 47 U.S.C. § 534(h)(1). Section 4 does not require cable operators to carry all commercial television stations whose signals originate within their markets. After carrying a specified number of stations (never more than one-third of its active channels), the cable operator can refuse to carry additional local television stations. Furthermore, commercial television stations may elect not to exercise their rights under Section 4, choosing instead the right to negotiate with the cable system to be compensated for carriage (the right of "retransmission consent," established by Section 6 of the Act, 47 U.S.C. § 536). Section 4 imposes no obligations on cable operators to carry the signals of stations who elect to pursue retransmission consent, but every local signal the cable operator chooses to carry pursuant to the retransmission consent provision counts towards satisfying the operator's must carry obligation.

[5] Congress' findings appear in 47 U.S.C. § 521 Historical and Statutory Notes, and in J.S. App. at 82a-87a.

television sets (*id.* ¶ 3), and has effectively replaced broadcast television as the source of video programming for those households. *Id.* ¶ 17.[6] "The result," Congress found, "is undue market power for the cable operator as compared to that of consumers and video programmers." *Id.* ¶ 2.

This bottleneck chokehold gives cable operators both "the incentive and ability" to commit anticompetitive acts against broadcast competitors. *See id.* ¶ 5. Cable operators have the *ability* to act anticompetitively, because their refusal to carry local television stations prevents those stations from reaching 60% of their potential audience. *See id.* ¶¶ 14-16. Cable operators have a particular *incentive* to harm local television stations, because "[c]able television systems and broadcast television stations increasingly compete for television advertising revenues." *Id.* ¶ 14; *see id.* ¶¶ 15 and 16. Indeed, local broadcast stations are cable's *only* meaningful competitors for such advertising revenues.

[6] Congress expressly rejected the contention that broadcasters have alternative means to reach the 60% of American households now receiving cable service. The 1991 Report of the Senate Subcommittee on Communications noted "considerable evidence that once individuals subscribe to cable it is rare for them ever to switch to receive an over-the-air-signal." Senate Report at 45. Although appellants now suggest that consumers might in some circumstances use what are known as "A/B switches" to access over-the-air signals, J.S. 26, n.16, appellant ICTA has expressly acknowledged that such switches "are unworkable and contrary to the public interest." Joint Petition For Reconsideration submitted to the FCC in MM Docket No. 85-349 on Dec. 17, 1986 by NCTA and others. Citing that Joint Petition and other evidence (*see* Senate Report at 45), Congress expressly found that the A/B switch "is not an enduring or feasible method of distribution and is not in the public interest." ¶ 18; *see Turner Broadcasting System, Inc. v. FCC*, J.S. App. 27a. Moreover, 98% of cable homes do not have a roof antenna, Senate Report at 45, n.16, and many jurisdictions *prohibit* them, eliminating in many cases viewers' ability to receive signals off air. As the Senate Report explained, "[e]vidence demonstrates that market factors, absent government regulation, are unable to cure cable's bottleneck problems." *Id.* at 51.

Congress determined that over-the-air broadcasting and, hence, effective competition in the market for video programming, were immediately and seriously threatened. *See id.* ¶¶ 14-16. Anticompetitive exclusion of broadcast stations from cable had occurred, and "[t]here is a substantial likelihood that . . . additional local broadcast signals will be deleted, repositioned, or not carried." *Id.* ¶ 15. These risks of anticompetitive harm are so substantial, Congress concluded, that, absent remedial legislation, "the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized." *Id.* ¶ 16. This threat to local broadcast television particularly placed at risk the interests of the 40% of the American public who do not have cable television, *id.* ¶¶ 3, 12, and thus are entirely dependent on free broadcast television for access to video programming.

Congress decided to ameliorate these risks in order to advance three distinct objectives—each of which independently justifies Section 4 without reference to the content of expression. *First*, Congress sought to preserve "the continued availability" of "free television programming" for the 40% of American households *without* cable, "especially for viewers who are unable to afford other means of receiving programming." *Id.* ¶ 12. *Second*, Congress sought to prevent anticompetitive conduct by cable operators in the market for video programming, *see id.* ¶¶ 4-5, which, if left unregulated, would harm consumer welfare by increasing advertising costs and diminishing programming quality. *Third*, Congress sought to ensure that the goals of the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.*— a fair, efficient and equitable distribution of diverse *broadcast* services—could be achieved in an era of increasing cable dominance. *See id.* ¶¶ 6, 9-11.

2. *The decision below.* The majority of the three-judge district court ruled that the must carry provisions are constitutional under the governing First Amendment principles established by this Court in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) (rejecting a "compelled speech" claim indistinguishable from appellants' claim), *Leathers v. Medlock*, 111 S. Ct. 1438 (1991) (rejecting a "discrimination" claim indistinguishable from appellants' claim), *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (laws with predominate purposes "unrelated to the suppression of free expression" *not* subject to strict scrutiny), and *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (same).[7]

All three judges agreed that cable's bottleneck monopoly presents "a very real problem," J.S. App. 50a (Williams, J., dissenting), which Congress has the power to remedy by requiring cable operators to carry speakers they would otherwise exclude. The majority upheld the must carry provisions because they "are essentially economic regulations designed to create competitive balance in the video industry as a whole, and to redress the effects of cable operators' anti-competitive practices," J.S. App. 13a, explaining that "Congress employed its regulatory powers over the economy to impose order upon a market in dysfunction, but a market in a commercial commodity nevertheless; not a market in 'speech.'" J.S. App. 12a.

The court rejected the argument that the must carry provisions trigger strict scrutiny because they allegedly

[7] As the district court correctly held, the D.C. Circuit's decisions in *Quincy Cable Television, Inc. v. FCC*, 768 F.2d 1434, 1463 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986), and *Century Communications Corp. v. FCC*, 835 F.2d 292, 304 (D.C. Cir. 1987), *clarified by*, 837 F.2d 517 (D.C. Cir.), *cert. denied*, 486 U.S. 1032 (1988), are distinguishable and are not to the contrary. J.S. App. 15a. In both cases, the regulations were found unconstitutional on the narrow ground that there was literally *nothing* in the record to support the FCC's determination that they were necessary to further the governmental interests asserted there, or that they were narrowly tailored to serve those interests. *See Century*, 835 F.2d at 300-04; *Quincy*, 768 F.2d at 1455-57, 1459, 1462-63. Congress' extensive findings of fact, supported by the record, plainly distinguish Section 4 from the FCC must carry regulations considered in *Quincy* and *Century*.

favor broadcasters over cable programmers, explaining that "[s]peaker partiality alone, . . . absent evidence that the government's distinction between groups of speakers is related to what the speakers are saying, is insufficient to trigger strict scrutiny." J.S. App. 18a. The court held that must carry does not trigger strict scrutiny because it is "unrelated to the content of [the] expression upon which it may have an effect." J.S. App. 19a, *citing Ward*, 491 U.S. at 791.

Because the court concluded that Section 4 was "*justified* by the existing structure of the cable business itself," without regard to content, it applied the test fashioned in *United States v. O'Brien*, 391 U.S. 367 (1968), and *Ward*, J.S. App. 13a, 22a (emphasis added), and found that Section 4 easily satisfied that test. Congress' interest—"to promote fair competition among video 'speakers' in order to assure the survival of local broadcasting for the benefit of both those who subscribe to a cable service and for those who do not"—is substantial. J.S. App. 23a-24a, *citing, e.g., United States v. Southwestern Cable Co.*, 392 U.S. 157, 172-73 & nn. 38 & 39 (1968), and *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984). And Section 4 is "narrowly tailored" to further that interest. As the court noted, under *O'Brien*, "the government is not required to settle for means that serve its interests less effectively merely because an alternative might be less burdensome." J.S. App. 26a-27a, citing *Ward*, 491 U.S. at 799. The court then held that the provisions "do not unnecessarily burden a substantial amount of [appellants'] speech." J.S. App. 27a. Section 4 "leaves open adequate—in fact, plentiful—alternative, intramedium channels of communication for cable speakers to deliver whatever messages they choose." J.S. App. 28a.

Although Judge Williams also rejected the legal arguments that were central to appellants' claim below (and on this appeal), he dissented based on an argument appellants had not raised below, and do not raise here. He concluded that "consistent with the First Amendment"

Congress *can* address the "bottleneck" problem by *compelling* cable operators to grant "compulsory access" to speakers they would otherwise choose not to carry, but only if Congress mandates access for "*all* parties that meet neutral criteria for service." J.S. App. 50a-51a (emphasis added). *See* J.S. App. 59a, 60a-61a, 66a-67a, and 71a.[8] Thus, the crux of Judge Williams' concern was that cable *programmers* were not accorded access rights *identical* to those granted local broadcasters.[9]

Appellant filed an Application For An Injunction Pending Appeal, which Chief Justice Rehnquist denied.[10]

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[8] The remedy proposed by Judge Williams would have been far more intrusive than the remedy Congress chose. According to Judge Williams, Congress could "expand the fraction of channels available" for "compulsory access" pursuant to the "leased access" provision of 47 U.S.C. § 532 to the extent necessary to "get broadcast TV into the homes of cable viewers," J.S. App. at 51a, 66a; could "set maximum reasonable rates and other reasonable terms and conditions" for such leased access, J.S. App. at 60a; and, if "broadcasters" could not afford leased access even under those regulated rates, "could subsidize the difference to the extent necessary." J.S. App. at 66a. Under the dissenter's proposal, in order to protect local broadcasters to the extent Congress found necessary while extending identical protection to all cable programmers, Congress would have had to impose common-carrier like obligations over a greater number of channels than are affected by the Act.

[9] Judge Williams failed to consider (or even note) that the Act gives cable programmers very substantial rights and protections against anticompetitive or unfair practices by cable operators, all of which are designed to ensure that cable programmers will have meaningful access to viewers. *See* Act, §§ 9(b), 11(c), and 12, and 19. Congress simply tailored the rights it gave broadcast stations and cable programmers to their differing needs. Even if the Act *were* underinclusive in the sense that it failed to protect cable programmers from operators' predatory conduct, no case has held that such underinclusiveness can invalidate otherwise constitutional legislation. Moreover, the *overall* statutory program is *not* underinclusive; Congress has tailored significant statutory protections to the particular competitive needs of cable programmers.

[10] *Turner Broadcasting Sys., Inc. v. FCC*, 113 S. Ct. 1806 (1993) (Rehnquist, C.J., in chambers).

ARGUMENT

I. THE JUDGMENT SHOULD BE SUMMARILY AFFIRMED BECAUSE THE DISTRICT COURT CORRECTLY CONCLUDED THAT SECTION 4 IS A CONTENT-NEUTRAL LAW THAT IS NARROWLY TAILORED TO PROMOTE SUBSTANTIAL GOVERNMENTAL INTERESTS.

Applying traditional First Amendment principles, the district court properly reviewed Section 4 under the *O'Brien/Ward* test rather than under strict scrutiny, and correctly ruled that Section 4 satisfied that test because it is a content-neutral law that is narrowly tailored to promote substantial governmental interests. J.S. App. 22a-28a.[11] Appellants' challenge to that decision depends on exotic and plainly incorrect legal arguments, and on rejection of Congress' well-supported factual findings. Those arguments are foreclosed by settled law and do not require plenary consideration.

A. Section 4 Is Content-Neutral and Thus Is Subject, At Most, To The *O'Brien/Ward* Test.

In ascertaining what level of scrutiny applies to legislation affecting First Amendment activity, "[t]he government's *purpose* is the *controlling* consideration." *Ward*, 491 U.S. at 791 (emphasis added). Strict scrutiny applies *only* to "regulations enacted for *the purpose of restraining speech on the basis of its content.*" *Renton*, 475 U.S. at 46-47 (emphasis added).[12] The less demanding scrutiny of *O'Brien* and its progeny applies where the purpose of the legislation is "unrelated to the suppression of free expression," *O'Brien*, 391 U.S. at 377, or where the legislation is "*justified* without reference to the content of the regulated speech," *Renton*, 475 U.S. at 48 (quotation omitted); *Ward*, 491 U.S. at 791.[13]

The district court correctly held that Section 4 is justified without reference to the content of any speech, and that its purposes are unrelated to the suppression of expression. J.S. App. 16a. Appellants have conceded that Section 4 is not *viewpoint*-based. J.S. App. 15a. Its application is triggered without regard to the *content* of cable operators', cable programmers', or broadcasters' speech. J.S. App. 16a. Section 4 simply requires cable operators to carry a specified number of signals

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[11] In any event, cable's special characteristics would justify a relaxed standard of review for regulations governing access to the cable conduit. *See* Point II, *infra*.

[12] *Simon & Schuster, Inc. v. New York State Crime Victims Bd.*, 112 S. Ct. 501 (1991), and *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993), are not to the contrary. In *Simon & Schuster*, the Court held that the statute failed the *O'Brien/Ward* test, and therefore determined that it "need not address" whether strict scrutiny applied. 112 S. Ct. at 511 n.**. In *Discovery Network*, the Court applied strict scrutiny because it concluded that the purpose of the ordinance at issue *was* related to the suppression of expression, because the ordinance was premised on the City's conclusion that the speech suppressed was of "low value." 113 S. Ct. at 1506. As the Court explained, "[i]t is the absence of a neutral *justification* . . . that prevents the city from defending its newsrack policy as content-neutral." *Id.* at 1517 (emphasis added).

[13] Notably, on July 9, 1993, appellant National Cable Television Association, Inc. ("NCTA"), submitted a brief to the United States District Court for the Eastern District of Virginia in which NCTA candidly acknowledged and even urged this very point in support of provisions of the Cable Communications Policy Act of 1984 that prohibit telephone companies from providing video programming to subscribers within their service areas, 47 U.S.C. § 533(b). Supplemental Memorandum of Intervenor-Defendant National Cable Television Association, Inc. in *Chesapeake and Potomac Telephone Co. v. United States*, No. 92-CV-1751-A (E.D. Va. 1993) at 17, quoting *Ward*, 491 U.S. at 791 (hereafter, "NCTA Supp. Mem."). Copies of that brief have been lodged with the Clerk of this Court. The district court agreed, holding that the statutory provisions at issue were subject to *O'Brien* because the government had advanced justifications unrelated to the suppression of expression and without reference to the content of the regulated speech. 1993 U.S. Dist. LEXIS 11822, slip op. at 35-40 (Aug. 24, 1993). Nevertheless, the court held—in a portion of its opinion with which we disagree—that the restrictions were unconstitutional because the ban did not "fit with its asserted justification" and "burden[ed] substantially more speech than is necessary to further the government's legitimate interests." Slip op. at 50, 55. The "fit" in this case is much closer. *See* Point I.B., *infra*.

that are transmitted in a certain manner—*i.e.* over the air, via the broadcast spectrum—*regardless* of their content.

Congress' principal goals were protecting free local broadcasting from unfair competitive practices by cable operators, and safeguarding the interests of the substantial number of Americans who are entirely dependent on free broadcast television. These goals are "unrelated to the suppression of free expression." The public will retain the benefits of effective competition, *regardless* of the content of local broadcasting, so long as cable operators are prevented from destroying "the economic viability of free local broadcast television." *Findings,* ¶ 16, J.S. App. 86a. And the 40% of Americans without cable television benefit by having continued access to free video programming, without regard to the specific content of the broadcast signals. These content-neutral justifications require application of the *O'Brien/Ward* test.[14]

Section 4 cannot be considered "content-based" as a result of Congress' *additional* finding that broadcast television stations are "an important source" of local programming, *Findings,* ¶ 11, J.S. App. 85a, and that absent must carry the ability of broadcast stations "to originate quality local programming will be seriously jeopardized." *Findings,* ¶ 16, J.S. App. 86a. These findings simply recognize that free broadcast television furthers the purposes of the Communications Act by contributing to the diversity of information sources available to the American people, who would be injured if free broadcast television were not protected from anti-competitive acts. They do *not* represent a judgment that the content of broadcast programming is (in the dissenting judge's words) "*especially* worthy," J.S. App. 53a (emphasis added);

[14] Section 4 is also content-neutral in the "commonsense" usage referred to in *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. at 1516-17, because its obligations are triggered by non-content factors—*technology* and *location*—and require carriage of speech without regard to its content.

that any *other* programming is "worse"; or that any programming whatsoever should be suppressed. Nothing in the Act or its extensive legislative history suggests Congress held such views or had such a goal.[15]

Such limited consideration of the *impact* of the cable bottleneck is an inevitable consequence of the bottleneck itself and the dangers it poses to the marketplace of ideas. Before partially displacing private control of that bottleneck, Congress appropriately considered whether, absent regulation, the video marketplace was at risk of losing any viewpoint-neutral categories or sources of information. Such consideration enabled Congress to tailor its access remedy to the actual dangers posed by the cable bottleneck, and to avoid needless interference with cable operators' private control over the mix of programming.[16] Congress' observations about the cable bottleneck's threat to local programming are viewpoint-neutral and not in any sense suppressive. Accordingly, those observations are unrelated to the suppression of free expression.

Moreover, even a legislative purpose to *suppress* speech of particular content—which is wholly lacking here—cannot subject a provision to strict scrutiny if that provision's "predominate" purposes are unrelated to the suppression of speech. *E.g., Renton,* 475 U.S. at 47-49; *O'Brien,* 391 U.S. at 382-86; *Wooley v. Maynard,* 430 U.S. 705, 716 (1977) (applying *O'Brien* test to a law that compelled speech of particular content even though one of the state's interests was "not ideologically neutral," because *another* interest was unrelated to the

[15] Indeed, the extensive protection Congress provided—in the 1984 *and* 1992 Cable Acts—to *cable* programmers demonstrates conclusively that Congress did not seek to suppress cable programming. *See* n.9, *supra.*

[16] For example, Section 4 expressly relieves cable operators of the obligation to carry local broadcasters who provide programming that substantially duplicates other programming carried on the system. Such viewpoint-neutral, non-suppressive consideration of "content" *reduces* the burden Section 4 imposes on cable operators, while ensuring that Section 4 furthers its important purposes.

suppression of expression). Thus, even if promotion of "localism"—the only allegedly content-based purpose on which appellants rely—could be said to be related to the "suppression" of any expression (and it cannot), that goal was plainly not Congress' primary goal, and therefore does not trigger strict scrutiny.[17] For these reasons, the district court correctly applied the test set forth in *O'Brien* and *Ward*.

B. It is Uncontested That Section 4 Satisfies the *O'Brien/Ward* Test.

Under *O'Brien*, a law is constitutional if 1) it "furthers an important or substantial governmental interest"; 2) "the governmental interest is unrelated to the suppression of free expression," 391 U.S. at 377; and 3) the "government interest . . . would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 799 (construing the *O'Brien* test); *United States v. Albertini*, 472 U.S. 675, 689 (1985) (same).

The jurisdictional statement does not even cite *O'Brien*, and does not argue that Section 4 fails scrutiny under the *O'Brien Ward* test. No such argument could be made. In *Capital Cities Cable, Inc. v. Crisp*, the Court held that regulations aimed at "protecting noncable households from loss of regular television broadcasting service due to competition from cable systems" "reflect[ed] an important and substantial federal interest." 467 U.S. at 714. The other interests asserted by Congress—preventing anticompetitive conduct in a critically important industry and promoting diversity of expression—have also been found substantial and important. *FTC v. Superior Ct. Trial Lawyers' Ass'n*, 493 U.S. 411, 430 (1990) (preventing

[17] As the district court ruled, "the record indicates that Congress' *primary* purpose in enacting must-carry was to restore competitive balance and assure a functional market in the distribution of video signals, whatever might be said with those signals." J.S. App. 19a (emphasis added). Even the dissent acknowledged that the decision to impose must carry obligations rested only "in part" on the goal of promoting localism. J.S. App. 51a.

anti-competitive conduct); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 567-68 (1990) (promoting diversity of expression). *O'Brien/Ward*'s second prong is met as well because those interests are "unrelated to the suppression of free expression." *See* Point I.A. *supra*.

Section 4 easily satisfies *O'Brien/Ward*'s third prong because the "fit" between the statute's ends and means is far closer than required by that test.[18] Restricting cable operators' ability to inflict anticompetitive injury on local broadcasting by requiring them to carry a limited number of local broadcast signals indisputably furthers the congressional goals. Indeed, appellant NCTA itself urged Congress to "enact a 'must carry' law," agreeing that "it is in our national interest to maintain a strong viable system that has the free over-the-air system."[19] NCTA also told Congress that must carry provisions were needed "to assure continued carriage on cable systems of qualified local broadcast stations."[20] Congress carefully crafted Section 4 to achieve its structural objectives, striking an appropriate balance between competing interests. Cable operators are not required to carry *all* local television stations, are free to select any programming whatsoever on the majority of their channels, and are free to add to their systems as many channels as they wish.[21] Section 4

[18] Indeed, Section 4 would satisfy even strict scrutiny, but the court need not reach that question in order to affirm.

[19] Hearings before the Subcommittee on Communications of the Committee on Commerce, Science, and Transportation, 101st Cong., 2d Sess., on S. 1880, March 29 and April 4, 1990, at 306 (testimony of Decker Anstrom).

[20] Letter from Mr. James P. Mooney of NCTA to the Hon. Daniel K. Inouye, Jan. 17, 1990, *reprinted in Oversight of Cable TV: Hearings on the Oversight of the 1984 Cable Telecommuns. Act Before the Subcomm. on Communs. of the Senate Comm. on Commerce*, 101st Cong., 1st Sess. 548 (1990).

[21] Section 4 is even more precisely tailored given the interaction of the retransmission consent provision. *See* note 4, *supra*. Broadcasters who are likely to be carried in the absence of must carry will demand retransmission consent—thereby foregoing their must carry rights—in order to receive compensation. Section 4 will thus

plainly "promotes . . . substantial government interest[s] that would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 798-99. *See also Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2463 (1991) (plurality opn.).

In cases reviewed under the *O'Brien/Ward* test, courts must be particularly respectful of Congress' findings and remedial choices.[22] Deference is due if Congress "could reasonably have determined that its interests overall would be served less effectively without the [law] than with it." *Ward*, 491 U.S. at 801; *Renton*, 475 U.S. at 50-52 (same).[23]

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function to protect those broadcasters who are most at risk of being excluded from cable systems, and for whom non-carriage will have the most devastating consequences. The Act thus protects *precisely* those broadcast stations most in need of protection.

[22] Appellant NCTA recently argued in the Eastern District of Virginia: "As cases like *Ward*, *Clark*, *Albertini*, and most recently *Edge Broadcasting*, make clear, deference to the means selected by the legislature is inherent in—indeed the defining characteristic of—the *O'Brien/Ward* standard of review." NCTA Supp. Mem., *supra* n.13, at 14-15.

[23] *See also Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) (courts "must pay close attention to . . . the factfinding of Congress," and with respect to "'complex' empirical question[s]," are "required to 'give great weight to the decisions of Congress'") (quoting *Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 102 (1973)); *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 330 n.12 (1985) ("When Congress makes findings on essentially factual issues . . . those findings are of course entitled to a great deal of deference, inasmuch as Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on [the] issue[s]"); *Columbia Broadcasting*, 412 U.S. at 102-03 ("The judgment of the Legislative Branch cannot be ignored or undervalued" simply because one side of the debate "casts its claims under the umbrella of the First Amendment."); *Rostker v. Goldberg*, 453 U.S. 57, 64, 67-68, 72-73 (1981); *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 813 (1978) (deference particularly appropriate for agency fact findings "of a judgmental or predictive nature"). Accordingly, deference is warranted for Congress' findings of fact, including its predictive judgments regarding the viability of local broadcasting in the absence of must-carry obligations.

The cases appellants cite—*Sable Communs. of Cal., Inc. v. FCC*, 492 U.S. 115, 129 (1989), and *Landmark Communs., Inc. v. Virginia*, 435 U.S. 829, 843 (1978)—arise in the inapposite context of strict scrutiny, and even in that context hold only that courts will not defer to Congress' *legal* conclusions. Those cases are thus irrelevant to this case, which involves Congress' empirical findings and predictive judgments. *Sable* held, in addition, that in the context of strict scrutiny the Court need not defer to governmental "assertions" of fact made for the first time in legal proceedings, when there were "*no* legislative findings" of fact and "*no* evidence in the record" to support those assertions. 492 U.S. at 128-29 (emphasis added). Here, by contrast, there are extensive legislative findings of fact and overwhelming evidence in the record before Congress to support them. Deference to the *facts* Congress found is therefore required.[24] It is undisputed, and indisputable, that those facts easily satisfy the *O'Brien/Ward* test.

C. Appellants' Unprecedented Arguments for "Per Se" Application of Strict Scrutiny Are Unfounded.

Appellants' challenge rests on two unprecedented and unpersuasive arguments for *per se* application of strict scrutiny.

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[24] The dissent below erroneously believed that critical assertions of fact made by appellants in their belated effort to dispute Congress' findings were "uncontradicted." J.S. App. 55a n.3, 62a, 64a, 65a, 66a. To the contrary, NAB and the federal defendants specifically contested those assertions of fact, on procedural grounds and on the merits, and sought the opportunity to engage in discovery regarding them as authorized by F.R. Civ. Pro. 56(f). Intervenor-Defendant Applicant National Association of Broadcasters' Response to Plaintiffs' Statement of Material Facts (filed February 19, 1993). Appellants' appeal also relies heavily, and inappropriately, on NCTA's contested Statement of Material Facts. *See, e.g.*, J.S. 26-27.

1. *Appellants' "Compelled Speech" and "Editorial Discretion" Arguments For Strict Scrutiny Are Unfounded.*

No *per se* rule requires strict scrutiny whenever government may be said to be "mandating speech" or interfering with cable operators' so-called "editorial discretion."[25] Such a rule would yield absurd results.[26] All three judges below rejected that argument—*see Turner Broadcasting System, Inc. v. FCC*, 113 S. Ct. at 1807 (Rehnquist, C.J., in chambers)—and it is foreclosed by *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980).

In *PruneYard*, a private property owner raised a "compelled speech" and "editorial discretion" challenge to a

[25] The "editorial discretion" for which appellants claim protection is merely their desire not to carry local broadcast stations. *See* J.S. 17-18. Their "editorial discretion" claim is thus indistinguishable from their "compelled speech" claim.

[26] Appellants' *per se* argument would subject to strict scrutiny an enormous range of federal and state laws that compel speech, including the Act's requirement that cable operators carry the same "emergency information" broadcasters are required to carry, Section 16(b); citizens' obligation to testify truthfully pursuant to compulsory process (*see Branzburg v. Hayes*, 408 U.S. 665 (1972) (applying rational basis scrutiny to compulsory process)); the tax code's filing and disclosure requirements (26 U.S.C. §§ 6012, 6061); laws requiring disclosure of health statistics (*e.g.*, 42 U.S.C. § 242, 38 U.S.C. § 7332); all disclosure requirements involving publication of periodicals (39 U.S.C. § 3685); employment (*e.g.*, 26 C.F.R. §§ 31.6001-2(a), -4(a)(3)); medical informed consent, *e.g.*, *Marchione v. New York*, 598 N.Y.S.2d 592, 593 (3d Dep't 1993); *Mathis v. Morrissey*, 11 Cal. App. 4th 332, 13 Cal. Rptr. 2d 819, 822 (1992); *Febus v. Barot*, 260 N.J. Super. 322, 616 A.2d 933, 935 (3d Dist. 1992); cash deposits exceeding $10,000 (31 U.S.C. § 5311 *et seq.*); lobbying activity (2 U.S.C. §§ 261-270)—and indeed *every* governmentally compelled disclosure requirement. Under the *per se* rule appellants urge, strict scrutiny would govern challenges to the "common carrier" obligation of telephone and telegraph companies to carry any speaker wishing to use those services. 47 U.S.C. § 201(a) (wire and radio services); 47 U.S.C. § 11 (telegraph operators). Of course, that is not the law.

law authorizing third parties to use the owner's property to communicate their messages. For reasons directly applicable here, the Court held that the First Amendment was not even *implicated* by the claim. There, as here, "no specific message" was "dictated by" the government, and the obligation to permit third party speech was not "trigger[ed] by the owner's speech." 447 U.S. at 87-88. Thus, there was "no danger of governmental discrimination for or against a *particular message*," and no danger that requiring the owner to permit third party speech would "deter" the owner from speaking. *Id.* (emphasis added). Furthermore, in *PruneYard*, as here, "the views [of the third parties] will not likely be identified with those of the owner," and the owner could "expressly disavow any connection with the message." *Id.* at 87. For these reasons, *PruneYard* held that the owner's "negative free speech" rights under the First Amendment were not even *implicated*, and the Court upheld that law under the rational basis test. Nor do appellants' "negative free speech" claims implicate the First Amendment here, much less trigger strict scrutiny.[27]

In contrast to *PruneYard*, the First Amendment *was* implicated by the mandatory disclosure requirement at issue in *Riley v. National Fed'n of the Blind*, 487 U.S. 781 (1988), because that requirement was triggered by and deterred underlying protected speech *of particular content*—charitable solicitations by professional fundraisers. The *Riley* majority noted that "the desired and intended effect of the statute" was to "discourage" certain protected solicitations—those the State considered misleading or harmful. *Id.* at 789 n.5, 790. Similarly, the right-of-reply statute at issue in *Miami Herald Pub.*

[27] In *PruneYard*, the property owner specifically argued, as do appellants here, that *Wooley v. Maynard* and *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974), established an absolute *per se* right to deny other speakers access to private property to facilitate their speech. Brief For Appellant in No. 79-289, *PruneYard Shopping Center v. Robins*, at 13-14. This Court squarely rejected that overly expansive interpretation. 447 U.S. at 87-88.

Co. v. Tornillo, 418 U.S. 241 (1974), implicated the First Amendment because it was triggered by speech *of particular content*—criticism of candidates for public office—and penalized and deterred such speech. *Id.* at 257; *see PruneYard*, 447 U.S. at 88 (distinguishing *Tornillo*).[28] Like the law at issue in *PruneYard*, Section 4 does not implicate the First Amendment because it does not deter speech of particular content.[29]

Moreover, even if Section 4 implicated the First Amendment—and it does not—neither *Riley* nor *Tornillo* would support the application of strict scrutiny here. *Riley* held at most that there is a constitutional "equivalence" between "compelled speech" and "compelled silence." *Id.* at 797. Compelled silence triggers strict scrutiny only when the purpose of the statute is related to the suppression of free expression. *See San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522 (1987) (applying *O'Brien/Ward* to a law forbidding speech of specific content). Accordingly, *Riley* holds that a law

[28] The *Tornillo* and *Riley* statutes also dictated the content of the mandated speech—in *Tornillo*, the candidates' rebuttals of the newspapers' criticisms; in *Riley*, specific financial disclosures. As in *PruneYard*, Section 4 does not dictate the content of any speech.

[29] For these reasons, as in *PruneYard*, Section 4 will not " 'dampe[n] the vigor and limi[t] the variety of public debate.' " *PruneYard*, 447 U.S. at 88 (quoting and distinguishing *Tornillo*, 418 U.S. at 257); *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 10 (1986) (plurality opn.); *id.* at 30 (Rehnquist, J., now C.J., dissenting). As the Court explained in *PruneYard*, it was this inescapable *deterrent* effect that the Court "found to be an 'intrusion into the function of editors.' " 447 U.S. at 88 (quoting *Tornillo*, 418 U.S. at 258). Similarly, the compelled speech at issue in *PG&E* was triggered by PG&E's expression of its own views, and thus "penalize[d] the expression of particular points of view." 475 U.S. at 9-10 (plurality opn.); *id.* at 30 (Rehnquist, J., now C.J., dissenting). The laws at issue in *Tornillo* and *PG&E* "discriminate[d] on the basis of the viewpoints of the selected speakers." *PG&E*, 475 U.S. at 12. The principles of *Tornillo* are not violated by an access provision, such as Section 4, that does not "condition[] access upon discrete instances of certain expression," and "bears no relationship" to the compelled speaker's "future conduct." *PG&E*, 475 U.S. at 31 (Rehnquist, J., now C.J., dissenting).

compelling speech, like one *forbidding* speech, is subject to strict scrutiny if its purpose is related to the suppression of free expression. *Accord Wooley v. Maynard*, 430 U.S. at 716-17 (applying *O'Brien* to a law compelling speech of specific content); *PruneYard*, 447 U.S. at 87-88 (applying rational basis test to a law compelling speech without regard to content).

Strict scrutiny was appropriately applied in *Riley* because the disclosure burden rested on *a governmental concern that the underlying solicitations might otherwise be unfair or unreasonable*—a purpose related to the suppression of free expression. *Id.* at 788-89, 798; *see id.* at 803 (Scalia, J., concurring). Similarly, the right-of-reply statute at issue in *Tornillo* was appropriately subject to strict scrutiny because it plainly was justified by reference to the content of the regulated expression. The stated goal of the statute was "to insure fairness and accuracy" in reporting about elections. *Id.* at 251. In contrast, Section 4, like the content-neutral compelled speech provision at issue in *PruneYard*, is justified *without* reference to content or suppressive intent, and the district court was plainly correct in ruling that Section 4 does not trigger strict scrutiny.[30]

[30] *Tornillo's* final paragraph, focusing on "the function of editors," 418 U.S. at 258, reflected a theory, in vogue briefly in the 1970s, that the First Amendment's Press Clause explicitly conferred upon the press special protections not afforded other speakers. *See* Potter Stewart, *"Or of the Press"*, 26 Hastings L. Rev. 631, 633 (1975); *see also* William J. Brennan, Jr., *Address*, 32 Rutgers L. Rev. 173, 176-77 (1979). The Court subsequently rejected this theory. *See Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 691 (1990) (Scalia, J., dissenting) (citing cases); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 795-802 (1978) (Burger, C.J., concurring).

Moreover, *Tornillo* in that paragraph expressly distinguished a "newspaper or magazine"—whose content is determined through "the exercise of editorial control" and "journalistic judgment," 418 U.S. at 258; *id.* at 259 (White, J., concurring)—from "a passive receptacle or *conduit* for news, comment, and advertising." *Id.* at 258 (majority opinion) (emphasis added). Because a cable operator functions principally as a "passive receptacle or conduit," *see infra* Point II, Section 4 does not implicate the type of editorial

2. *Appellants' "Favoritism" and "Discrimination" Arguments For Strict Scrutiny Are Unfounded.*

Appellants argue that Section 4 should be subjected to strict scrutiny because it favors speakers using broadcast technology over speakers using other technologies. *See* J.S. 19-20. That is not the law. In *Leathers v. Medlock*, 111 S. Ct. 1438 (1991), this Court applied the *rational basis* test to a law that, like Section 4, singled out cable operators for burdens and favored speakers using other technologies. The Court held that "differential taxation of speakers, even members of the press, *does not implicate* the First Amendment unless the tax is directed at, or presents the danger of suppressing, *particular ideas*." *Id.* at 1447 (emphasis added). The Court expressly *rejected* the argument that "intermedia and intramedia discrimination, even in the absence of any evidence of intent to suppress speech or of any effect on the expression of particular ideas, violates the First Amendment." *Id.* at 1445; *see id.* at 1443 ("differential taxation of First Amendment speakers is constitutionally suspect [only] when it threatens to suppress the expression of particular ideas or viewpoints"). *Leathers* also made clear that a differential *regulatory* burden on different categories of speakers "is insufficient by itself to raise First Amendment concerns." *Id.* at 1446.[31]

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discretion that *Tornillo* protected. Thus, even if *Tornillo*'s reliance on the Press Clause retained any validity, the special concerns identified in *Tornillo* are not at issue here.

[31] *Leathers* also forecloses appellants' suggestion that imposing must carry obligations on cable operators, but not on other media, triggers strict scrutiny. *See* J.S. 13-16. *Leathers* squarely ruled that cable operators are *not* a "small group" for purposes of First Amendment analysis, and that regulations singling out cable operators for special burdens do *not* trigger strict scrutiny. 111 S. Ct. at 1444-45. *See also FCC v. Beach Communications, Inc.*, 113 S. Ct. 2096 (1993) (applying rational basis test to alleged discrimination against cable operators whose cables cross public rights of way).

Appellants' reliance on *Burson v. Freeman*, 112 S. Ct. 1846 (1992), is entirely misplaced. In *Burson*, this Court applied strict scrutiny to a *content-based* restriction on core political speech conducted in a quintessential public forum. *Id.* at 1850.

Buckley v. Valeo, 424 U.S. 1 (1976), is not to the contrary. *Buckley* itself made clear that absent the *ceilings* on expression and the speech-suppressive *objectives* of the expenditure and contribution limitations at issue there, legislative classifications that discriminate between *categories* of speakers, without more, do not even implicate the First Amendment. For that reason, *Buckley* applied *rational basis* scrutiny in upholding provisions that discriminated between major and minor parties in public election financing. 424 U.S. at 97-106. *Cf. PG&E*, 475 U.S. at 27-28 (Rehnquist, J., now C.J., dissenting) (relying on this aspect of *Buckley* in the context of an access requirement).

In another section of the opinion, *Buckley* applied strict scrutiny to the expenditure and contribution limitations at issue not because they treated different speakers differently, but because they were content-based *bans* that directly suppressed all speech conducted with expenditures and contributions in excess of $1,000 per person. The expenditure and contribution limitations imposed absolute ceilings on protected expressive activity, and thus "necessarily reduce[d] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Id.* at 19. Section 4 does *not* impose a limit on speech: to the contrary, it leaves cable operators free to carry as much speech as they wish, either on existing or expanded channel capacity. The *Buckley* Court expressly distinguished laws, like Section 4 (and the election financing provisions in *Buckley* itself), whose "presumed effect . . . is one of enhancing the volume and quality of coverage of public issues." *Id.* at 48, n.55 (internal quotation omitted).

Moreover, the *Buckley* Court stressed that Congress' *purpose*, in enacting the expenditure and contribution limitations, "involve[d] 'suppressing communication' "; Congress viewed the suppressed speech as "harmful" to the public interest. *Id.* at 17 (quoting *O'Brien*, 391 U.S. at 382). Because the limitations suppressed speech "out of concern for its likely communicative impact," *United*

States v. Eichman, 496 U.S. 310, 317 (1980), they were properly reviewed under strict scrutiny as a content-based ban.[32] In contrast, Section 4 is justified by factors wholly unrelated to the content of the speech of broadcasters or cable operators, and is not *intended* to suppress any speech. Accordingly, the "discrimination" about which appellants complain does not require strict scrutiny.

Buckley does not prevent Congress from protecting a discrete class of speakers from anticompetitive activities because Congress declined to extend identical protection to other classes of speakers who do not require identical protection. Indeed, the *Buckley* Court acknowledged that "sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." 424 U.S. at 97-98 (internal quotes omitted). So long as Congress does not "aim at the suppression of dangerous ideas," it is free to treat different classes of speakers differently, even though that may have the effect of enhancing the speech of some classes over the speech of others. *Regan v. Taxation With Representation*, 461 U.S. 540, 548, 550 (1983) (quotation omitted).[33]

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[32] As the district court held, "*Buckley* is thus a case in which the government sought, in effect, to suppress the expression of a meretricious idea. Speaker partiality alone, however, absent evidence that the government's distinction between groups of speakers is related to what the speakers are saying, is insufficient to trigger strict scrutiny." J.S. App. 18a. Appellant NCTA recently acknowledged that this understanding of *Buckley* is correct. Memorandum of Intervenor-Defendant National Cable Television Ass'n, Inc. in Opposition to Plaintiff's Motion for Summary Judgment and in Support of its Cross-Motion for Summary Judgment, in *Chesapeake and Potomac Telephone Co. v. United States*, No. 92-CV-1751-A (E.D. Va.), at 70-72 (citing and relying upon the opinion below on this point). Copies of that brief have been lodged with the Clerk of this Court.

[33] Here, Congress did extend substantial protections to cable programmers. *See* note 9, *supra*. Strict scrutiny applies only if the government cannot explain the differential treatment of broadcast programmers and cable programmers "by some special characteristic" of those speakers. *Minneapolis Star & Tribune v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983). Congress has explained why the special characteristics of local broadcast stations require different treatment for local broadcasters than for cable programmers: local broadcasters are the primary objects of cable operators' anti-competitive activities because they *alone* can compete with cable operators for local advertising revenues. Findings ¶¶ 14-16. Moreover, local broadcasters *alone* fulfill the needs of the 40% of the American public who either cannot or do not subscribe to cable television. *See id.* ¶ 12. Providing "identical" protection to cable programmers would do nothing to further that goal. For these reasons, under *Leathers*, Section 4's differential treatment of local broadcast stations and cable programmers does not require strict scrutiny.

D. The District Court Could Properly Have Upheld Section 4 Under the Rational Basis Test.

The district court correctly concluded that Section 4 fully satisfies the *O'Brien/Ward* test, but appellants' claims could also properly have been dismissed pursuant to the rational basis test. As noted in Point I.C., *supra*, appellants' "compelled speech" and "editorial discretion" claims are indistinguishable from claims rejected under the rational basis test in *PruneYard*, and appellants' "discrimination" and "singling out" claims are indistinguishable from claims rejected under the rational basis test in *Leathers*. Because Section 4 satisfies the more demanding *O'Brien/Ward* test, it plainly satisfies the rational basis test. *See generally FCC v. Beach Communications, Inc.*, 113 S. Ct. 2096 (1993).

Moreover, Section 4 is directly analogous to economic laws of general applicability, such as the Sherman Act, adopted for purposes wholly unrelated to the suppression of expression. An antitrust injunction forbidding exclusionary practices by a cable monopolist would not be subjected to First Amendment scrutiny. *See Sunbelt Television, Inc. v. Jones Intercable, Inc.*, 795 F. Supp. 333, 335-36 (C.D. Cal. 1992). There is no reason to apply such scrutiny to Section 4, which was enacted to accomplish precisely the same unobjectionable and substantial goal. *See* J.S. App. 12a-13a; *Associated Press v. United States*, 326 U.S. 1 (1945).

II. THE JUDGMENT SHOULD BE SUMMARILY AFFIRMED FOR THE INDEPENDENT REASON THAT FACILITATING COMPETITION THROUGH THE MONOPOLIZED CABLE CONDUIT DOES NOT REQUIRE THE SAME FIRST AMENDMENT SCRUTINY AS REGULATION OF THE EDITORIAL DISCRETION OF THE TRADITIONAL PRESS.

As demonstrated, plenary review is unwarranted because the district court correctly rejected Appellants' claims on the basis of settled First Amendment principles. But even if there were some question about the correctness of the decision below under the standards applicable to the traditional press—and there is not—plenary review would nonetheless be unwarranted. Appellants' case depends on an assumption they have not even attempted to prove: that a cable operator's exercise of its bottleneck monopoly power to exclude competitors is entitled to the same level of First Amendment protection afforded to the editorial function of the traditional press. That proposition is untenable.

"Each medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975). Indeed, "[e]ach method of communicating ideas is a law unto itself and that law must reflect the differing natures, values, abuses and dangers of each method." *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 501 (1981) (internal quotes omitted); *accord Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969); *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949). Accordingly, "the Court must determine whether the characteristics of cable television make it sufficiently analogous to another medium to warrant application of an already existing standard or whether those characteristics require a new analysis." *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986) (Blackmun, J., concurring).

The "editorial discretion" of cable operators at issue here is not entitled to the same level of First Amendment

protection afforded the traditional press. *First*, unlike broadcasters or newspapers, cable operators are not principally engaged in the *generation* of news, information or entertainment programming. Rather, much like telephone companies, cable operators function principally as *conduits*; they "simultaneously receive and channel to their subscribers a variety of signals from many sources without any advance notice about the . . . content of" the programming provided. *Crisp*, 467 U.S. at 707. Performance of this conduit function involves "editorial discretion" only in the limited sense that cable operators choose an overall package of channel offerings designed to maximize the operator's profits.[34] As a leading cable lawyer has acknowledged, "important differences" between the ways cable operators and newspapers function "tend to make the decision [whether to carry a particular programmer] more like an economic activity and render the editorial aspects almost entirely theoretical." Daniel Brenner, Cable Television and the Freedom of Expression, 1988 Duke L.J. 329, 339 (1988).[35]

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[34] *See* J.S. 3-4 (cable operators seek "the most attractive package for consumers of news, information and entertainment").

[35] *See also* Brenner, 1988 Duke L.J. at 339 ("For the most part, cable personnel do not review any of the material provided by cable networks. . . . [C]able systems have no conscious control over program services provided by others. . . . [G]enerally [there is] no individual selection of programs or series, only of entire channels"); *id.* at 341 ("[i]n this capacity [cable] operates as a *conduit*") (emphasis added).

Cable technology also enables cable operators to *add* an unlimited number of programmers simply by using previously unused channels or increasing channel capacity. *See Quincy*, 768 F.2d at 1450 (cable's channel capacity is "virtually unlimited"). When Congress enacted Section 4, approximately 9,000 of the nation's 11,000 cable systems had unused channel capacity. *Compare Television and Cable Action Update*, Feb. 8, 1993, at 4 (over 11,000 cable systems), with Application For Injunction Pending Appeal in *Turner Broadcasting System, Inc. v. FCC*, No. A-798, at 17, n.22 ("about 2,000 cable systems . . . currently have no excess channel capacity"). Thus, Section 4 does not prevent cable operators from carrying any programming they wish.

Second, cable is not just one among several fungible local conduits for video programming; as Congress concluded, cable has become the *dominant* medium for providing video programming to consumers, and has largely supplanted competing delivery systems, such as over-the-air transmission, for 60% of American households. In 99% of communities, the cable operator is a monopoly. Cable operators decide which programmers will be transmitted through their conduits, and thus function as private censors in each community.

Third, cable operators have concrete economic incentives to harm local broadcasters, because cable operators compete directly with local broadcasters for advertising revenues. Profit maximization provides an ample incentive for cable operators to abuse their control of the conduit in order to deny local broadcasters the ability to reach the 60% of Americans who *do* have cable. Given local broadcasters' dependency on the cable conduit, such exclusionary conduct by cable operators inevitably harms consumers, reduces the diversity of programming sources, and debilitates or destroys the only source of video programming available to the 40% of Americans who do *not* have cable.

Fourth, cable operators occupy their dominant bottleneck position as a direct result of three decades of governmental assistance. Wide-ranging federal regulation has long sought to "assure cable systems the breathing space necessary to expand vigorously and provide a diverse range of program offerings to potential cable subscribers in all parts of the country." *Crisp*, 467 U.S. at 708.[26]

[26] For example, federal law precludes private and public entities that control facilities *cable* companies need for access to consumers from exploiting their position to deny or unreasonably charge for such access. In 1978, at the request of the cable industry, Congress authorized the FCC to regulate the rates, terms, and conditions that owners of utility poles could charge for access to their poles—access that was essential to the ability of cable operators to reach subscribers. *See* Pole Attachment Act of 1978, 47 U.S.C. § 224(b)(1). The 1984 Cable Act strengthens that protection and guarantees cable operators access to private easements dedicated by utilities. 47 U.S.C. § 541(a)(2). Federal law also prevents municipal franchising authorities from imposing unreasonable conditions on cable operators, and from exploiting their leverage during the franchise renewal process. 47 U.S.C. §§ 542(b), 544(b).

Federal law has also insulated the cable industry from potentially more powerful competitors. By 1970, the FCC had imposed cross-ownership rules that prohibited telephone companies and broadcasters from entering the cable market. 47 C.F.R. §§ 63.54(a), 76.501(a) (1970). The 1984 Cable Act codified the cross-ownership restrictions. 47 U.S.C. § 533(a), (b)(4). *But see* n.13 *supra*. And federal law grants cable operators compulsory and preferential access to *broadcast* programming by granting them a compulsory copyright license to retransmit broadcast programming either free or upon payment of nominal royalties. *See* Copyright Revision Act of 1976, 17 U.S.C. § 111. The FCC has concluded that, in the absence of must carry rules, the compulsory license scheme "forced the cable television industry and the broadcast television industry into a significantly imbalanced 'contract'," and contributed significantly to cable's "explosive" growth. 1990 FCC Cable Report, 5 FCC Rcd. at 5038 (¶ 147).

Cable operators thus occupy "a preferred position *conferred by the government.*" *See Red Lion*, 395 U.S. at 400 (emphasis added).

Fifth, in contrast to the hands-off approach historically taken with respect to newspapers and other print media, regulation of cable operators' conduit function has long been recognized as an important and appropriate exercise of governmental power. As the Court explained in *Crisp*, since the early 1960s the Commission has been:

> concerned that unlimited importation of distant broadcast signals into the service areas of local television broadcasting stations might, through competition, "destroy or seriously degrade the service offered by a local television broadcaster," and thereby cause a significant reduction in service to households not served by cable systems. *First Report and Order*, 38 F.C.C. 683, 700 (1965). In order to contain this potential effect, the Commission promulgated rules *requiring cable systems to carry the signals of all local stations in their areas*, to avoid duplication of the programs of local television stations carried on

> the system during the same day that such programs were broadcast by the local stations, and to limit their importation of distant broadcast signals into the service areas of the local television broadcasting stations. *Second Report and Order*, 2 F.C.C. 2d 725, 745-746, 781-82 (1966).

467 U.S. at 701-02 (emphasis added). Cable operators have thus been subject to must-carry rules for many years. *See, e.g., Cable Television Report and Order*, 36 F.C.C. 2d 325 (1972), *aff'd sub nom. American Civil Liberties Union v. FCC*, 523 F.2d 1344 (9th Cir. 1975); *see also Cable Television Syndicated Program Exclusivity Rules Report and Order*, 79 F.C.C. 2d 663, 891 (1980), *aff'd sub nom. Malrite T.V. v. FCC*, 652 F.2d 1140 (2d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982).

Taken together, these five characteristics—the attenuated nature of cable operators' First Amendment "editorial discretion"; cable operators' unbridled power to determine what speech will be received by much of the community; cable operators' powerful anticompetitive incentive to prevent local broadcasters from reaching the large cable audience; government's pivotal role in conferring such dangerous powers on cable operators; and the long history of regulation of the cable conduit—warrant less than strict scrutiny for viewpoint-neutral regulation ensuring access to the cable conduit. Indeed, what cable operators describe as an exercise of "editorial discretion" is the very anticompetitive conduct that places at risk the availability of free television for the 40% of Americans without cable.[37] Thus, the assumption underlying appellants' entire argument—that regulation of the cable conduit requires the same First Amendment scrutiny as regulation of the traditional press—is unwarranted, and plenary review should not be granted because, even if the Court ultimately did not accept the district court's analysis, Section 4 would plainly be upheld under a First Amendment analysis appropriate to cable.

[37] *See Preferred Communications*, 476 U.S. at 495 ("where speech and conduct are joined in a single course of action, the First Amendment values must be balanced against competing societal interests").

Appellants argue for strict scrutiny, hoping that under that standard their attenuated First Amendment interest in silencing other speakers in order to maximize their own revenues will render irrelevant all countervailing public interests, no matter how weighty or how numerous those other interests may be, and will trump even compelling public interests if they could conceivably be advanced in any less burdensome way. Appellants assert that they can constitutionally control the "mix" of video offerings in every American community, even if their "editorial discretion" is exercised for anticompetitive purposes, and degrades or destroys the local broadcast stations on which 40% of the population depends for news, information and entertainment.

The First Amendment does not require such a conclusion—a conclusion rejected even by Judge Williams in dissent below. The unanimous Court in *Associated Press v. United States* articulated the First Amendment principle that controls here:

> [The First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. . . . *Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.*

326 U.S. 1, 20 (1945) (emphasis added).

For these reasons, the First Amendment does not require strict scrutiny for Congress' efforts to ensure that cable operators set aside a limited portion of the cable conduit for use by local broadcasters. *See Preferred Communications*, 476 U.S. at 495. *See also FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 n.9 (1979) ("[a] cable system may operate as a common carrier with respect to

a portion of its service").[38] Because the "purpose and effect" of Section 4 "is to promote free speech, not to restrict it," and to remedy the dangers to free expression posed by cable's exercise of its bottleneck monopoly power to exclude competing voices, this provision is entirely consistent with the First Amendment. *See FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 801 (1978).

CONCLUSION

The judgment of the three-judge district court should be summarily affirmed.

Respectfully submitted,

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[38] Indeed, because Congress could certainly have required any entity wishing to provide cable service to accept common carrier status, it can take the lesser step of requiring that a portion of the conduit be set aside for use by others.

No. 93-44

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In the Supreme Court of the United States

OCTOBER TERM, 1993

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APPELLANTS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON APPEAL FROM THE DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION OF THE FEDERAL RESPONDENTS TO AFFIRM

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QUESTION PRESENTED

Whether Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1471-1481, which require cable system operators to devote a portion of their channel capacity to the carriage of certain commercial broadcast stations and noncommercial educational broadcast stations, violate the First Amendment.

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In the Supreme Court of the United States

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No. 93-44

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APPELLANTS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION OF THE FEDERAL RESPONDENTS TO AFFIRM

Pursuant to this Court's Rule 18.6, the United States and the Federal Communications Commission move to affirm the judgment of the district court.

OPINION BELOW

The opinion of the district court (J.S. App. 1a-72a) is reported at 819 F. Supp. 32.

JURISDICTION

These consolidated cases were heard by a three-judge district court convened pursuant to Section 23 of the Cable Television Consumer Protection and Competition Act of 1992 (1992

Act), Pub. L. No. 102-385, 106 Stat. 1500; 47 U.S.C. 555(c)(1), [1] and 28 U.S.C. 2284. The judgment of the district court was entered on April 12, 1993. On May 3, 1993, notices of appeal were filed pursuant to Section 23 of the 1992 Act, 106 Stat. 1500; 47 U.S.C. 555(c)(2). The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

STATEMENT

Congress enacted the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, §§ 4, 5, 106 Stat. 1471-1481; 47 U.S.C. 534, 535, to address certain anticompetitive practices in the cable industry that threaten the vitality of broadcast television and the availability of that medium to local viewers. As relevant here, the 1992 Act accomplishes that objective by requiring cable operators to devote a limited portion of their channel capacity to the carriage of certain commercial broadcast stations and noncommercial educational broadcast stations. The Act does so, moreover, in a manner that does not punish, suppress, or promote any particular programming based on its content. The so-called "must-carry" requirements, enacted pursuant to detailed congressional findings made after hearings spanning several years, therefore constitute a carefully designed mechanism specifically aimed at promoting the First Amendment interests of viewers—interests this Court has described as "paramount." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969). The district court therefore properly sustained the must-carry provisions in this case.

A. Statutory Background

1. Section 4 of the 1992 Act adopts a limited must-carry obligation relating to local commercial broadcast stations. In particular, a cable system with more than 300 subscribers but

[1] Unless otherwise specified, citations to the United States Code relating to the provisions of the 1992 Act refer to the place in Supp. IV 1992 where those provisions are to be codified.

12 or fewer active usable channels must carry "the signals of at least three local commercial television stations." § 4, 106 Stat. 1471; 47 U.S.C. 534(b)(1)(A). For systems with more than 300 subscribers and more than 12 active usable channels, a cable operator must devote up to one-third of its channel capacity to local commercial broadcast stations. § 4, 106 Stat. 1471; 47 U.S.C. 534(b)(1)(B).[2] In general, a cable operator must retransmit, in its entirety, the programming of a broadcast station carried to fulfill must-carry obligations. § 4, 106 Stat. 1471-1472; 47 U.S.C. 534(b)(3). And absent an agreement to the contrary, a commercial broadcast station must be carried in the channel position in which it is presently carried or was carried at specified times in the past. § 4, 106 Stat. 1472; 47 U.S.C. 534(b)(6). Finally, with some exceptions, a cable operator may not charge a fee for carrying broadcast signals in fulfillment of the must-carry provisions. § 4, 106 Stat. 1473; 47 U.S.C. 534(b)(10).[3]

For local noncommercial educational stations, Section 5 of the 1992 Act imposes similar requirements. Thus, a cable system with 12 or fewer channels must carry "one qualified local noncommercial educational television station." § 5, 106 Stat. 1478; 47 U.S.C. 535(b)(2)(A). A system having between 13 and 36 channels must carry between one and three such sta-

[2] If there are not enough full power local commercial broadcast stations to fill the requirements of the must-carry provisions, a cable operator with up to 35 active channels must carry one qualified low power station and an operator with more than 35 channels must carry two such stations. See § 4, 106 Stat. 1473-1474; 47 U.S.C. 534(c)(1); see also § 4, 106 Stat. 1476-1477; 47 U.S.C. 534(h)(2) (defining "qualified low power station").

[3] The 1992 Act provides that commercial broadcast stations may elect not to invoke the must-carry requirements, in which case they may withhold consent to retransmit their programming. See § 6(2), 106 Stat. 1482-1483; 47 U.S.C. 325(b)(1) and (3). If a broadcaster carries programming that is popular and attractive to a cable operator, there should be no reason to select the must-carry option, which is uncompensated. See J.S. App. 6a.

tions, and a system with more than 36 channels must carry "each qualified local noncommercial educational television station requesting carriage." § 5, 106 Stat. 1478; 47 U.S.C. 535(b)(3)(A) and (D). The 1992 Act requires a cable operator, in certain circumstances, to import distant signals (§ 5, 106 Stat. 1478; 47 U.S.C. 535(b)(3)(B)), but provides protection against substantial duplication of local noncommercial educational stations receiving carriage. § 5, 106 Stat. 1479; 47 U.S.C. 535(e). As with commercial stations, the 1992 Act requires cable operators to carry the entire programming schedule of noncommercial educational stations, specifies channel positioning requirements, and limits the payments allowable for the signals of noncommercial educational stations. See § 5, 106 Stat. 1479-1480; 47 U.S.C. 535(g) and (i).

2. The must-carry provisions in the 1992 Act were adopted after extensive public hearings, conducted over several years, that carefully examined the structure and operation of the cable industry. See S. Rep. No. 92, 102d Cong., 2d Sess. 3-4 (1992) (describing hearings); H.R. Rep. No. 628, 102d Cong., 2d Sess. 74 (1992) (same).[4] As part of the 1992 legislation, Congress enacted detailed factual findings supporting the must-carry requirements as a means of addressing the mar-

[4] See also, *e.g.*, *Cable TV Consumer Protection Act of 1991: Hearing on S. 12 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 102d Cong., 1st Sess. (1991) [hereinafter *1991 Senate Cable Hearing*]; *Cable Television Regulation: Hearings on H.R. 1303 and H.R. 2546 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. (1991) [hereinafter *1991 House Cable Hearings*]; *Cable Television Regulation (Part 2): Hearing Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 101st Cong., 2d Sess. (1990) [hereinafter *1990 House Cable Hearing (Part 2)*]; *Media Ownership—Diversity and Concentration: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 101st Cong., 1st Sess. (1989) [hereinafter *Media Ownership Hearings*].

ket power and concentration of cable system operators and the anti-competitive practices existing in the cable television industry.

Congress found that "[f]or a variety of reasons, including local franchising requirements and the extraordinary expense of constructing more than one cable television system to serve a particular * * * area, most cable television subscribers have no opportunity to select between competing cable systems." § 2(a)(2), 106 Stat. 1460. Congress also found that the cable industry has become "highly concentrated," resulting in greater "barriers to entry for new programmers and a reduction in the number of media voices available to consumers." § 2(a)(4), 106 Stat. 1460. And because of increasing vertical integration in the industry, cable operators have an incentive to favor affiliated programmers, making it "more difficult for noncable-affiliated programmers to secure carriage on cable systems." § 2(a)(5), 106 Stat. 1460-1461. At the same time, Congress found that more than 60% of all households with televisions have cable television, and that cable television "has become a dominant nationwide video medium." § 2(a)(3), 106 Stat. 1460.

Congress supplemented its findings on the structure of the cable industry with additional findings concerning the "substantial governmental and First Amendment interest" in promoting a diversity of programming. § 2(a)(6), 106 Stat. 1461. Congress found that there is a substantial governmental interest in assuring that cable subscribers have access to (a) local noncommercial educational programming; (b) local commercial broadcasting; and (c) local origination of programming, including news and public affairs programs critical to an informed electorate. §§ 2(a)(7)-(11), 106 Stat. 1461.

Those objectives, Congress determined, have been threatened by the competition between cable operators and broadcasters for advertising revenues. Because cable systems and broadcasters compete for advertising, cable systems have an incentive to drop local broadcasters or relegate them to unfa-

vorable channel positions—steps that threaten the economic base and survival of television broadcasting. §§ 2(a)(14)-(16), 106 Stat. 1462. Further, Congress found that "[m]ost subscribers to cable television systems do not or cannot maintain antennas to receive broadcast television services, do not have input selector switches to convert from a cable to antenna reception system, or cannot otherwise receive broadcast television services." § 2(a)(17), 106 Stat. 1462. Finally, Congress determined that cable systems derive great benefits from their ability to carry popular broadcast programming, which has resulted in an "effective subsidy" of cable systems by local broadcasters. § 2(a)(19), 106 Stat. 1462.

In light of those findings, Congress declared that it is the policy of the 1992 Act, *inter alia*, to promote a diversity of views and information for the public and assure that cable operators do not exercise undue market power. §§ 2(b)(1) and (5), 106 Stat. 1463.

B. The Proceedings In This Case

1. Soon after the 1992 Act was enacted, appellants filed these five consolidated actions challenging the constitutionality of the must-carry requirements. Their must-carry claims were heard by a three-judge district court convened under 28 U.S.C. 2284. See 1992 Act, § 23, 106 Stat. 1500; 47 U.S.C. 555(c)(1). On April 12, 1993, a divided court ruled that the must-carry provisions of the 1992 Act comply with First Amendment requirements.

a. The district court began its analysis by observing that Congress had found (1) that horizontal concentration and vertical integration of companies in the cable industry created barriers to access to cable facilities by noncable programmers; (2) that cable systems serve 60% of all households with televisions; (3) that in cable households, cable has virtually supplanted over-the-air reception; (4) that competition between cable systems and broadcasters for advertising has placed free broadcast television in jeopardy; and (5) that must-

carry provisions are needed to preserve local broadcasting for those viewers who receive cable, as well as for those who do not. J.S. App. 10a-12a.

The court found that in enacting the must-carry provisions, Congress was merely seeking "to impose order upon a market in dysfunction." J.S. App. 12a. In the court's view, the 1992 Act "is simply industry-specific antitrust and fair trade practice regulatory legislation." *Id.* at 13a. And the must-carry requirements "are essentially economic regulation designed to create competitive balance in the video industry as a whole, and to redress the effects of cable operators' anti-competitive practices." *Ibid.*

The court rejected appellants' contention that the must-carry obligations are subject to strict scrutiny under this Court's cases condemning compelled speech or interference with editorial discretion. See J.S. App. 16a-19a. Those decisions, the court reasoned, call for strict scrutiny only if "it appears that the government has prescribed the content—either the message or the subject matter—of the speech to be spoken." *Id.* at 16a. Thus, finding that the aim of the must-carry provisions was "to restore competitive balance and assure a functional market in the distribution of video signals, whatever might be said with those signals," the court concluded that the rules do not prescribe the content of speech. *Id.* at 19a.[5]

The court found unpersuasive appellants' contention that the 1992 Act's policy—to "promote the availability to the pub-

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[5] As the court explained (J.S. App. 15a-16a):

> All parties agree * * * that the must-carry provisions are not *viewpoint*-based; must-carry rights are conferred upon all full-power local broadcasters, and the obligations upon most cable operators, regardless of any views expressed in the programming of either. The provisions do not compel the carriage of any particular messages nor do they impose any burden on operators or programmers on the basis of the messages they or the broadcasters propose to transmit.

lic of a diversity of views and information through cable television and other video distribution media" (§ 2(b)(1), 106 Stat. 1463)—is indicative of a content-based statute. J.S. App. 19a & n.23. The court acknowledged that "Congress may have presumed, on a very nonspecific (and unarticulated) level, that there would be some content differences between the subject matter and/or emphasis of the video signals emitted by local broadcasters and those produced by cable programmers." *Id.* at 20a. But the court found that any content-relatedness was no more than "marginal[] * * * to the point of [being] *de minimis*." *Ibid.*

The court then sustained the must-carry provisions under the intermediate level of scrutiny prescribed by *United States* v. *O'Brien*, 391 U.S. 367 (1968), and *Ward* v. *Rock Against Racism*, 491 U.S. 781 (1989). First, the court concluded that the must-carry provisions further the significant governmental interest of "promot[ing] fair competition among video 'speakers' in order to assure the survival of local broadcasting for the benefit of both those who subscribe to a cable service and for those who do not." J.S. App. 23a; see *id.* at 23a-26a. Second, in ruling that the must-carry provisions are narrowly tailored to serve that interest, the court emphasized Congress's finding that input-selector switches are not an effective means of preserving local broadcasting and that the must-carry requirements do not unnecessarily burden appellants' freedom of speech. *Id.* at 26a-28a.[6]

b. Judge Williams dissented. He recognized that Congress confronted the "very real problem" that "cable systems control access 'bottlenecks' to an important communications medium" (J.S. App. 50a), but he concluded that Congress may

[6] Judge Sporkin filed a concurring opinion to emphasize that "any burden imposed by the 1992 Cable Act on speech is * * * remote and incidental to the purpose and effect of the 1992 Cable Act." J.S. App. 36a. In his view, Congress acted permissibly to "rei[n] in cable companies' growing economic might and to restore competitive balance in the telecommunications industry." *Ibid.*

not extend access only to local commercial and noncommercial stations. *Id.* at 51a-52a. Applying strict scrutiny (*id.* at 53a-57a), Judge Williams reasoned that there was an insufficiently close fit between the important governmental objective of promoting programming diversity and the must-carry requirements. *Id.* at 57a-58a. In particular, he noted that cable systems now carry a majority of local stations and that the interest in diverse programming may be served by an access requirement available to all unaffiliated programmers. *Id.* at 58a-60a. He also suggested that there was insufficient evidence to support Congress's determination that over-the-air broadcasting is in jeopardy and in need of the protection of the must-carry provisions. *Id.* at 60a-67a. And even if it were, Judge Williams would require Congress to adopt alternatives such as mandatory leased access or federal subsidization of broadcasting. *Id.* at 66a. Finally, Judge Williams rejected the argument that the must-carry rules are justified by the fact that government regulation has done much to promote cable's position, and that the must-carry rules are a permissible means of assuring that cable operators do not use their market power to drown out the voices of others. *Id.* at 69a-71a.

2. On April 14, 1993, the district court denied appellants' request for an injunction pending appeal. 4/14/93 Dist. Ct. Order 1-2. Judge Williams would have granted the injunction. *Id.* at 2. On April 29, 1993, the Chief Justice denied appellants' application to enjoin the enforcement of Sections 4 and 5 during the pendency of this appeal. *Turner Broadcasting System, Inc.* v. *FCC*, 113 S. Ct. 1806 (1993) (Rehnquist, C.J., in chambers).[7]

[7] Subsequent to that order, Viacom International, Inc. (Viacom), filed a separate lawsuit challenging the constitutionality of the must-carry provisions in the United States District Court for the Northern District of California. On June 1, 1993, a single judge issued a temporary restraining order barring enforcement of the 1992 Act against Viacom pending a hearing on its motion for a

ARGUMENT

1. Appellants argue (J.S. 13-24) that because the cable operators are speakers for purposes of the First Amendment, the district court erred in refusing to apply strict scrutiny to a statute that seeks to affect the programming carried by cable operators. The must-carry provisions, however, are valid under a straightforward application of this Court's cases recognizing that when market failure threatens to drown out the speech of some, Congress may take reasonably limited and viewpoint-neutral measures to protect the "paramount" First Amendment interests of viewers (*Red Lion*, 395 U.S. at 390) by ensuring that a diversity of programming and information will be available.

a. The proper framework for evaluating the First Amendment issues in this case is found in *Associated Press* v. *United States*, 326 U.S. 1 (1945). There, this Court rejected a First Amendment challenge to the application of the Sherman Act to a news gathering organization. Although the judgment in *Associated Press* required the organization to deal with certain newspapers that it would otherwise have excluded from its membership, this Court held that the resulting obligation to speak was permissible under the circumstances:

> [The First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. * * * Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from

preliminary injunction. See 28 U.S.C. 2284(b)(3). On June 29, 1993, a three-judge court dissolved the temporary restraining order. The court later issued an opinion explaining that Viacom's suit was barred under principles of res judicata because Viacom was in privity with a party to this suit. See *Viacom International, Inc.* v. *FCC*, No. C-93-1984 EFL (Aug. 26, 1993), slip op. 7-20.

> publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.

Id. at 20; see *Lorain Journal Co.* v. *United States*, 342 U.S. 143, 155 (1951) (sustaining injunction against newspaper's refusal to accept advertisements from merchants who advertised on the local radio station; the decree imposed "no restriction upon any guaranteed freedom of the press").[8]

Significantly, the reasoning of *Associated Press*—that First Amendment interests are served when the government takes reasonable steps to correct market failure in a market whose commodity is speech—has been applied to regulation of radio and television broadcasting, an area closely related to the cable industry. For more than half a century, Congress and the FCC have regulated broadcasting "so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service." 47 U.S.C. 151 (1988). To that end, Congress has charged the FCC, *inter alia*, with encouraging "the larger and more effective use of radio in the public

[8] Appellants attempt to distinguish (J.S. 14-15) *Associated Press* on the ground that it arose under the Sherman Act, a statute of general applicability. To be sure, that consideration was part of the rationale of both *Associated Press* and *Lorain Journal*. But it was not, and could not have been, the entire rationale of those cases. Neither case involved a facial attack on the application of the antitrust laws to the media. Rather, each case involved an as-applied challenge to a particular decree enforcing the Sherman Act in a way that directly altered the defendant speaker's communicative activity. The judgment in *Associated Press* ordered the news organization to share its collective information (*i.e.*, to speak) with some entities with which it otherwise would not do business, and the injunction in *Lorain Journal* required a newspaper to carry advertisements that it would not otherwise have carried.

interest" (47 U.S.C. 303(g) (1988)) and with awarding broadcast licenses so that the "public convenience, interest, or necessity" will be served and "a fair, efficient, and equitable distribution of radio service" will be provided to all the Nation's communities. 47 U.S.C. 307(a) and (b) (1988).

In numerous cases, this Court has sustained against First Amendment challenge the FCC's reasonably limited and viewpoint-neutral implementation of that authority to correct market failure that interfered with the wide dissemination of programming and information to listeners and viewers, even when the resulting rules were designed to affect the content of programming carried by broadcasters. See, *e.g.*, *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 198-201, 226-227 (1943) (*NBC*) (sustaining FCC rules that, *inter alia*, prohibited networks from entering contracts forbidding a network affiliate from carrying programs of another network and forbidding a network from selling its programs to another station in the affiliate's territory); *Red Lion*, 395 U.S. at 392-401 (sustaining the FCC's personal attack rule and the fairness doctrine as applied to broadcasters); *FCC* v. *National Citizens Comm. for Broadcasting*, 436 U.S. 775, 801 (1978) (FCC may prohibit co-ownership of a newspaper and broadcast station located in a single community; the "purpose and effect [of the regulations] is to promote free speech, not to restrict it"); *Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547, 567 (1990) (sustaining minority preferences in licensing and distress sales; "the interest in enhancing broadcast diversity is, at the very least, an important governmental objective"); see also *CBS, Inc.* v. *FCC*, 453 U.S. 367, 396 (1981) (upholding law requiring "reasonable access" to broadcast time for federal electoral candidates; statute makes "significant contribution to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process").

As the Court explained in those cases, the free market does not function properly in the context of broadcasting because

the radio spectrum is not large enough to accommodate everyone wishing to broadcast. Consequently, broadcast regulation, including the licensing of broadcasters, has been "as vital to its development as traffic control was to the development of the automobile." *NBC*, 319 U.S. at 213. Congress and the FCC may not use that regulatory authority to favor speakers "upon the basis of their political, economic or social views" (*id.* at 226); to silence, discriminate against, censor, or promote particular viewpoints (*Red Lion*, 395 U.S. at 396); or to adopt requirements that are not "limited" and "reasonable" in scope (*CBS*, 453 U.S. at 396 (emphasis omitted)). But within those boundaries, this Court has found considerable latitude for federal regulation designed to promote a broad diversity of programming and information, recognizing that such regulation directly serves "the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." *Red Lion*, 395 U.S. at 390.

b. Although the cable industry is not characterized by the same kind of physical scarcity as broadcasting, salient features of that industry nevertheless similarly justify governmental regulation to correct market failure and promote diversity of programming and information.

First, Congress accurately determined that various circumstances, "including local franchising requirements and the extraordinary expense of constructing more than one cable television system to serve a particular geographic area," have given rise to natural monopoly characteristics resulting in a similar bottleneck in communications. 1992 Act, § 2(a)(2), 106 Stat. 1460; see J.S. App. 13a ("The regulation is justified by the existing structure of the cable business itself, and by the market peculiarities resulting from the technological differences in the manner in which different video signal distributors deliver their products to their viewers' receivers."); cf.

FCC v. *Beach Communications, Inc.*, 113 S. Ct. 2096, 2104 (1993) (because of the fixed costs incurred in installing the receiving antenna and the associated transmission equipment, first cable operator in a market will enjoy substantial cost advantages in providing service to additional, unserved subscribers).[9]

Congress also found that (1) cable companies serve more than 60% of American households with televisions;[10] (2) the cable industry is highly concentrated;[11] and (3) the industry is vertically integrated and its members have a powerful incentive to favor affiliated cable programmers over unaffiliated broadcasters.[12] §§ 2(a)(3)-(5), 106 Stat. 1460-1461. In

[9] See, *e.g.*, *Media Ownership Hearings* 685 (statement of Edward O. Fritts, President, National Association of Broadcasters (NAB)) (20 multiple system operators (MSOs) serve 70% of subscribers; fewer than 1% face competition).

[10] See *1991 House Cable Hearings* 755 (statement of NAB) (93% of American homes are passed by cable, and more than 60% subscribe to cable); *1991 Senate Cable Hearing* 118 (statement of James P. Mooney, President, National Cable Television Association) (60% of homes have cable).

[11] See, *e.g.*, *Media Ownership Hearings* 343 (statement of Bob Phillips, National Rural Telecommunications Cooperative) (noting that the 25 biggest MSOs serve 72% of the 49.5 million cable subscribers); *id.* at 97 (statement of Michael A. Salinger, Columbia University) (one company owns 82% of second largest MSO and owns first and third largest pay services); *id.* at 85 (statement of Ben H. Bagdikian, University of California at Berkeley) (three cable firms serve one-third of all subscribers).

[12] See, *e.g.*, *Media Ownership Hearings* 99 (statement of Michael A. Salinger, Columbia University) (describing research showing that "vertically integrated systems give preference to the services they own and tend to exclude competing services"); *1991 Senate Cable Hearing* 214 (statement of James Hedlund, President, Association of Independent Television Stations, Inc. (AITS)) (same); see also *Media Ownership Hearings* 29, 31-32, 41 (statement of John C. Malone, President, Telecommunications, Inc.) (describing holdings of cable companies in cable programmers).

addition, cable companies compete with broadcasters for advertising revenues,[13] giving the cable operators a strong economic incentive to drop the broadcasters' signals or reposition them unfavorably.[14] §§ 2(a)(14)-(15), 106 Stat. 1462. Finally, the concerns relating to that potential unfair competition cannot be addressed effectively through technology allowing subscribers to switch between cable transmissions and over-the-air broadcasting.[15] §§ 2(a)(16)-(17), 106 Stat. 1462. The must-carry requirements therefore directly address economic market dysfunction by ensuring that cable operators do not use their market power to engage in unfair competition to the detriment of viewers who depend upon or wish to receive full-service local broadcasting.

Second, governmental conduct has substantially contributed to the market power of cable. Because cable systems traditionally have used public rights-of-way (see *Leathers* v. *Medlock*, 111 S. Ct. 1438, 1441 n.1 (1991); *Beach Communications*, 113 S. Ct. at 2100), and because the federal government

[13] See, *e.g.*, *1990 House Cable Hearing (Part 2)* 103 (statement of NAB) (advertising on cable rose from $58 million in 1980 to approximately $2 billion in 1989); *1991 Senate Cable Hearing* 351-352 (statement of Association of National Advertisers, Inc.) (must-carry requirements "are essential to ensure that cable systems do not misuse their 'gate-keeper' position to exclude or financially penalize broadcast competitors"); *1991 House Cable Hearings* 755 (statement of NAB) (cable sold $963 million in advertising in 1987; in 1991 estimated cable advertising revenues were between $2 and $3 billion; and revenues are estimated to reach $9 or $10 billion by the end of the decade).

[14] See, *e.g.*, *1991 Senate Cable Hearing* 214-215 (statement of James Hedlund, President, AITS) (discussing incentive of cable companies to drop broadcasters and reduce competition for viewers and advertising revenues).

[15] See, *e.g.*, *1991 Senate Cable Hearing* 246 n.86 (statement of James Hedlund, President, AITS) ("both the broadcasting and cable industries agreed that the A/B switch was not a viable solution to the problem" of cable access).

has required cable systems to obtain state or local franchises (see 47 U.S.C. 541(b) (1988)), cable operators have been unable to provide service without obtaining authority from a state or local governmental authority. Until the 1992 Act prohibited franchise authorities from doing so (§ 7(a), 106 Stat. 1483; 47 U.S.C. 541(a)(1)), most local authorities made exclusive franchises available to cable operators. See J. Goodale, *All About Cable* § 4.02[1], at 4-7 to 4-8 (1991) (discussing prevalence of exclusive cable franchises); 47 U.S.C. 541(a)(1) (1988) (authorizing franchise authorities to determine the number of cable operators in its jurisdiction).

In addition, in the Cable Communications Policy Act of 1984 (1984 Act), Pub. L. No. 98-549, 98 Stat. 2779, Congress sharply limited franchise fees (47 U.S.C. 542 (1988)); restricted rate regulation (47 U.S.C. 543 (1988)); and substantially limited franchise authorities' ability not to renew franchises, while also requiring compensation when franchises were not renewed (47 U.S.C. 546 and 547 (1988)).[16] Finally, Congress provided substantial benefits to cable operators by enacting the Copyright Act of 1976, 17 U.S.C. 111, which adopted a system of compulsory licensing for the retransmission of broadcast programming by cable operators.

As this Court has made clear, where government regulation has given certain speakers "a preferred position" in the marketplace of ideas and enables them to monopolize an important means of communication, the government may act to ensure that such speakers provide a diversity of programming to their listeners and viewers. See *Red Lion*, 395 U.S. at 400; cf. *Austin* v. *Michigan State Chamber of Commerce*, 494 U.S. 652, 659-660 (1990) (because "state-conferred corporate structure * * * facilitates the amassing of large treasuries," the State has a compelling state interest in ensuring that corporations do not use the resources to obtain an "unfair advantage in the political marketplace"). Even where changed circumstances create a "present possibility for new entry by competing" entities, that possibility is "not enough, in itself, to render unconstitutional the Government's effort" to assure a wide availability of programming and information in the public interest. *Red Lion*, 395 U.S. at 400.

[16] The 1992 Act imposes significant rate regulation on cable operators that are not subject to effective competition. § 3(a), 106 Stat. 1464-1471; 47 U.S.C. 543.

Third, this Court's cable television precedents have recognized that cable and broadcast television are integrally related, and that the objectives of broadcast regulation adopted by Congress and the FCC and approved by this Court could not be accomplished if the cable industry may not be regulated to advance the purposes of such regulation. Prior to 1984, the Commission lacked explicit authority to regulate cable. But it adopted cable regulations—including a must-carry rule—pursuant to its authority under the Communications Act of 1934, 47 U.S.C. 151 *et seq.* See *First Report & Order in Docket Nos. 14895 & 15233*, 38 F.C.C. 683, 697, 741-742 (1965); see also 47 U.S.C. 151, 303(b) and (g) (1988).[17]

[17] The original must-carry rules remained in effect until 1985, when the D.C. Circuit invalidated them on First Amendment grounds in *Quincy Cable TV, Inc.* v. *FCC*, 768 F.2d 1434 (1985), cert. denied, 476 U.S. 1169 (1986); see also *Century Communications Corp.* v. *FCC*, 835 F.2d 292 (D.C. Cir. 1987) (invalidating interim must-carry rules promulgated in the aftermath of *Quincy Cable*), cert. denied, 486 U.S. 1032 (1988). Those decisions, however, do not speak to the validity of the must-carry provisions of the 1992 Act. In each case, the court of appeals relied heavily on the absence of a sufficient record to support the FCC's rationale for the must-carry rules—that an unregulated cable industry posed a serious threat to local broadcasting. See *Century Communications*, 835 F.2d at 304; *Quincy Cable*, 768 F.2d at 1455-1459. Because the must-carry provisions enacted in the 1992 Act are supported by an extensive legislative record, reduced to congressional findings of fact, the reasoning of *Quincy Cable* and *Century Communications* would suggest a contrary result here.

In *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968), this Court sustained the FCC's exercise of authority over cable—including its authority to promulgate must-carry rules. In so doing, the Court emphasized that "Congress has imposed upon the Commission the 'obligation of providing a widely dispersed radio and television service,' with a 'fair, efficient, and equitable distribution' of service among the 'several States and communities.'" *Id.* at 173-174 (footnote omitted). The Court also noted that Congress and the FCC had concluded that "these obligations require for their satisfaction the creation of a system of local broadcasting stations, such that 'all communities of appreciable size [will] have at least one television station as an outlet for local self-expression.'" *Id.* at 174. Relying on the Commission's reasonable determination that the importation of distant signals by cable operators threatened to divide the "available audiences and revenues" and to "deprive the public of the various benefits of a system of local broadcasting stations," the Court found that the FCC could not discharge its responsibilities regarding broadcasting without also asserting authority over cable. *Id.* at 174-176; see also *United States* v. *Midwest Video Corp.*, 406 U.S. 649 (1972) (upholding FCC's authority to promulgate regulation requiring cable systems with 3,500 or more subscribers to originate local programs to ensure diversified programming).[18]

Congress's findings accompanying the 1992 Act indicate that the must-carry provisions rest on the same rationale as

[18] See, *e.g.*, *FCC* v. *Midwest Video Corp.*, 440 U.S. 689, 697 (1979) ("'successful performance' of [the FCC's] duty to ensure 'the orderly development of an appropriate system of local television broadcasting' depended on regulation of cable operations"); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 714 (1984) ("There can be little doubt that the comprehensive regulations developed over the past 20 years by the FCC to govern signal carriage by cable television systems reflect an important and substantial federal interest.").

the cable regulations upheld against statutory challenge in *Southwestern Cable* and *United States* v. *Midwest Video Corp.* As Congress specifically found, enactment of the must-carry requirements was necessary not only to preserve "the economic viability of free local broadcast television," but also to ensure that broadcasters retain their "ability to originate quality local programming." § 2(a)(16), 106 Stat. 1462. Even where market dysfunction in the cable industry does not jeopardize the existence of local broadcasting altogether, it nevertheless threatens to weaken the local broadcasters' ability to provide full-service programming to local communities. See H.R. Rep. No. 628, *supra*, at 51-52, 64; S. Rep. No. 92, *supra*, at 59. At the same time, broadcasters' programming "remains the most popular programming [carried] on cable systems, and a substantial portion of the benefits for which consumers pay cable systems is derived from carriage of [broadcasters'] signals." § 2(a)(19), 106 Stat. 1462. Accordingly, as the Court recognized in *Southwestern Cable* and *United States* v. *Midwest Video Corp.*, because of the similarity and interrelatedness of cable and broadcast television, a comparable regulatory approach is appropriate for each. *United States* v. *Midwest Video Corp.*, 406 U.S. at 669 (plurality opinion) (cable regulation seeking to assure that "viewers are provided suitably diversified programming" has "the same objective underlying [the broadcast] regulations sustained in *National Broadcasting Co.* v. *United States*, *supra*").

Under the applicable standards, the must-carry provisions of the 1992 Act easily pass muster. As discussed, those provisions require cable operators to set aside only a limited portion of their channel capacity for local broadcasting. Moreover, "must-carry rights are conferred upon all full-power local broadcasters, and the obligations upon most cable operators, regardless of any views expressed in the programming of either." J.S. App. 15a-16a. Particularly when measured against broadcast regulations sustained by this Court—including the explicitly content-related fairness doctrine (*Red*

Lion)[19] and right of reasonable access for federal political candidates (*CBS*)—the reasonably limited and viewpoint-neutral must-carry provisions of the 1992 Act plainly constitute a permissible effort to promote the viewers' paramount First Amendment interest in a wide diversity of programming and information. Indeed, they are far more limited than the must-carry rules this Court found reasonably ancillary to the legitimate objectives of broadcast regulation in *Southwestern Cable*. See 392 U.S. at 166 (under must-carry rules then in effect, cable systems were required "to transmit to their subscribers the signals of any station into whose service area they * * * brought competing signals," and were forbidden "to duplicate the programming of such local stations for * * * 15 days before and after a local broadcast").

c. Appellants contend (J.S. 22-23) that because the cable industry is not characterized by spectrum scarcity, cable regulation cannot be evaluated under standards comparable to those governing broadcasting regulation. For two reasons, that contention is unpersuasive.

First, as is the case with broadcasting, part of the bottleneck in the cable industry is attributable to the physical characteristics of cable itself. Although cable is not characterized by spectrum scarcity, it "involves another type of interference—interference with other users of telephone poles and underground ducts." *Omega Satellite Products Co.* v. *City of*

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[19] The "fairness doctrine" required broadcasters "to provide adequate coverage of public issues and to ensure that this coverage fairly and accurately reflects the opposing views." *FCC* v. *League of Women Voters*, 468 U.S. 364, 378 (1984). That doctrine, which the FCC has since eliminated (see *Syracuse Peace Council* v. *FCC*, 867 F.2d 654 (D.C. Cir. 1989), cert. denied, 493 U.S. 1019 (1990)), intruded far more upon programming discretion than a requirement that cable operators devote a limited portion of their channel capacity to local broadcasting, without regard to the programming of the broadcasters to be carried or that which the cable operator would otherwise place on the channels set aside.

Indianapolis, 694 F.2d 119, 127 (7th Cir. 1982) (Posner, J.). Cable operators typically (although not invariably) transmit their signals "through cables strung over utility poles and through underground conduits." *Leathers*, 111 S. Ct. at 1441 n.1; see *Beach Communications*, 113 S. Ct. at 2100 (a traditional cable system "delivers video programming to a large community of subscribers through coaxial cables laid under city streets or along utility lines"). The practical difficulty and expense of constructing a competing cable system can therefore be very great, particularly in urban areas. See, *e.g.*, J. Goodale, *supra*, § 4.02[1], at 4-7; Brenner, *Cable Television and the Freedom of Expression*, 1988 Duke L.J. 329, 332. Thus, there is typically some physical constraint on the development of multiple competing cable systems, and a concomitant need for the government to exert a form of "traffic control" where traditional cable systems are concerned. *NBC*, 319 U.S. at 213.

Second, the concept of physical scarcity is not essential to invoke the framework applicable here. To be sure, the concept of spectrum scarcity played a significant role in the development of this Court's rationale for sustaining broadcast regulation. But the critical factor has not been the physical phenomenon of spectrum scarcity as such, but the resulting inability of the broadcasting market to function successfully. We see no reason to exclude from the Court's approach cases in which comparable market dysfunction occurs for other reasons. To limit the Court's approach to the physical spectrum, moreover, would be contrary to this Court's precedents.

For example, in articulating the First Amendment justification for the broadcast regulation at issue in *Red Lion*, the Court relied heavily on its precedents in *Associated Press* as well as other newspaper cases having nothing to do with the scarcity of the electromagnetic spectrum, but with economically driven market failure. See *Red Lion*, 395 U.S. at 387, 390. The Court in *Red Lion* also made clear that its analysis applied even where factors other than spectrum scarcity gave

some broadcasters the ability to monopolize the market for programming and information:

> Even where there are gaps in spectrum utilization, the fact remains that existing broadcasters have often attained their present position because of their initial government selection in competition with others before new technological advances opened new opportunities for further uses. Long experience in broadcasting, confirmed habits of listeners and viewers, network affiliation, and other advantages in program procurement give existing broadcasters a substantial advantage over new entrants, even where new entry is technologically possible. These advantages are the fruit of a preferred position conferred by the Government. Some present possibility for new entry by competing stations is not enough, in itself, to render unconstitutional the Government's effort to assure that a broadcaster's programming ranges widely enough to serve the public interest.

Red Lion, 395 U.S. at 400.

In short, the power of private entities to silence others' speech justifies government intervention to promote a diversity of programming and information, whether that market power derives from physical limitations on the medium of delivery (as in *Red Lion*); from economic monopoly (as in *Associated Press*); from advantages secured through governmental action (as in *Red Lion* and *Austin*); or from a combination of the three (as in this case). Where Congress acts to address such market failure in a reasonably limited and viewpoint-neutral way designed to provide viewers the widest dissemination of programming and information, this Court's cases instruct that First Amendment interests are served, not offended, by such legislation.

2. Even if the foregoing framework were not applicable to this case, the district court's judgment should be affirmed under the framework of intermediate scrutiny established in

United States v. *O'Brien*, 391 U.S. 367 (1968). Although the must-carry provisions, like any law designed to promote diversity of information, alter the content of programming, they are content-neutral in the crucial constitutional sense. "The principal inquiry in determining content neutrality * * * is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989). However, "the First Amendment's hostility to content-based regulation extends not only to a restriction on a particular viewpoint, but also to a prohibition of public discussion of an entire topic." *Burson* v. *Freeman*, 112 S. Ct. 1846, 1850 (1992).

When measured against the standards articulated by this Court, the must-carry provisions are not content-related for First Amendment purposes. As the district court explained, the must-carry provisions "do not compel the carriage of any particular messages nor do they impose any burden on operators or programmers on the basis of the messages they or the broadcasters propose to transmit." J.S. App. 16a. The provisions thus are not designed to express disagreement with the message of cable operators or programmers. Nor do the must-carry provisions single out any topic that cable operators may or may not discuss. Compare, *e.g.*, *Simon & Schuster, Inc.* v. *Members of the New York State Crime Victims Bd.*, 112 S. Ct. 501, 508 (1991) (speech about crime); *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U.S. 530, 537 (1980) (prohibition against discussion of nuclear power).[20]

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[20] Appellants argue (J.S. 20-21) that the 1992 Act's "preference for local broadcasters" renders the Act impermissibly content-based. The 1992 Act, however, confers must-carry rights upon all full power local broadcasters regardless of the programming they carry. Accordingly, this case differs significantly from *City of Cincinnati* v. *Discovery Network, Inc.*, 113 S. Ct. 1505, 1517 (1993), in which this Court invalidated a municipal ordinance selectively banning commercial publications from the city's newsracks based

The must-carry provisions satisfy the requirements of the *O'Brien* test. First, there is an "important or substantial governmental interest" (*O'Brien*, 391 U.S. at 377) in addressing unfair competition in the video communications market and in preserving the local broadcast industry. As Congress found in the 1992 Act, the local broadcast industry provides "educational and informational programming to the Nation's citizens, thereby advancing the Government's compelling interest in educating its citizens," and serves as an "important source of local news and public affairs programming and other local broadcast services critical to an informed electorate." §§ 2(a)(8)(A) and (11), 106 Stat. 1461; see H.R. Rep. No. 628, *supra*, at 50; see also *CBS*, 453 U.S. at 396 (citing cases). As discussed, moreover, if Congress lacked authority to regulate cable it would effectively lose its ability to assure "a fair, efficient, and equitable distribution" (47 U.S.C. 307(b) (1988)) of broadcasting services, a feature of broadcast regulation for more than half a century. See S. Rep. No. 92, *supra*, at 58. Accordingly, "an important and substantial federal interest" is served by a regulatory scheme that, like the must-carry provisions, "strike[s] a balance between protecting noncable households from loss of regular television broadcasting service due to competition from cable systems and ensuring that the substantial benefits provided by cable of increased and diversified programming are secured for the maximum number of viewers." *Capital Cities Cable*, 467 U.S. at 714.

Second, the must-carry requirements are narrowly tailored, as required by *O'Brien*, 391 U.S. at 377, because they are not "substantially broader than necessary" to achieve legitimate governmental ends. *Ward*, 491 U.S. at 800. As

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on "the city's naked assertion that commercial speech has 'low value.'" The must-carry provisions are not designed to suppress any kind of speech, but to promote diversity of information by addressing market dysfunction and anti-competitive practices in the cable industry.

Congress found after lengthy hearings on the cable industry, the deployment of technology to allow viewers to switch between cable and over-the-air television is not a viable alternative. § 2(a)(17), 106 Stat. 1462. And as the legislative history notes, the must-carry obligations themselves are carefully confined: a cable operator is required to devote only one-third of its channel capacity to local commercial programming; an operator has discretion to choose which broadcasters it will carry when there are more local broadcasters than the operator must carry; there is nonduplication protection; and the requirements are designed to protect those broadcasters most likely to be in direct competition with cable operators. S. Rep. No. 92, *supra*, at 61. Even if it may be possible to envision an alternative scheme that may have less impact on the cable operators (see J.S. App. 50a-51a (Williams, J., dissenting)), this Court's cases make clear that narrow tailoring does not require the adoption of the least restrictive or intrusive alternative.[21] See *Ward*, 491 U.S. at 798.

3. Appellants contend (J.S. 16-17) that the must-carry provisions constitute a form of forced speech that interferes with the cable operators' editorial discretion and places a concomitant burden on the right of cable programmers to speak. Those contentions, however, are unsupported by this Court's cases.

Appellants rely heavily (J.S. 17) on this Court's decision in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974). There, the Court invalidated a state law giving political candidates a right to equal space in a newspaper to reply to attacks on their records by the newspaper. For several reasons, however, *Tornillo* does not govern here. First, as discussed, for purposes of First Amendment analysis, cable shares many similarities with broadcast television, and the constitutional

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[21] We note, moreover, that alternatives suggested in the dissenting opinion below, such as public subsidization, could be regarded by Congress as having very serious disadvantages.

analysis of *Red Lion* rather than *Tornillo* supplies the relevant framework here. Second, the state statute at issue in *Tornillo* represented a very serious incursion into the editorial discretion of newspapers. The reply statute was strongly viewpoint-based and struck at the core of First Amendment speech—political discourse. When a newspaper expressed an opinion critical of a political candidate, it was compelled by state law to print the opposite viewpoint as well. As the Court explained, the statute "exact[ed] a penalty on the basis of the content of a newspaper." 418 U.S. at 256. That is a far cry from a statute, such as the 1992 Act, that is designed to serve the public's First Amendment interest in diversity without an intent to punish, suppress, or promote the message being conveyed by the broadcaster, the cable operator, or the cable programmer.[22]

Third, although cable operators exercise "editorial discretion over which stations or programs" to carry (*City of Los*

[22] Appellants emphasize (J.S. 17) *Tornillo*'s statement that the government may not compel publishers to print that which reason tells them should not be published. 418 U.S. at 254 (citing *Associated Press*, 326 U.S. at 20 n.18). *Tornillo*'s observation, however, does not undermine the constitutionality of the 1992 Act. First, where a law is specifically designed to require a publisher to print a reply to a view it has taken, the very essence of the law is to compel that publisher to print what reason tells him not to print. The must-carry rules have no such purpose, but are designed to assure that cable operators do not exercise their market power to silence other speakers and thereby to deprive viewers of competing services. Second, while the decree in *Associated Press* did not compel members of the Associated Press (AP) to print that which reason told them not to print, it effectively required AP to supply information (*i.e.*, to speak) to certain newspapers with whom it otherwise would not have dealt for economic reasons. And, in *Lorain Journal*, a newspaper was enjoined from refusing to deal with a category of advertisers. Thus, the must-carry provisions, which are viewpoint-neutral requirements designed to combat anticompetitive practices directed at broadcasters, are constitutional under *Tornillo*, *Associated Press*, and *Lorain Journal*.

Angeles v. *Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986)), their functions are quite distinct when they serve as passive conduits retransmitting the programming of others, rather than originating programming of their own. Cf. *Teleprompter Corp.* v. *Columbia Broadcasting System, Inc.*, 415 U.S. 394, 404-405 (1974). If national newspapers monopolized the local distribution systems in a city (*i.e.*, owned all the newsstands and newsracks), and the city passed an ordinance requiring such newspapers to make a limited percentage of space on their newsstands available to local newspapers (without regard to content), the effect on the newspapers' "editorial discretion" would be far less intrusive than that of a law requiring them to print replies to their editorials. And it would be analogous to the intrusion on cable operators resulting from the must-carry provisions. The concerns underlying *Tornillo* thus do not apply to the must-carry provisions at issue here.[23]

[23] Nor are the appellants assisted by the other "compelled-speech" cases on which they rely. See J.S. 16-17, 19. The must-carry provisions can hardly be equated with the viewpoint-based requirement in *Pacific Gas & Elec. Co.* v. *Public Utilities Comm'n*, 475 U.S. 1, 13 (1986) (plurality opinion), that a utility include in its mailings materials submitted by those who disagree with the views expressed in the utility's own newsletter. Nor is Congress's reasonable accommodation of the First Amendment interests of viewers, broadcasters, and cable operators inconsistent with the principle that a charity cannot be required to disclose facts that might interfere with its ability to obtain political donations, when the disclosure is unnecessary to protect the potential donor's interests. See *Riley* v. *National Fed'n of Blind, Inc.*, 487 U.S. 781, 795-800 (1988).

Finally, appellants err in relying (J.S. 19) on *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam). *Buckley* struck down statutory limitations on political expenditures, noting that the right of some to speak may not be secured by suppressing the rights of others. Unlike this case, however, *Buckley* involved no danger that unfair economic competition would deprive viewers of local broadcast services. Moreover, the Court in *Buckley* explicitly distinguished

Instead, this case is more closely analogous to *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74, 87-88 (1980), which upheld a state law mandating public access to shopping centers for speech-related activities. First, the views expressed by broadcasters are not likely to be associated with the cable company that carries broadcasting stations among many other channels. Second, the government is not dictating that a cable operator convey any particular message. Third, a cable company may insert appropriate disclaimers of responsibility for material broadcast pursuant to the must-carry requirements. Thus, there is no risk that viewers will believe that cable operators are "affirm[ing] their belief" in a position or view carried pursuant to the must-carry provisions of the 1992 Act. *PruneYard*, 447 U.S. at 88.

4. Appellants contend (J.S. 24-26) that the district court gave unwarranted deference to Congress's findings supporting the 1992 Act. Appellants do not dispute Congress's findings that the cable industry is highly vertically integrated and is characterized by substantial horizontal concentration. Rather, they dispute (J.S. 25-26) Congress's finding that, in the absence of the must-carry provisions, cable operators would deny carriage to a significant number of broadcast stations.

Appellants do not take issue with the underlying facts—that a 1988 FCC survey disclosed that 20% of the cable operators responding had dropped one or more local broadcasting stations and that some 1,700 cable systems had denied carriage in approximately 3,600 cases. See S. Rep. No. 92, *supra*, at 42-43. Rather, they argue (J.S. 26-27) that those figures on dropped stations are in fact relatively modest, that the number of broadcasting stations has increased in the past several years, and that Congress was unjustified in its ultimate finding that cable poses a serious threat to the vitality and availability of local broadcasting.

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the "fairness doctrine" sustained in *Red Lion*. In so doing, the Court reasoned (1) that restrictions on the broadcast media present different concerns from restrictions on individual speakers and (2) that "the presumed effect of the fairness doctrine is one of 'enhancing the volume and quality of coverage' of public issues." *Buckley*, 424 U.S. at 50 n.55 (per curiam). For the reasons discussed above, those considerations indicate that the must-carry provisions of the 1992 Act are consistent with First Amendment principles.

The district court properly declined to substitute its judgment for that of Congress concerning the future effect upon broadcasting of leaving unregulated a vertically integrated and highly concentrated cable industry. This Court has emphasized that "[t]he problems of regulation are rendered more difficult because the broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence." *Columbia Broadcasting System, Inc.* v. *Democratic National Comm.*, 412 U.S. 94, 102 (1973). Accordingly, the Court has admonished that it "must afford great weight to the decisions of Congress and the experience of the Commission." *Ibid.* Indeed, in *FCC* v. *League of Women Voters*, *supra*, this Court declined to consider the claim that technological developments had rendered obsolete its approach to broadcast regulation, and indicated that it would not revisit its framework for evaluating First Amendment claims in that area "without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." 468 U.S. at 377 n.11.

There is no less reason to respect the predictive judgment of Congress and the FCC when they address the relationship between two technical, rapidly changing, and closely interdependent industries—broadcasting and cable. Although appellants asked the district court to substitute its judgment for that of Congress, "[t]he special attribute [of Congress] as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the res-

olution of an issue." *Metro Broadcasting*, 497 U.S. at 572 (internal quotation marks omitted). And while Congress cannot "predict with certainty the consequences of unregulated [cable]," its responsibilities to viewers "demand that it 'plan in advance of foreseeable events, instead of waiting to react to them.' " *Southwestern Cable*, 392 U.S. at 177. The district court in this case properly respected Congress's reasonable predictive judgment, which rested on substantial evidence that cable operators have, and will use, substantial market power to the detriment of local broadcasters and of the paramount First Amendment interests of their viewers. See pp. 13-15, *supra*.

In any event, because appellants have mounted a facial attack upon the must-carry provisions of the 1992 Act, they must show that the statute is substantially overbroad—*i.e.*, that it reaches a "substantial amount of speech that is constitutionally protected." *Forsyth County* v. *Nationalist Movement*, 112 S. Ct. 2395, 2401 (1992); see, *e.g.*, *City of Houston* v. *Hill*, 482 U.S. 451, 458-459 (1987). Thus, at a minimum, appellants must show that Congress's predictive judgment about the need for must-carry provisions is demonstrably erroneous in a substantial number of markets in which it applies. Because they have failed to meet that burden, the judgment of the district court should be affirmed.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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No. 93-44

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

Appeal from the United States District Court
for the District Of Columbia

MOTION TO AFFIRM OF INTERVENORS ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS, PUBLIC BROADCASTING SERVICE, AND CORPORATION FOR PUBLIC BROADCASTING

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QUESTION PRESENTED

Whether Congress, consistent with the First Amendment, may require cable operators to carry a limited number of noncommercial educational television stations in order to redress the severe competitive imbalances that exist in the video marketplace and preserve the institution of local public broadcasting.

RULE 29.1 LIST OF PARENT COMPANIES AND SUBSIDIARIES

Pursuant to Rule 29.1, the Association of America's Public Television Stations, Public Broadcasting Service, and Corporation for Public Broadcasting, Inc., through undersigned counsel, hereby certify that they have no parent companies, subsidiaries, or affiliates that have any outstanding securities in the hands of the public.

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Century Federal, Inc. v. City of Palo Alto, 710 F. Supp. 1552 (N.D. Cal. 1987) 25

Chicago Cable Communications v. Chicago Cable Commission, 879 F.2d 1540 (7th Cir. 1989), *cert. denied*, 493 U.S. 1044 (1990) 25

City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488 (1986) 16

Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973) 18

Community Communications Co. v. City of Boulder, 660 F.2d 1370 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982) 25

Erie Telecommunications, Inc. v. City of Erie, 659 F. Supp. 580 (W.D. Pa. 1987), *aff'd*, 853 F.2d 1084 (3d Cir. 1988) 25

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Ward v. Rock Against Racism, 491 U.S. 781 (1989) . . . . . *passim*

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Public Telecommunications Act of 1992, Pub. L. No. 102-356, 106 Stat. 949 (1992) (amending 47 U.S.C. § 396(a)) 4, 28

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S. Rep. No. 102-221, 102d Cong., 2d Sess. (1992), *reprinted in* 1992 U.S.C.C.A.N. 839-40 3

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Cable Television Regulation (Part 2): Hearings Before the Subcommittee on Telecommunications and Finance of the House Comm. on Energy and Commerce, 101st Cong., 2d Sess. (March 1 and Apr. 19, 1990) 9

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IN THE
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OCTOBER TERM, 1993

No. 93-44

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,
v.
FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

Appeal from the United States District Court
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MOTION TO AFFIRM OF INTERVENORS ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS, PUBLIC BROADCASTING SERVICE, AND CORPORATION FOR PUBLIC BROADCASTING

Appellees, the Association of America's Public Television Stations, Public Broadcasting Service, and Corporation for Public Broadcasting (collectively "the public broadcasters"), who were granted leave to intervene as defendants below, hereby move to affirm the judgment of the three-judge district court that Section 5 of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. § 535 (1992) ("1992 Cable Act") does not violate the First Amendment.

Section 5 requires cable operators to carry, with certain important limitations, the signals of noncommercial educational television stations. Section 4 of the 1992 Cable Act, which appellants also challenge, enacts must carry require-

ments with respect to commercial television stations. Although appellants have indiscriminately lumped Sections 4 and 5 together, the two provisions are in fact distinct and severable. Section 5 is supported not only by the same substantial governmental interests that support Section 4, but also by important governmental interests that apply only to public television stations. Furthermore, Section 5 will have a substantially more limited impact on cable operators than Section 4. Thus, while the public broadcasters endorse the constitutionality of Section 4, they also submit that there are independent reasons to affirm the decision below with respect to Section 5 even if the Court determines that it should hear further argument with respect to Section 4.

STATEMENT

Section 5 of the 1992 Cable Act was enacted against the backdrop of public television's special position in the telecommunications infrastructure, the unique characteristics of cable television, and the threat that cable presents to the continued viability of local public television.

A. The Special Position of Public Television.

Since 1952, when the FCC reserved nearly one-third of the nation's broadcast television channels for noncommercial educational licensees, a primary objective of our national telecommunications policy has been to assure that all Americans have access to locally-controlled public television services. *See* Television Table of Allotments, 47 C.F.R. § 73.606. Today, the noncommercial television infrastructure includes more than 347 stations spread across the country's approximately 211 television markets. These noncommercial licensees include a diverse array of local school boards and

other state and local agencies, colleges and universities, and a variety of other community-based nonprofit organizations.[1/]

Nowhere is the local orientation of public television more evident than in its commitment to educational programming. Nearly 70,000 schools with over 29 million elementary and secondary students use public television instructional programming. Public television stations have prepared thousands of adults, many of them disabled or of modest means, to earn the equivalent of a high-school diploma through telecourses. Since 1981, local stations, in conjunction with more than 1,800 colleges and universities, have brought telecourses to 1.4 million college students.

Public television stations also serve as vital local community institutions, serving as catalysts for action on issues of local importance such as literacy, racial harmony, AIDS, and the environment. *See* S. Rep. No. 102-221, 102d Cong., 2d Sess. 6-7 (1992), reprinted in 1992 U.S.C.C.A.N. 839-40. In addition, public television has become a leader in providing innovative video services to groups of viewers — such as the visually and hearing impaired, and non-English speakers — that are too small or too impoverished to attract other broadcast services. Indeed, just prior to passage of the 1992 Cable Act, Congress found in related legislation that public television is a "valuable local community resource . . . to address national concerns and solve local problems" and that "it is in the public interest for the Federal Government to ensure that all citizens of the United States have access to

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1/ The substantial funding necessary to construct and operate this infrastructure has come from a wide variety of public and private sources. As recited in the 1992 Cable Act, the federal government has expended nearly $3 billion on public broadcasting since 1969. § 2(a)(8). State and local governments have contributed nearly $5 billion since 1972. H.R. Rep. No. 102-628, 102d Cong., 2d Sess. 69 (1992). Despite these substantial governmental expenditures, the development and operation of the system would not have been possible without private contributions (primarily from viewers), totalling over $6 billion during the same period. *Id.* *See* 1992 Cable Act § 2(a)(8).

public telecommunications services." Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 4, 106 Stat. 949 (1992) (amending 47 U.S.C. § 396(a)).

B. Cable Television Is A Dynamic And Still-Evolving Technology.

Cable television operators perform three distinct functions. First, in its original and still primary role, cable serves as a "community antenna" service, passively transmitting the signals of broadcast television stations to viewers. Second, cable operators purchase and transmit programming produced by cable programmers. The average cable system presently has the capacity to carry about 36 channels, *see* S. Rep. No. 102-92, 102d Cong., 1st Sess. 3 (1991) ("1991 Senate Report"), although there are more than 75 cable programmers. *See* Jurisdictional Statement ("J.S.") at 4.[2/] Consequently, not all cable programmers can obtain carriage on most cable systems, even without any requirement that cable operators carry broadcast signals.[3/]

Third, and most recently, a few cable operators have begun to produce and transmit their own original programming. In this capacity, cable comes closest to resembling the print medium. However, there was no showing in the district court that the must carry requirements

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[2/] In the district court, appellant National Cable Television Association asserted that the average cable system has the capacity to carry 40 channels and that there are 80 national and 48 regional cable programming networks. *See* NCTA Statement of Material Facts ¶¶ 3, 5 (February 12, 1993) (Court Record ("CR") 147).

[3/] Some cable programmers are owned by, or are otherwise affiliated with, entities that own multiple cable systems. In these circumstances, as Congress found, a cable operator will often give preference to programming produced by cable programmers with which it is affiliated. *See, e.g.*, 1991 Senate Report at 24-26.

of the 1992 Cable Act threaten to displace any of the *de minimis* original programming produced by cable operators.

Today, cable television is a highly dynamic and still evolving technology. While the average system has a capacity of about 36 channels, some cable systems have as many as 150 useable channels. Technological developments have placed channel capacity of this magnitude within reach of nearly all cable systems, and further developments promise to provide virtually unlimited channel capacity (500 or more channels) within a few years. Thus, in the not too distant future, cable systems will have the capacity to carry all broadcast signals and all cable programming.[4/]

C. Cable's Role As A Gatekeeper And Prior Regulatory Responses.

Cable's role as a conduit gives it a unique status as the "gatekeeper" into cable homes. This is because, as Congress found, "[a]ll evidence indicates that, once a television set is connected to a cable system, consumers will not watch signals available only over the air." H.R. Rep. No. 102-628, 102d

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[4/] The dynamic state of cable system technology is set forth in detail in the Affirmations of Michael C. Rau, Senior Vice President, Science & Technology, of the National Association of Broadcasters. These Affirmations were submitted to the district court below and are included in the accompanying Public Broadcasters' Appendix to this Motion to Affirm ("Pub. Broad. App.") at 5a, 18a. As Mr. Rau makes clear, expanding channel capacity for cable systems is being driven by three revolutionary technologies: fiber optics, video compression, and video server technology. Fiber optics increases the physical channel capacity of the cable system. Video compression makes more efficient use of (and thereby expands) whatever physical channel capacity the cable system possesses. *See* 11/23/92 Rau Aff. ¶ 15 (Pub. Broad. App. at 11a). Video server technology may render even these advances obsolete, as it effectively moves the channel selector switch upstream in the cable system so that the television receiver only needs the capacity to carry the program being viewed. The sum total of these developments is that "*channel capacity limitations in cable television systems are vanishing and will shortly be a thing of the past.*" 2/12/93 Rau Aff. ¶ 18 (Pub. Broad. App. at 26a) (emphasis added).

Cong., 2d Sess. 54 (1992) ("1992 House Report"). With over 60% of all television households now receiving cable, 1991 Senate Report at 3, cable operators have enormous control over what programming viewers can see. This gatekeeper function, unless otherwise restrained, gives cable systems the ability to "cherry pick" broadcast stations, dropping or giving unfavorable channel placement to any station perceived to be in competition with the cable operator's preferred programming, or otherwise considered to be less desirable, less popular, or less profitable.

Cable's power as gatekeeper has been greatly enhanced by its freedom to use the programming of broadcast stations without their consent. When cable was a pure "conduit," doing nothing but retransmitting broadcast signals, the Supreme Court found this passive activity to be so devoid of expressive content that it did not constitute a "performance" for purposes of the copyright laws.[5/] When Congress finally did subject cable to copyright liability for carrying broadcast signals, it granted cable a "compulsory" license to carry all local signals without consent or cost. *See* Copyright Revision Act of 1976, 17 U.S.C. § 111 (1988). The FCC has concluded that the compulsory license scheme "forced the cable television industry and the broadcast television industry into a significantly imbalanced contract" and contributed significantly to the cable industry's "explosive" growth. 1990 FCC Cable Report, 5 F.C.C.R. 4962, 5038 (1990).

In adopting the 1976 Copyright Act, Congress was aware that cable systems might abuse their power and deny local broadcast stations access to the viewers they were licensed to serve. But Congress relied on the fact that, in 1965, the FCC had adopted a careful array of regulations governing

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[5/] *See Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390 (1968); *Teleprompter Corp.* v. *Columbia Broadcasting System*, 415 U.S. 394, 402-05 (1974) (extending *Fortnightly* to cable systems that import distant broadcast signals).

cable's use of broadcast signals — foremost of which were the must carry rules — that were designed to protect the universal reach of the local broadcast system.[6/]

In 1984, Congress substantially deregulated the cable industry,[7/] but left the compulsory license in place. In so doing, Congress relied on the fact that the FCC's must carry rules would remain operative as a crucial counterweight to cable's freedom from copyright liability. "Given the current compulsory licensing system for cable systems under the copyright laws, if the 'must carry' rules were eliminated, local cable operators might not carry some local broadcast stations." S. Rep. No. 98-67, 98th Cong., 1st Sess. 11 (1983). Because of "the importance of local programming," Congress saw "a need to continue the existing 'must carry' rules to protect the public interest." *Id.* at 11-12.

This careful balance between the compulsory license and the FCC's must carry rules was upset in 1985 in *Quincy*,[8/] and again in 1987 in *Century*,[9/] when the D.C. Circuit found two different versions of the Commission's must carry rules invalid under the First Amendment. Although both decisions stressed that must carry requirements were not *per se* invalid under the First Amendment,[10/] both concluded that the

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[6/] *See* H.R. Rep. No. 1476, 94th Cong., 2d Sess. 89 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5704-05; 1992 House Report at 48.

[7/] Cable Communications Policy Act of 1984, 47 U.S.C. § 521 *et seq.*

[8/] *Quincy Cable TV, Inc.* v. *FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

[9/] *Century Communications Corp.* v. *FCC*, 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988).

[10/] *See Century*, 835 F.2d at 304 ("We do not suggest that must-carry rules are per se unconstitutional, and we certainly do not mean to intimate that the FCC may not regulate the cable industry so as to advance

(continued...)

Commission had failed to justify its rules on the factual record. The net effect of these decisions was to eliminate the must carry rules and throw the video industry into significant imbalance. As the FCC found in 1990, the elimination of must carry rules "drastically" and unfairly changed the relationship between the cable and broadcast industries and threatened the universal availability of public broadcast signals. *See* 1990 FCC Cable Report, 5 F.C.C.R. at 5038. The Commission therefore unequivocally recommended that Congress enact must carry requirements for public television. *Id.* at 5044.

D. The Congressional Response To *Quincy* And *Century*.

Following *Quincy* and *Century*, Congress undertook a comprehensive five-year investigation into the cable-broadcast relationship. The results of this inquiry were clear and unequivocal. *First*, Congress found that the cable industry has monopoly status in the market — *i.e.*, that it has become "highly concentrated" and "vertically integrated," "making it more difficult for noncable-affiliated programmers [such as public broadcasters] to secure carriage on cable systems." 1992 Cable Act § 2(a)(3), (4) & (5). "As a result of the economic incentive that cable systems have to delete, reposition, or not carry local broadcast signals," Congress found that "the economic viability of free local broadcast television . . . will be seriously jeopardized." § 2(a)(16).

Second, Congress found extensive evidence of discriminatory behavior by cable operators against public television stations, especially those that offer educational and instructional programming. *See* 1992 House Report at 70.

[10/](...continued)
substantial government interests."); *Quincy*, 768 F.2d at 1463 ("[W]e have not found it necessary to decide whether any version of the mandatory carriage rules would contravene the First Amendment.").

For example, an FCC study submitted to Congress revealed that between 1985 and 1988, 153 public television stations, nearly half of all such stations, were dropped or denied carriage 463 times by 347 cable systems. *Cable System Broadcast Signal Carriage Survey, A Staff Report by the Policy and Rules Division, FCC Mass Media Bureau*, at 10 (Sept. 1, 1988) (cited, *e.g.*, in 1991 Senate Report at 42 n.102; 1992 House Report at 52 n.51). The FCC study also showed that 182 stations had been involuntarily repositioned on 541 occasions between 1985 and 1988. *Id.* at 19.

Third, Congress found that a must carry requirement for public television stations would impose only a minimal burden on the cable industry. *See* 1992 House Report at 71. Data supplied to the Congress showed that a blanket requirement for carriage of *all* substantially unduplicated public television programming would have the following effects:

- 84 percent of all cable systems would be required to carry one public station;
- 13 percent would be required to carry two public stations; and
- 3 percent would be required to carry more than two public stations.

Id.[11/]

[11/] The 1992 Cable Act has even less impact than this hypothetical "blanket" requirement because it limits the number of public television stations that must be carried (depending on cable channel capacity) and eliminates substantial duplication. Indeed, the impact is so minimal that the National Cable Television Association, an appellant here, agreed in 1990 to support must carry legislation limited to public television. *See Cable Television Regulation (Part 2): Hearings Before the Subcommittee on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 101st Cong., 2d Sess. 85 (March 1 and Apr. 19, 1990).

Fourth, Congress found that "there is a substantial governmental and First Amendment interest in ensuring that cable subscribers have access to local noncommercial educational stations." 1992 Cable Act § 2(a)(7). Those substantial government interests include "provid[ing] public service programming that is responsive to the needs of the local community," "furthering the educational development of all citizens," and "protect[ing] the nation's substantial investment in and commitment to public television services." *Id.* § 2(a)(8)(A) and (B); 1992 House Report at 68. Congress further concluded that "absent carriage requirements there is a substantial likelihood that citizens, who have supported local public television stations, will be deprived of those services." 1992 Cable Act § 2(a)(8)(D).

Fifth, Congress also gave careful and extended consideration to the constitutionality of the must carry provisions. *See*, *e.g.*, 1992 House Report at 58-74; 1991 Senate Report at 53-62. In Congress' view, the must carry requirements are nothing more than "economic regulations designed to promote competition and diversity of voices in communications services," 1991 Senate Report at 55, and, as such, should be upheld under the minimal standard of First Amendment review set forth in *Associated Press* v. *United States*, 326 U.S. 1 (1945). *Id.*; *see* 1992 House Report at 72. In addition, Congress cited Section 5's content-neutrality, its service of substantial government interests, and its minimal burden on the cable industry as grounds for upholding that provision under *United States* v. *O'Brien*, 391 U.S. 367 (1968). *See* 1992 House Report at 62-67, 72-74; 1991 Senate Report at 57-62.

E. Section 5 of the 1992 Cable Act.

Section 5 of the 1992 Cable Act requires cable operators to carry the signals of qualified local noncommercial educational ("NCE") television stations that request carriage.

§ 5(e).[12] The number of NCE stations that must be carried under Section 5 depends on the channel capacity of the cable system. Systems with twelve or fewer useable activated channels are required to carry the signal of only one NCE station. § 5(b)(2)(A). Cable systems with thirteen to thirty-six channels are required to carry at least one NCE station, but not more than three. § 5(b)(3)(A). Cable systems with capacities of more than thirty-six channels are required to carry all NCE stations that request carriage. The requirements for systems with thirteen or more channels, however, are modified where there is substantial duplication in the programming of the eligible NCE stations. § 5(b)(1) & 5(e).[13]

The limited burden of Section 5's must carry obligations on cable operators is further reduced by the statute's interrelationship with the scheme for public, educational and government ("PEG") channels established in the Cable Communications Policy Act of 1984, 47 U.S.C. § 521 *et seq*. Under that statute, a franchising authority may require a cable operator, as one of the terms of its franchise, to designate channels for public, educational, or governmental use. 47 U.S.C. § 531. When a cable operator is required under Section 5 of the Cable Act to add the signal of an NCE station, the cable operator may do so, subject to approval by the franchising authority, by placing that additional signal on a PEG channel that is not in use for its designated purpose. § 5(d). In these circumstances, the must carry obligation is

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[12] A qualified noncommercial educational television station is (1) a station licensed by the FCC as such, owned by a public agency or nonprofit entity, and eligible to receive a grant from the Corporation for Public Broadcasting; or (2) a station that is owned and operated by a municipality and transmits predominantly noncommercial programs for educational purposes. 1992 Cable Act § 5(l)(1).

[13] Substantial duplication has been defined by the FCC. *See* FCC Final Report and Order, 58 Fed. Reg. 17350, 17351 (1993) (to be codified at 47 C.F.R. Part 76).

fulfilled without any additional loss of current channel availability by the cable operator.[14/]

Section 5 also creates certain channel positioning rights. Each NCE station having a mandatory carriage right under Section 5 must be carried, at its election, on its current over-the-air channel, its channel position as of July 19, 1985, or on such other channel number that is mutually agreed upon by the station and the cable operator. § 5(g)(5).

F. The Decisions Below.

On April 8, 1993, the three-judge district court (by a 2-1 decision) held that Sections 4 and 5 of the Cable Act do not violate the First Amendment freedoms of speech and press. The court prefaced its opinion with a careful review of the "exhaustive" Congressional fact-finding process (discussed above) that resulted in the enactment of the Cable Act. J.S. App. 10a. In particular, the court took note of the "indisputable" evidence before Congress concerning the cable industry's dominance of the video signal distribution market, *id.* at 24a, and the corresponding evidence of the dangers facing local broadcasting, *id.* at 12a, 25a. As aptly summarized by the district court, "unrestrained, cable holds the future of local broadcasting at its mercy." *Id.* at 26a.

In light of this record, the district court held that the Act "is simply industry-specific antitrust and fair trade practice regulatory legislation" that is "justified by the existing

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[14/] Neither the section of the 1984 Act authorizing the reservation of PEG channels nor the action of any franchising authority pursuant to that section is being challenged on this appeal. However, appellant Time Warner's omnibus complaint in this action did include such a challenge; that claim is currently pending before the single-judge district court. *See Turner* v. *FCC*, 810 F. Supp. 1308 (D.D.C. 1992) (severing Time Warner's challenge to the 1984 Act, as well as all challenges to provisions of the 1992 Act other than sections 4 and 5, from the three-judge district court's jurisdiction).

structure of the cable business itself" and designed to "create competitive balance in the video industry as a whole, and to redress the effects of cable operators' anticompetitive practices." J.S. App. 13a. As such, "the must carry provisions are, in intent as well as form, unrelated (in all but the most recondite sense) to the content of any messages" that the cable industry might convey. *Id.*

Accordingly, the district court applied the First Amendment balancing test for content-neutral regulation established in *United States* v. *O'Brien*, 391 U.S. 367 (1968), as modified by *Ward* v. *Rock Against Racism*, 491 U.S. 781 (1989). The must carry requirements meet this test, the court held, because they are supported by substantial government interests, including the promotion of fair competition among video "speakers" and the preservation of local broadcasting, J.S. App. 23a, and because they serve those substantial government interests effectively without unnecessarily burdening a significant amount of the cable industry's speech, *id.* at 27a. Indeed, on the latter point, the district court specifically noted the minimal burden imposed by Section 5. *Id.*

Judge Williams dissented. Although he agreed with Congress and the majority that cable industry "bottlenecks" in the free flow of video information pose "a very real problem," he asserted that the remedy chosen by Congress — must carry — is not the least restrictive alternative available for solving the problem. J.S. App. 50a, 66a. Judge Williams also disagreed with Congress' (and the majority's) factual finding that cable poses substantial dangers to the continued vitality of local broadcasting. *Id.* at 60a-67a. Thus, he concluded that the must carry provisions should be reviewed, and struck down, under strict First Amendment scrutiny. In so doing, however, Judge Williams plainly rejected plaintiffs' contention that Congress is constitutionally barred from imposing any type of access requirements on cable operators. *Id.* at 51a.

On April 14, 1993, the district court denied plaintiffs' request for an injunction pending appeal. On April 29, 1993, Chief Justice Rehnquist (as Circuit Justice for the District of Columbia Circuit) denied the same request. The Chief Justice found that "[t]he 1992 Cable Act, like all Acts of Congress, is presumptively constitutional." Pub. Broad. App. at 1a.[15/] He further noted that "even the dissenting judge [below] rejected the argument now urged by applicants — that Congress may not compel cable operators to carry the video signals of programmers they would otherwise choose not to carry." *Id.* at 2a. Indeed, all judges on the district court "recognize[d] that the government may regulate cable television as a medium of communication." *Id.*

THE DISTRICT COURT'S DECISION SHOULD BE AFFIRMED

This Court should affirm the three-judge district court's determination that Section 5 of the Cable Act does not violate the First Amendment. As an initial matter, this case is not appropriate for the Court's review because the cable industry is on the verge of a revolutionary increase in channel capacity. The First Amendment standard to be applied to each medium of communication depends on the special characteristics of that medium; accordingly, this Court should not undertake to fashion a standard for cable television at a time when its fundamental technological characteristics are in a state of such significant flux.

Even if the Court determines that it must reach the merits of this appeal, it should nonetheless affirm the district court's conclusion that Section 5 is constitutional. Appellants face a heavy burden in attempting to overturn a presumptively

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15/ Chief Justice Rehnquist's denial of appellants' request for an injunction pending appeal is reported at 113 S. Ct. 1806 (1993), and is reprinted in the accompanying Public Broadcasters' Appendix. Pub. Broad. App. at 1a.

constitutional Act of Congress. That burden is only increased by the facial posture of appellants' claims and the deference owed by this Court to the extensively detailed findings of fact made by Congress in support of Section 5. Appellants cannot overcome this extraordinary burden here.

In order to affirm the constitutionality of Section 5, the Court need only apply the intermediate First Amendment balancing test established in *O'Brien* for content-neutral regulation. This standard is appropriate because of Section 5's content-neutrality, its incidental impact on speech, and the many factors distinguishing the cable industry from traditional print media — including the longstanding regulatory relationship between government and cable, and the bottleneck characteristics of cable operators. Further, Section 5 meets the *O'Brien* standard because it serves several substantial government interests and is no broader than reasonably necessary in doing so.[16/]

I. CABLE TELEVISION TECHNOLOGY IS ON THE VERGE OF DRAMATIC CHANGE, RENDERING THIS CASE INAPPROPRIATE FOR THE COURT'S REVIEW.

The issues presented by appellants are not appropriate for the Court's review at this time. As noted in the Statement, cable technology is in a state of significant flux. Accordingly, it would be premature for the Court to grapple

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16/ As content-neutral economic regulation, Section 5 is appropriately analyzed for First Amendment purposes under the rational basis review standard established in *Associated Press* v. *United States*, 326 U.S. 1 (1945), and related cases. However, as the public broadcasters make clear below, the Court need not apply the lower level of First Amendment review set forth in *Associated Press* in order to grant this motion to affirm. However, if the Court notes probable jurisdiction, the public broadcasters reserve the opportunity to argue, as they did below, that rational basis scrutiny is appropriate in this case.

with the question of what First Amendment standard should apply to this technology.

Although cable operators are entitled to First Amendment protection, *see Leathers* v. *Medlock*, 111 S. Ct. 1438, 1442 (1991), that conclusion does not answer the question of precisely what First Amendment standard should be applied to their claims. *See City of Los Angeles* v. *Preferred Communications, Inc.*, 476 U.S. 488, 495 (1986). As the Court has pointed out, the characteristics of a particular medium may justify "differences in the First Amendment standards applied to [that medium]." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 386 (1969).

In *Preferred Communications*, the Court declined to address cable operators' First Amendment claims because the Court did not know enough about the nature of the cable industry. *See* 476 U.S. at 495. As Justice Blackmun wrote in his concurrence, "[i]n assessing First Amendment claims concerning cable access, the Court must determine whether the characteristics of cable television make it sufficiently analogous to another medium to warrant application of an already existing standard or whether those characteristics require a new analysis." 476 U.S. at 496. Most recently, in denying appellants' application for an injunction pending appeal, Chief Justice Rehnquist observed that "we have not decided whether the activities of cable operators are more akin to that of newspapers or wireless broadcasters." Aff. App. at 3a.

Thus, this case, if accepted for plenary review, may require the Court to decide whether the characteristics of cable television, as presented on the record of this case, warrant application of the First Amendment standard traditionally applied to newspapers, *see Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), that applied to wireless broadcasters, *see Red Lion*, 395 U.S. 367, or some new and unique standard. This would be a challenging task under any

circumstances, but it is a task the Court ought not to take up at a time when the fundamental characteristics of cable television are still evolving. In short, appellants ask the Court to fashion a First Amendment standard for a moving target.

For example, technological developments promise to moot entirely the claims of the cable programmers. As discussed above, although the number of cable programmers presently exceeds the capacity of the average cable system, this balance will shortly be reversed. Some cable systems already have as many as 150 channels — a capacity that exceeds the number of programmers — and within two or three years many more systems will reach this same level of capacity. Indeed, capacity of as many as 500 channels is on the immediate horizon. *See supra* at 5; 2/12/93 Rau Aff. ¶¶ 9, 11 (Pub. Broad. App. at 22a-23a). When channel capacity exceeds the number of programmers vying for carriage, programmers cannot attribute their failure to achieve carriage to must carry requirements.[17/]

Cable operators no doubt will continue to argue that their First Amendment rights are violated so long as they are required to carry any broadcast signal they would not otherwise choose to carry. Assuming *arguendo* that the must carry requirements cause any such injury (a proposition with which we disagree), the need for this Court's attention, from a practical perspective, is much reduced if cable systems with

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[17/] Appellants may respond that the number of cable program networks and other uses of cable channels will expand at the same rate as channel capacity, but that is no response to the point made in text. To begin with, the record does not demonstrate that cable systems with capacities of 150 channels currently carry all available programming. Instead, such systems continue to make commercial judgments about the appeal of various programming. *See* Affidavit of Joseph J. Collins at ¶ 17 (Feb. 12, 1993) (CR 152). Moreover, the question of whether the supply of programming will keep up with expanded channel capacity is precisely the sort of speculative factor that makes the fashioning of a First Amendment standard for cable television inappropriate at this time.

150 or 500, rather than the current average of 36, channels are required by statute to carry a handful of broadcast signals. Thus, assuming that cable operators have suffered any First Amendment injury, technological developments have already reduced that injury to a *de minimis* level for some cable systems and promise to do so for other systems within the near future.

II. THE DISTRICT COURT'S DECISION SHOULD BE AFFIRMED ON THE MERITS.

A. Appellants Face An Insurmountable Burden.

Appellants face an insurmountable burden in attempting to strike down the 1992 Cable Act. First, as Chief Justice Rehnquist confirmed in denying appellants' request for an injunction pending appeal, "[t]he 1992 Cable Act, like all Acts of Congress, is presumptively constitutional." Pub. Broad. App. at 1a. This presumption is a factor that should be taken into account in evaluating appellants' claim on the merits, especially where, as here, Congress gave extensive and deliberate consideration to the question of the Cable Act's constitutionality. *See Brown* v. *Kendrick*, 487 U.S. 589, 617 (1988); *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981); *supra* page 10. In short, the judgment of the 102d Congress "cannot be ignored or undervalued simply because one segment of the broadcast constituency casts its claims under the umbrella of the First Amendment." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 103 (1973).

Second, appellants must overcome the even greater deference owed by this Court to the extensive and detailed Congressional findings of fact underlying the Cable Act. Such deference is compelled by the fact that "Congress is an institution better equipped [than a court] to assess and evaluate the vast amounts of data bearing on [the] issue[s]." *Walters* v. *Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305,

331 n.12 (1985); *accord Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547, 563 (1990); *Rostker*, 453 U.S. at 72-73. Accordingly, there is no basis for appellants' contention that the Court should re-weigh the massive factual record analyzed by Congress.

Finally, the facial posture of appellants' constitutional challenge imposes an additional burden on their claim. As this Court has stated, "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *Rust* v. *Sullivan*, 111 S. Ct. 1759, 1767 (1991) (internal quotation omitted).[18/] Indeed, all that a defendant need do to defeat a facial challenge is to demonstrate some set of circumstances under which the statute could be constitutionally applied. *Id.*

There is at least one circumstance in which Section 5 can be applied without causing any of the constitutional harm alleged in this case. As noted above, cable systems can comply with Section 5 by placing noncommercial stations on unused PEG channels. Thus, it is entirely conceivable that for some cable operators compliance with Section 5 will not involve any loss of channels otherwise available to them.[19/] Because there is a set of circumstances under which Section 5 can be constitutionally applied, appellants' facial challenge to that section is doomed.

[18/] *See also Younger* v. *Harris*, 401 U.S. 37, 52 (1971) (courts passing on the constitutionality of statutes on their face are acting "fundamentally at odds with the function of the federal courts in our constitutional plan").

[19/] All that is required for such a scenario is a willing franchising authority and a cable operator with unused PEG channels that equal or exceed the number of qualified local noncommercial educational television stations required to be carried (*i.e.*, only one station for more than 80 percent of the cable systems).

B. Section 5 Should Be Reviewed Under A First Amendment Standard No More Stringent Than That Set Forth In *O'Brien-Ward*.

The district court's denial of appellants' constitutional challenge to Section 5 can be affirmed by applying an intermediate level of First Amendment scrutiny, as established in *United States* v. *O'Brien*, 391 U.S. 367 (1968), and *Ward* v. *Rock Against Racism*, 491 U.S. 781 (1989). As demonstrated below, several factors justify the choice of this standard, including Section 5's content neutrality, its incidental impact on speech, and the special characteristics of the cable industry.

1. Section 5 Is Content-Neutral.

It is well-settled that the core of First Amendment protection is a bar against regulation directed to suppressing the content of free expression. *See*, *e.g.*, *Texas* v. *Johnson*, 491 U.S. 397, 414 (1989). This Court has counseled that, in determining content neutrality, "[t]he government's purpose is the controlling consideration." *Ward*, 491 U.S. at 791. Thus, "[g]overnment regulation of expressive activity is content neutral so long as it is justified without reference to the content of the regulated speech." *Id.*; *accord Renton* v. *Playtime Theaters, Inc.*, 475 U.S. 41, 47-48 (1986).

Applying this standard here, it is clear that Section 5's must carry provisions are content-neutral. As set forth in substantial detail in the Act itself, these provisions are based on Congress' concern over the monopolistic position of cable systems, the corresponding likelihood that citizens will be deprived of local public television programming, and the consequent demise of local public television stations, which Congress found to be vital community institutions in which the nation has made an enormous investment. 1992 Cable

Act, § 2(a)(2), (3), (4), (5), (6), & (8). *See supra* pp. 8-10.[20/] In short, Congress' purpose in enacting Section 5 was to preserve and promote continued access to the institution of public television — not to any particular programming — in the face of economic conditions that are denying viewers that access now and may increasingly do so in the future. *See*, *e.g.*, 1992 Cable Act § 2(a)(8); 1992 House Report at 68.

Despite appellants' protestations, *see* J.S. at 20-21, Section 5 cannot be considered content-based because it fosters — through public television — the substantial government interests in education, localism, diversity, and community service. These interests are institutional ones, similar to those served by universities or libraries, and are not, therefore, associated with any particular speech or point of view.[21/] Instead, Section 5 is nothing more than content-neutral economic regulation — akin to the antitrust laws or commercial regulations — designed to eradicate market imbalances and ensure "the widest possible dissemination of information from diverse and antagonistic sources." *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945).

2. Section 5 Has Only An Incidental Impact On Speech.

Because Section 5 of the Cable Act is content-neutral, and does not compel or prohibit the expression of any

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[20/] The legislative history of the Act contains a similar analysis. *See*, *e.g.*, 1992 House Report at 68-72.

[21/] No one could argue that government support for a library or university constitutes government preferment for the books the library chooses for its shelves or the university chooses for its courses. Similarly, because Section 5 does not dictate the content of public television programming that must be carried by cable operators, the governmental support for the institution of public television does not offend the First Amendment.

particular viewpoint or message, its impact on speech is entirely incidental. As the district court correctly found, the indirect impact of Section 5 is another factor weighing in favor of a low level of First Amendment review. *See* J.S. App. 15a-19a; *Home Box Office, Inc.* v. *FCC*, 567 F.2d 9, 47-48 (D.C. Cir. 1977).

Appellants contest this conclusion on the ground that the must carry provisions impermissibly infringe on cable operators' "right not to speak" — previously described in this litigation as the cable operators' "editorial discretion." J.S. at 16-18. For this, appellants rely on *Miami Herald* v. *Tornillo*, 418 U.S. 241 (1974), in which the Court struck down a Florida statute granting political candidates the right to reply to criticisms published in newspaper editorials. Unlike the statute in *Tornillo*, however, which authorized a right of access predicated on content (*i.e.*, a "response" to the newspaper's view), the must carry rules do not dictate that cable systems carry broadcast "speech" having any particular content. *Cf.* 1992 House Report at 69, 72 (discussing enormous variety of public television content). Nor are cable operators "being compelled to affirm their belief in any governmentally prescribed position or view." *Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74, 88 (1980).[22/] Given the minimal burden on cable systems imposed by Section 5, *see supra* p. 9, this provision will not impose any

[22/] For these same reasons, appellants' reliance on *Riley* v. *Nat'l Fed'n of the Blind, Inc.*, 487 U.S. 781 (1988), is misplaced. In *Riley*, the Court struck down a state law that required entities engaging in particular speech (charitable solicitation) to engage in other particular speech (the disclosure of certain information). Here, Section 5 is not based on the content of the cable operators' speech, nor does it require carriage of programming with any particular content.

limitation — substantial or otherwise — on a cable operator's "right not to speak" or alleged "editorial discretion."[23/]

Second, plaintiff argues that the must carry provisions discriminate against the cable industry in order to promote the speech of broadcasters. J.S. at 19-20. This argument, however, has been rejected by the Court on several occasions. For example, in *FCC* v. *National Citizens Committee For Broadcasting*, 436 U.S. 775 (1978) ("*NCCB*"), the Court upheld the FCC's rules restricting cross-ownership of same-market media outlets as "a reasonable means of promoting the public interest in diversified mass communications." *Id.* at 802. The Court held that "efforts to enhance the volume and quality of coverage of public issues through regulation of broadcasting may be permissible where similar efforts to regulate the print media would not be." *Id.* at 800 (internal citations omitted).

More recently, in *Leathers* v. *Medlock*, 111 S. Ct. 1438, 1446 (1991), the Court explicitly stated that "a differential burden on speakers is insufficient by itself to raise First Amendment concerns." Indeed, if it were true that strict scrutiny applied to any regulation favoring one member of the media over another, then there would be no basis for the government's well-settled right to arbitrate between the claims of competing speakers under valid time, place, and manner restrictions. *See, e.g.*, *Kovacs* v. *Cooper*, 336 U.S. 77 (1949) (favoring the "natural speech" of residents and

[23/] In addition, the nature of the "editorial discretion" exercised by cable operators is far removed from that exercised by newspaper editors. Except for the few cable operators who produce their own programming, cable systems are passive conduits for the speech of others. While there may be some discretion involved in choosing which programming to transmit, it is plainly not the same discretion exercised by newspaper editors.

denizens of public fora over the "amplified" speech of persons driving sound trucks).[24/]

3. The Cable Industry Is Unlike The Print Medium.

A final factor justifying a low level of First Amendment scrutiny is that the cable industry possesses a number of unique characteristics that distinguish it from the traditionally-protected print medium. First, unlike the print medium, the cable industry has for almost thirty years been the recipient of substantial government assistance. For example, unlike *any* business entity other than traditional public utilities, cable relies for dissemination of its message upon the permanent physical occupation of governmental resources. In order to provide cable service to subscribers, cable wires and associated equipment must be hung from utility poles, housed in underground utility ducts, or otherwise placed in or across public rights-of-way. Further, cable operators necessarily depend upon franchising authorities to exercise their powers of eminent domain in order to ensure cable's access to private property. *See Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

Cable operators also receive a host of statutory benefits. For example, government regulates the rates for cable's access to utility poles. *See* 47 U.S.C. § 224. Congress also imposes a limit on the amount of the fees local franchising authorities can extract from cable operators. *See* 47 U.S.C. § 542. Indeed, even the existence of the franchising authority is a benefit to the cable industry, because, as a practical

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[24/] Appellants' argument is based on a vastly overstated reading of *Buckley* v. *Valeo*, 424 U.S. 1, 48-49 (1976). But even the *Buckley* Court recognized that this "favoritism" principle applies only in "traditional free speech case[s]" and not in cases, such as those involving the broadcast media or, indeed, the cable industry, posing "unique and special problems." 424 U.S. at 50 n.55. *See also* J.S. App. 17a-18a (finding that *Buckley* does not support appellants' favoritism argument).

matter, the number of such franchises is necessarily limited. *See* 47 U.S.C. § 541.

In addition, under the provisions of the Copyright Act, cable operators are granted a compulsory license to retransmit broadcast signals. *See* 17 U.S.C. § 111(c) & (d) (1992). Thus, government (and the broadcasting industry) essentially subsidizes cable operators by granting them free and unrestricted access to local broadcasting. While Section 6 of the Cable Act alters this regime to some extent for commercial broadcasters, the retransmission consent scheme established by Section 6 does not apply to public broadcasters. *See* 47 U.S.C. § 325(b)(2)(A).

The existence of these numerous government benefits is a characteristic unique to the cable industry and stands in stark contrast to the historic independence (and even antagonism) of the print medium vis à vis the government. Moreover, as numerous courts have found, the existence of these benefits justifies a less searching First Amendment standard than that traditionally applied to the print media.[25/]

[25/] *See, e.g., Warner Cable Communications* v. *City of Niceville*, 911 F.2d 634 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 2839 (1991); *Chicago Cable Communications* v. *Chicago Cable Comm'n*, 879 F.2d 1540 (7th Cir. 1989), *cert. denied*, 493 U.S. 1044 (1990); *Central Telecommunications, Inc.* v. *TCI Cablevision, Inc.*, 800 F.2d 711 (8th Cir. 1986), *cert. denied*, 480 U.S. 910 (1987); *Omega Satellite Products Co.* v. *City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982) (Posner, J.); *Community Communications Co.* v. *City of Boulder*, 660 F.2d 1370, 1377 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982); *Telesat Cablevision, Inc.* v. *City of Riviera Beach*, 773 F. Supp. 383 (S.D. Fla. 1991); *Erie Telecommunications, Inc.* v. *City of Erie*, 659 F. Supp. 580, 599-600 (W.D. Pa. 1987), *aff'd*, 853 F.2d 1084 (3d Cir. 1988); *Carlson* v. *Village of Union City*, 601 F. Supp. 801, 809-12 (W.D. Mich. 1985); *Berkshire Cablevision* v. *Burke*, 571 F. Supp. 976, 985-88 (D.R.I. 1983), *vacated as moot*, 773 F.2d 382 (1st Cir. 1985). *But see Preferred Communications, Inc.* v. *City of Los Angeles*, 68 Rad Reg.2d (P&F) 121 (C.D. Cal. 1990); *Century Federal, Inc.* v. *City of Palo Alto*, 710 F. Supp. 1552 (N.D. Cal. 1987); *Group W Cable, Inc.* v. *City of Santo Cruz*, 669 F. Supp. 954 (N.D. Cal. 1987).

Second, the cable industry is also distinguishable from print because of its increasingly dominant position as a distributor of information to household televisions. Cable's role as an information bottleneck results from the physical scarcity of public rights-of-way — scarcity that, as a practical matter, completely insulates most cable operators from competition. Indeed, Congress cited the "necessarily severely limited number of franchised cable systems able to operate in any one community," as grounds for ensuring, through must carry, that "the diversification principle is not undermined in this increasingly important governmentally franchised medium." 1991 Senate Report at 51-52.

Congress' findings have been echoed by numerous courts in their review of cable regulations. *See supra* note 25. Because cable operators are increasingly acting as impediments, rather than facilitators, to the "widest possible dissemination of information from diverse and antagonistic sources," *Associated Press*, 326 U.S. at 20, regulations governing their activity need not be accorded the highest standard of First Amendment review.[26/]

C. Section 5 Should Be Upheld Under *O'Brien-Ward*.

Under *O'Brien-Ward*, the must carry rules clearly satisfy the First Amendment because they serve "substantial"

[26/] As the district court made clear, the *Tornillo* Court's rejection of a similar economic scarcity argument is distinguishable here because of the content-based nature of the right-of-reply law at issue in that case. J.S. App. 22a n.25. *Tornillo* is also distinguishable because newspapers do not function in the same "bottleneck" capacity as do cable operators. Even in one-newspaper communities, there are a myriad of ways for print speakers to reach their audiences — flyers, leaflets, newsletters, alternative newspapers, and the like. In contrast, the sole cable operator in a community typically determines which voices will be heard by cable subscribers in that community. This peculiar characteristic of cable compels a lower level of First Amendment scrutiny than that applied to print.

government interests and are no broader than necessary in doing so.[27/]

As set forth in the Act and its legislative history, the Cable Act's must carry provisions are intended to further several longstanding government interests: (1) preserving for the public the benefits of local television service, (2) promoting the widespread dissemination of information from diverse sources, and (3) promoting fair competition in the video marketplace. *See generally* 1992 Cable Act § 2(a). With respect to Section 5 in particular, the must carry rules also serve the goals "of furthering the educational development of all citizens and . . . protect[ing] the nation's substantial investment in and commitment to public television services." 1992 House Report at 68; *see id.* at 68-74; 1992 Cable Act § 2(a)(8).

As the district court found, the substantiality of each of these interests is "beyond dispute." J.S. App. 23a. Localism, diversity, and fair competition have served as the touchstones of Congressional regulation of the television industry — and judicial review of that regulation under the First Amendment — since 1934.[28/] More recently, in its amendments to the 1934 Communications Act, Congress made the point as clearly as it can be made: "public television

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[27/] As made clear above, Section 5 meets *O'Brien*'s requirement that "the governmental interest [underlying the regulation] is unrelated to the suppression of free expression." 391 U.S. at 377. As demonstrated by the entirety of this Motion to Affirm, Section 5 also meets *O'Brien's* requirement that the government regulation at issue be "within the constitutional power of the Government." *Id.*

[28/] *See, e.g., Metro Broadcasting, Inc.*, 497 U.S. at 567 ("the interest in enhancing broadcast diversity is, at the very least, an important governmental objective"); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 714 (1984) ("There can be little doubt that the comprehensive regulations developed over the past 20 years by the FCC to govern signal carriage by cable television systems reflect an important and substantial federal interest."); *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 172-73 & nn.38-39 (1968).

and radio stations and public telecommunications services constitute valuable local community resources for utilizing electronic media to address national concerns and solve local problems through community programs and outreach programs." Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 4, 106 Stat. 949 (1992) (amending 47 U.S.C. § 396(a)). Thus, "it is in the public interest for the Federal Government to ensure that all citizens of the United States have access to public telecommunication services through all appropriate available telecommunications distribution technologies." *Id.* Indeed, appellants do not even appear to contest the point in their Jurisdictional Statement.[29/]

The Cable Act's must carry rules are also no broader than reasonably necessary to achieve the government's interest, thus satisfying the second major prong of the *O'Brien* test. Congress has carefully crafted the requirements of Section 5 of the Cable Act to achieve its objectives with minimal burden on cable operators. Among other provisions, the must carry requirements of Section 5 are circumscribed in the following ways:

- The number of public television stations that a cable operator must carry is limited, depending on the number of channels available on the system. § 5(b)(1), (2) & (3).[30/]

[29/] Appellants do attack as "speculative" and "fanciful" Congress' finding that cable poses a threat to local broadcasting. J.S. at 25. That contention is both misplaced and wrong. Even if it was proper for this Court to re-weigh the factual evidence presented to Congress (which it plainly is not), that evidence clearly establishes the anticompetitive treatment accorded to local public television stations by cable operators following the demise of the FCC's must-carry rules. *See supra* pp. 8-9.

[30/] In general, systems with 12 or fewer channels are required to carry only one public television station; systems with 13-36 channels must carry one but no more than three public television stations; and systems with more than 36 channels must carry all public television stations that request carriage.

- The cable operator is not obligated to carry duplicate qualified signals. § 5(b)(3)(C).

- If the cable operator is obliged to add a public television station under the must carry rules, it can choose to carry that station on a PEG channel not then being used for its designated purpose, subject to the agreement of the franchising authority. § 5(d). *See* 1992 House Report at 100.

Section 5 is also congruent with Congress' interest in preserving and promoting localism. As Congress found, noncommercial stations have long been the beacon of localism in the television industry. Not only have they served the needs of local communities since noncommercial spectrum channels were allocated in 1952, but local governments and citizens have supported the continued provision of these services through substantial tax dollars and voluntary contributions. *See* 1992 Cable Act § 2(a)(8). In light of the economic structure and incentives of the cable industry, it cannot seriously be argued that Congress has overreached in preserving this locally supported educational service through modest must carry rules.

Finally, the channel position aspects of Section 5 serve the goal of promoting competition in the video services market. At the outset, it is difficult to conceive how positioning requirements burden any First Amendment interest, because they do not suppress any speech. Assuming that such a First Amendment interest exists, however, the channel positioning provisions are clearly justified. As found by Congress, if left unregulated, cable operators will have every incentive to shunt public television stations to even less desirable channels than they currently occupy. 1992 House Report at 71. Under these circumstances, the channel position requirements are clearly no broader than necessary to support the government's interest in meaningful access to public television services.

CONCLUSION

For the reasons stated above, the Court should affirm the district court's judgment upholding the constitutionality of Section 5.

Respectfully submitted,

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Dated: September 7, 1993

APPENDICES

SUPREME COURT OF THE UNITED STATES

No. A-798

TURNER BROADCASTING SYSTEM, INC., ET AL.
v.
FEDERAL COMMUNICATIONS COMMISSION ET AL.

ON APPLICATION FOR AN INJUNCTION

[April 29, 1993]

CHIEF JUSTICE REHNQUIST, Circuit Justice.

Applicants have asked me, as Circuit Justice for the District of Columbia Circuit, to enjoin enforcement of §§ 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat. 1471-1481, which require cable operators to reserve a portion of their channel capacity for carrying local commercial and noncommercial educational broadcast stations. Applicants, cable operators and programmers, contend that these "must-carry" provisions violate the First Amendment because (1) they tell cable operators what speakers they must carry, thereby controlling the content of the operator's speech and shrinking the number of channels available for programming they might prefer to carry; (2) they inhibit the operators' editorial discretion to determine what programming messages to provide to subscribers; and (3) they give local broadcast "speakers" a preferred status. I herewith deny the application.

The 1992 Cable Act, like all Acts of Congress, is presumptively constitutional. As such, it "should remain in effect pending a final decision on the merits by this Court." *Marshall* v. *Barlow's, Inc.*, 429 U.S. 1347, 1348 (1977)

(REHNQUIST, J., in chambers). Moreover, the Act was upheld by the three-judge District Court, and even the dissenting judge rejected the argument now urged by applicants — that Congress may not compel cable operators to carry the video signals of programmers they would otherwise choose not to carry. __ F. Supp. __, __ (DC 1993). Unlike applicants, therefore, all three judges below would recognize that the government may regulate cable television as a medium of communication. *Ibid.*

Equally important is the fact that applicants are not merely seeking a stay of a lower court's order, but an injunction against the enforcement of a presumptively valid Act of Congress. Unlike a stay, which temporarily suspends "judicial alteration of the status quo," an injunction "grants judicial intervention that has been withheld by the lower courts." *Ohio Citizens For Responsible Energy, Inc.* v. *NRC*, 479 U.S. 1312, 1313 (1986) (SCALIA, J., in chambers). By seeking an injunction, applicants request that I issue an order *altering* the legal status quo. Not surprisingly, they do not cite any case in which such extraordinary relief has been granted, either by a single Justice or by the whole Court.

The All Writs Act, 28 U.S.C. § 1651(a), is the only source of this Court's authority to issue an injunction. We have consistently stated, and our own Rules so require, that such power is to be used sparingly. See, *e.g.*, *Ohio Citizens For Responsible Energy, supra,* at 1313; this Court's Rule 20.1 ("The issuance by the Court of an extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion sparingly exercised"). "[J]udicial power to stay an act of Congress, like judicial power to hold that act unconstitutional, is an awesome responsibility calling for the utmost circumspection in its exercise. This factor is all the more important where, as here, a single member of the Court is asked to delay the will of Congress to put its policies into effect at the time it desires." *Heart of Atlanta Motel, Inc.* v.

United States, 85 S. Ct. 1, 2, 13 L. Ed. 12 (1964) (BLACK, J., in chambers).

An injunction is appropriate only if (1) it is "necessary or appropriate in aid or [our] jurisdiction," 28 U.S.C. § 1651(a), and (2) the legal rights at issue are "indisputably clear." *Communist Party of Indiana* v. *Whitcomb,* 409 U.S. 1235 (1972) (REHNQUIST, J., in chambers); *Ohio Citizens For Responsible Energy, supra,* at 1313. Without doubt, implementation of §§ 4 and 5 would not prevent this Court's exercise of its appellate jurisdiction to decide the merits of applicants' appeal. Nor is it "indisputably clear" that applicants have a First Amendment right to be free of the must-carry provisions. In *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974), we struck down Florida's right of reply statute, holding that the State may not compel "editors or publishers to publish that which reason tells them should not be published." *Id.,* at 256 (internal quotation marks omitted). Under *Tornillo*, Congress plainly could not impose the must-carry provisions on privately owned newspapers. In *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367 (1969), however, we upheld the Federal Communications Commission's requirement that broadcasters cover public issues, and give each side of the issue fair coverage. Noting that there is a finite number of frequencies available, we stated that "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." *Id.,* at 390. Although we have recognized that cable operators engage in speech protected by the First Amendment, *Leathers v. Medlock*, 499 U.S. ___, ___ (1991); *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986), we have not decided whether the activities of cable operators are more akin to that of newspapers or wireless broadcasters. *Id.*, at 494-495.

In light of these two lines of authority, it simply is not indisputably clear that applicants have a First Amendment right to be free from government regulation. The application for an injunction pending appeal to this Court is therefore denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Turner Broadcasting System, Inc., *et al.*,	)	
Plaintiffs,	)	
v.	)	Civ. Action No. 92-2247
	)	(SFW, TPJ, SS)
FCC and United States,	)	
Defendants,	)	
Daniels Cablevision, Inc.,	)	
Plaintiff,	)	
v.	)	Civ. Action No. 92-2292
	)	(SFW, TPJ, SS)
United States,	)	
Defendant.	)	

AFFIRMATION OF MICHAEL C. RAU

District of Columbia: ss

I, Michael C. Rau, affirm pursuant to 28 U.S.C. § 1746, as follows:

1. I am the Senior Vice President, Science & Technology, of the National Association of Broadcasters. I submit this affidavit in support of the Opposition to Plaintiffs' Motion for Preliminary Injunction and the Opposition to Plaintiff's Motion for Summary Judgment filed by the National Association of Broadcasters in these cases.

2. I am responsible for a broad range of NAB technical affairs and for providing technical advice and guidance to the membership and Board of Directors of the Association. As part of my duties, I review technological developments which may affect the television industry, either through changes in broadcast television systems or changes in other technologies used to distribute television signals, including in particular cable television. Prior to joining NAB in 1981, I was employed by Jules Cohen & Associates, an engineering consulting firm, and by Rau Radio Stations, Inc., a broadcasting company with cable television interests.

3. Plaintiffs have alleged that the must carry requirements of the 1992 Cable Act may cause displacement of certain cable program services because of a lack of capacity on cable systems. Briefly, technology improvements and increased customer expectations have resulted in a strong and unmistakable trend toward expanding channel capacity on cable television systems, especially at franchise renewal time, developments which make displacement either unlikely or unnecessary. Even without exploiting new technologies such as fiber optics and signal compression, today's cable and electronics technology easily allows substantial improvements in channel capacity. Often even the most primitive systems, with only 12-22 channels, can be upgraded to provide 40 channels without overhauling the system. Most new builds and rebuilds are for high capacity systems which can provide at least 80 channels. Some systems are now appearing with capacity of 150 channels or more.

4. There are two new technologies which are being used to dramatically expand the channel capacity of cable television systems: fiber optics and video compression. Installation of fiber optic networks is already proceeding for many cable operators. The capacity on optical fibers is only limited by the electronics necessary to interface with the fiber. With today's electronics technology, a single fiber can carry up to

80 NTSC television signals. NTSC is the current technical standard for U.S. television signals.

5. Video compression provides the greatest promise for long term expansion of cable channel capacity. Cable Laboratories (CableLabs), a technical facility funded completely by the cable industry, is evaluating standards proposals to develop a system for delivering compressed television signals from the cable head-end to consumers. Compression technologies already exist which can fit 4 NTSC quality video signals in an existing 6 MHz television channel. CableLabs expects to have a system available for cable operators' use by 1994.

6. Therefore, industry trends are combining with new technologies to expand the capacity of cable television systems. Systems such as one in Queens, New York, with 150 channels, are pointing the way to the future. If technology developments continue as most experts expect, compression will allow channel capacity on a cable television system to be multiplied by a factor of four, with compression equipment availability expected by 1994. Cable operators, foreseeing the imminent arrival of excess capacity, are exploring how to use these channels to branch out into personal communications and other bus[illegible]sses. A more detailed description of these developments follows.

Background

7. Channel capacity for a cable television (CATV) system is limited by the band-width available in the system. Every television channel carried on a cable system requires 6 MHz of bandwidth. Total system bandwidth, in turn, is limited by the physical properties of the cable system equipment.

8. A cable system can be divided into 5 parts: (1) the headend, (2) the trunk, (3) the distribution system, (4) the

drop cable, and (5) the customer premises equipment.[1/] The trunk is the long backbone cable that runs through the system to within a mile or so of each subscriber. The distribution system distributes the signal from the trunk throughout the various neighborhoods served by the system. The drop cable is the line which connects an individual subscriber to the cable distribution system.

9. The bandwidth of a system is limited by the trunk and, to a lesser extent, the distribution system and the drop cable. Only 14% of all cable footage is in the trunk.[2/] Thus, when cable systems are upgraded to expand their channel capacity, most of the existing cable is left intact.[3/] This has made it easy and commonplace for cable systems to increase their capacity as technology has improved.

Current CATV Capacity

10. Because the cable and electronic components used in CATV systems are fairly standardized, these systems tend to operate at a few bandwidth plateaus. On the lowest plateau are very old, small systems which operate at an upper frequency at 220 MHz, yielding up to 22 channels of capacity.[4/] On the upper plateau are modern, urban systems

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1/ Ciciora, *An Overview of Cable Television*, National Association of Broadcasters Engineering Handbook 731, 732 (8th ed. 1992).

2/ *Id.* at 746.

3/ *Id.*

4/ In figuring the channel capacity of a cable system, not all frequencies are used for distribution of video programs. The lower 54 MHz, as well as 20 MHz for the FM radio band, are not occupied with television signals. Another two 6 MHz channels, designated A1 and A2, are typically used for isolating system faults. Thus a system with a 220 MHz upper bandwidth limit has capacity for: (220-54-20-12)/6 = 134/6 = 22 channels.

operating at 1 GHz with over 150 channels of capacity.[5/] In between are plateaus at 330 MHz, 450 MHz, 550 MHz, and 750 MHz with capacities of up to 40, 60, 80 and 110 channels respectively.[6/]

11. No more than ten percent of cable plant today operates at the lowest capacity plateau of 22 or fewer channels.[7/] Even these systems can be, and often are, upgraded to 330 MHz and 40 channels without a complete rebuild. Seventy-five percent of cable plant today consists of systems with 330 MHz bandwidth and up to 40 channels of capacity. However, few new systems are built with the limited capacity of a 330 MHz system.[8/] Most new systems are built with bandwidths of 550 MHz providing 80 channel capacity.[9/] Already, 15% of existing cable plant is in the "high capacity" category.[10/]

5/ *See, e.g.*, Jesuale, *Video on Demand: Cable's Next Step?*, TV Technology, Sept. 1992, at 1, 48. The Time-Warner system in Queens, New York provides 150 channels of programming, went on-line in February 1992 and uses fiber optics in its trunk.

6/ *See* Ciciora, *supra* note 1, at 736.

7/ *Id.* at 736, 738.

8/ *See id.*

9/ *See* Moloney, Schilling, and Marz, *Expanded Bandwidth Requirements in CATV Applications*, 1992 NCTA Technical Papers 200, 201 [hereinafter *Expanded Bandwidth*] (noting the rapid expansion of cable system bandwidth "to the current standard level of 550 MHz").

10/ Ciciora, *supra* note 1, at 738.

Trends

12. Bandwidth expansion in CATV has been routine since the early days of cable.[11/] Clearly the trend is for new systems and rebuilds to expand bandwidth to 550 MHz or more with a capacity of at least 80 channels.[12/] This trend is being driven by consumer demands,[13/] and technology improvements.[14/]

13. This high-capacity trend is reported in a recent poll by Midwest CATV and *Cablevision*.[15/] The pool of 200 general managers revealed that 43% of the managers would upgrade or rebuild their system in 1993.[16/] An earlier poll showed that 36% planned to modernize in 1992.[17/] Of the

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11/ *Expanded Bandwidth*, *supra* note 9, at 201. The authors note that bandwidth, and hence capacity, has doubled every 12-15 years.

12/ *See, e.g.*, *Expanded Bandwidth*, *supra* note 9, at 200; Brugliera, *Compression and its Impact on Cable*, Communications Technology, May 1992, at 18; Vaughan, *Upgrades with Fiber: Selecting Cost-Effective Architectures*, 1991 NCTA Technical Papers 273.

13/ *See, e.g.*, Brugliera, *supra* note 12, at 18 (noting the growth in available programming choices); Ciciora, *Scenarios for Compressed Video in Cable Practice*, 1991 NCTA Technical Papers 123. Ciciora maintains that "[w]hen given a choice, the American consumer has always chosen 'more' over 'better'." He points out that most VCRs are used in the six hour "EP" format despite "the noticeably superior video and dramatically better audio" available in the two hour "SP" mode. *Id.*

14/ *See* Chiddix and Vaughan, *Upgrading Coaxial Distribution Networks with Amplified Taps*, 1991 NCTA Technical Papers 245 (discussing how low cost fiber technology is allowing 1 GHz systems to be built); Brugliera, *supra* note 12, at 18 (noting that steady advances in technology are extending cable plant bandwidth beyond 350 MHz and 450 MHz bandwidths).

15/ *Building Blocks*, Cablevision, September 21, 1992, at 44.

16/ *Id.*

17/ *Id.*

managers planning upgrades or rebuilds, 78% said that they would be expanding the capacity of their systems. And 15% of those surveyed will be expanding their systems to a 1 GHz bandwidth and its capacity for 150 channels.[18/]

14. Thus, steady bandwidth and channel capacity expansion has been, and continues to be, the trend for all cable systems. Customer demands and technology improvements have fueled this expansion. However, two new technologies, *fiber optics* and *video compression*, promise to turn this slow, steady expansion into an imminent explosion in available capacity.

New Technologies for Expanding Channel Capacity

15. Fiber optics and video compression are two revolutionary new technologies which are being used to expand the channel capacity of cable television systems. Fiber optics expands the effective bandwidth of the cable system. Video compression makes more efficient use of whatever bandwidth is already available in the system. If a CATV system is analogized to a water distribution system, then adding fiber optics is like using a bigger pipe, and adding signal compression is like using a more powerful pump.

16. The combined impact of these technologies is an imminent explosion in channel capacity on CATV systems. Indeed, the impact of fiber optics alone on cable television has been compared to the tremendous growth of cable

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18/ *Id.*

television popularity following its marriage to satellite technology in the 1970's.[19/] "Technology is making channel capacity ubiquitous and low cost."[20/]

Fiber Optics

17. Installation of fiber optic networks in CATV systems is now commonplace.[21/] Fiber optics is an extremely cost-effective approach to upgrading a cable trunk.[22/] The capacity of an optical fiber is, in practice, only limited by the electronics necessary to interface with the fiber. With today's electronics technology, a single fiber can carry up to 80 NTSC television signals.[23/] Many systems are built with several fibers bundled together for even greater capacity.

19/ Mattson, *Fiber to Feeder Design Study*, 1991 NCTA Technical Papers 309, 319.

20/ Pollack, *Packing Cable with Programs*, New York Times, January 22, 1992, at D1 (quoting Mr. Craig Tanner, Vice President for Advanced Television Products at Cable Television Laboratories (CableLabs)).

21/ *See, e.g.*, Holobrow, Bohn, and Das, *Passive Optical Network (PON) Architectures and Applications*, 1992 NCTA Technical Papers 364 (noting that "fiber systems have supplanted coaxial trunking in most new and rebuild construction in the last two years."); Ciciora, *supra* note 1, at 738, 740, 746 (noting that optical fiber is now "frequently used" in cable systems as part of upgrades, rebuilds, and new builds).

22/ *See*, Ciciora, *supra* note 1, at 746 (noting that some studies have shown that the cost of upgrading a system's trunk to fiber is less than $25 per subscriber). *See also* McGrath, *The Evolution of Broadband Hybrid Networks*, 1992 NCTA Technical Papers 124, 126 (proclaiming that, "[f]iber trunking/coax distribution . . . with analog bandwidths of 600 MHz (to a demonstrated top of 1 GHz) is now the architecture of choice.").

23/ *See, e.g.*, Weinschenk, *Jerrold to Extend Starfire Family*, Cable World, April 20, 1992, at 62; Kearns, *An 80-Channel High Performance Video Transport System Over Fiber Using FM-SCM Techniques for Super-Trunk Applications*, 1991 NCTA Technical Papers 71.

18. In fact, fiber use has been proposed to interconnect cable systems with one another.[24/] In this vein, Adelphia Communications is currently building a 165 mile, 1 GHz fiber optic loop around the state of Vermont.[25/] And New Jersey Bell recently announced a partnership with Sammons Communications to build a fiber-to-the-curb (FTTC) system to 11,700 customers in New Jersey.[26/]

19. Once installed, fiber eliminates the capacity bottleneck on the cable trunk. In fact, many cable industry executives see the tremendous capacity made available by fiber as a tool to allow them to expand into the telephone and personal communications industries.[27/] Tele-Communications, Inc. has been testing personal communications networks (PCNs) with McCaw Cellular in Oregon.[28/] Meanwhile, CableLabs has formed a PCN Technical Advisory Subcommittee to explore provision of these services using the excess capacity on cable networks.[29/]

20. In addition to PCN, cable executives appear to want to use their new-found excess capacity to provide more pay-

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24/ Stratton, *A Future Without Satellites*, Cable Television Business, July 1, 1990, at 20A.

25/ *See Ring Around the State*, Cablevision, September 21, 1992, at 40.

26/ Communications Daily, November 17, 1992, at 6.

27/ Hart, *Cost Effective Cable Television Transport for PCN*, 1992 NCTA Technical Papers 148; Gitten, Albagli, and Walker, *Planning CATV-Based Personal Communications Networks*, 1992 NCTA Technical Papers 129.

28/ *Impact of Fiber Optics*, Communications Technology, May 1992, at 28, 40.

29/ Dukes, *CableLabs 1991 Advanced Network Development Work*, 1991 NCTA Technical Papers 232, 234.

per-view channels.[30] In fact, in one almost unbelievable trial, Comcast and Jerrold have teamed to design a system that would dedicate 25 channels to a single movie, with start times rotating at 5 minute delays.[31] Indeed the Time-Warner 150-channel cable system in Queens, New York includes 57 channels of pay-per-view.[32]

21. Fiber is available, cost effective, and is being used in most CATV trunk construction today. It is expanding cable system capacity beyond the number of conventional programming services available to cable systems today. The result is that plans are in the works to use the excess capacity for PCN, pay-per-view, and other subscription services.

Video Compression

22. If fiber optics is a crowbar to pry open previous bottlenecks in CATV systems, then video compression is a sledgehammer to smash the bottleneck to pieces. Fiber optics adds capacity to a cable system. Video compression literally multiplies that capacity by a factor of four or more. Video compression is the future of virtually every video transmission and storage system from CATV to High Definition Television (HDTV). And video compression has already moved from the laboratory to the marketplace.

23. Video compression eliminates redundancy and irrelevancy in video signals, thus reducing the bandwidth required for their transmission. An NTSC television signal requires 6 MHz of bandwidth, but it is possible to fit six

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[30] *See, e.g.*, Brugliera, *supra* note 12, at 18; *Multiple Channels Planned*, TV Digest, September 21, 1991, at 7.

[31] Jesuale, *supra* note 5, at 48.

[32] *Id.* at 48.

compressed NTSC signals in that same 6 MHz bandwidth.[33] Thus, even a very limited capacity cable system operating at 220 MHz could be upgraded to provide over 100 video channels *without replacing the existing cable plant.*[34] And 1 GHz systems will be able to provide over 500 channels of television programming. Although decompression converters would need to be provided for every customer, Hal Krisbergh, President of Jerrold, has estimated that these boxes will only cost about 35% more than existing boxes.[35]

24. Video compression is already being installed in satellite transmission systems for cable programming distribution. National Technological University and Westcott Communications have recently converted to Compression Lab's SpectrumSaver system.[36] Meanwhile Rogers Cable has been using the General Instruments DigiCipher compression system since July 1992 to provide 4 video signals over a single transponder.[37] Cablevision Systems and Multivision of Mexico have also selected the DigiCipher system.[38]

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[33] *See, e.g.*, Weinschenk, *DigiCipher Gear Wins High Marks*, Cable World, September 21, 1992, at 46; *Westcott and NTU — Important End Users*, Satellite News, November 2, 1992, at 4; Communications Daily, September 16, 1992, at 5-6.

[34] *See* Tanner, *Digital Compression and Transmission: A Primer for Non-Technical Readers*, Specs, October 1992, at 3.

[35] Weinschenk, *Digital Compression: No Sure Thing*, Cable World, April 27, 1992, at 30.

[36] *Westcott and NTU - Important End Users*, *supra* note 33, at 4.

[37] Weinschenk, *supra* note 33, at 46.

[38] Lambert, *Digital Compression Now Arriving on the Fast Track*, Broadcasting, July 27, 1992, at 40; *Multivision to Use Digicipher*, TV Digest, June 8, 1992, at 7.

25. The migration of compression from the satellite feed to the cable distribution system would appear to be imminent. All of the systems being considered by the Federal Communications Commission for a U.S. standard for terrestrial HDTV use video compression, thus ensuring that integrated circuits will be mass produced as an important component of the next generation of home receivers.

26. Most experts are in agreement that video compression is coming soon to CATV systems and will be cost effective. CableLabs joined with Viacom, Tele-Communications Inc. (TCI), and the Public Broadcasting Systems (PBS) to issue a request for proposals for satellite transponder compression systems in the fall of 1991.[39] The process ultimately led to purchase negotiations between Viacom, TCI, and PBS, and the three compression finalists: AT&T, General Instruments, and Scientific-Atlanta.[40]

27. CableLabs is now focusing on development of headend-to-the-home compression systems.[41] And the experts are predicting that these systems will become available by 1994.[42] John Malone, President of TCI, has opined that compression will have as much impact on the

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[39] Lambert, *supra* note 38, at 40.

[40] *Id.*

[41] *Id.* at 42. CableLabs President Dick Green has said, "In general, I have a lot of faith in the entrepreneurial process that costs are tractable." Weinschenk, *supra* note 35, at 30.

[42] Tony Weselberger, Vice President at Oak Communications, believes compression will hit the market beginning in 1994. Lambert, *supra* note 38, at 44. Mike Harris, Senior Vice President of Century Communications also sees 1994 as a target date for compression in the distribution system. *Building Blocks*, *supra* note 15, at 44. AT&T has also said that their system will be available to cable television operators by 1994. Farhi, *AT&T Announces System to Expand Cable Offerings: Technology Could Allow Up to 500 Channels*, Washington Post, May 5, 1992, at C1.

development of the cable industry as did the availability of communications satellites which made national distribution of programming possible.[43]

Conclusions

28. The history of CATV systems has been a steady expansion of channel capacity. Systems are now in place with 1 GHz of bandwidth and 150 channels of capacity. These systems are pointing the way to the future. Most new systems and upgrades to old systems are providing at least 80 channels of capacity. This expansion is and will continue to be built on the availability of low cost, wide bandwidth fiber optics.

29. Meanwhile, a tremendous explosion in available capacity is at hand with the introduction of video compression technology. This technology has already moved out of the lab and into the marketplace. As systems are upgraded with video compression, their capacity will be multiplied by a factor of four or more. The outlook is for a future where capacity exceeds available programming. Cable industry executives, foreseeing that result, are investigating new services such as PCN to exploit that excess capacity.

/s/
Michael C. Rau

Subscribed and sworn to before me
this 23rd day of November, 1992.

/s/
Notary Public

My Commission Expires February 28, 1994

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[43] *MSO's Prime Compression*, TV Digest, April 22, 1991, at 2.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Time Warner Entertainment Company, L.P.,	)	
Plaintiff,	)	
v.	)	Civ. Action No. 92-2494 (SFW, TPJ, SS)
FCC and United States,	)	
Defendants,	)	
Discovery Communications, Inc., *et al.*,	)	
Plaintiffs,	)	
v.	)	Civ. Action No. 92-2558 (SFW, TPJ, SS)
United States, *et al.*,	)	
Defendants,	)	
National Cable Television Association, Inc.,	)	
Plaintiff,	)	
v.	)	Civ. Action No. 92-2495 (SFW, TPJ, SS)
United States, *et al.*,	)	
Defendants.	)	

AFFIRMATION OF MICHAEL C. RAU

District of Columbia: ss

I, Michael C. Rau, affirm pursuant to 28 U.S.C. § 1746, as follows:

1. I am the Senior Vice President, Science & Technology, of the National Association of Broadcasters. I submit this affidavit in support of the Opposition of Intervenor-Defendant Applicant National Association of Broadcasters to Motions for a Preliminary Injunction Restraining Enforcement of Sections 4 and 6 of the 1992 Cable Act Filed by Plaintiffs TWE, NCTA and Discovery in these cases. This affidavit supplements the information in my earlier affidavit submitted November 22, 1992, in *Turner Broadcasting System* v. *FCC*, Civ. Action No. 92-2247 (SFW, TPJ, SS), and describes recent developments in fiber optics, video compression, and digital video servers for cable television.

2. I am responsible for a broad range of NAB technical affairs and for providing technical advice and guidance to the membership and Board of Directors of the Association. As part of my duties, I review technological developments which may affect the television industry, either through changes in broadcast television systems or changes in other technologies used to distribute television signals, including in particular cable television. Prior to joining NAB in 1981, I was employed by Jules Cohen & Associates, an engineering consulting firm, and by Rau Radio Stations, Inc., a broadcasting company with cable television interests.

3. Plaintiffs have alleged that the must carry requirements of the 1992 Cable Act may cause displacement of certain cable program services because of a lack of capacity in cable systems. However, the channel capacity of cable television systems is being rapidly expanded by cable television companies. The increasing deployment of fiber optics and the use of video compression techniques will

expand significantly the number of channels of capacity available to all cable customers, eliminating any shortage of channel capacity for desirable programming. Perhaps more importantly, however, the development of cost-effective video switching devices to provide video-on-demand completely removes any ceiling or limits on the availability of video programs through cable systems. Video switches shift the program-delivery limitations of cable television systems from the channel-carrying capacity of the systems to the unlimited capacity to store programs in each system's video library. Video switching technology is being deployed not only by cable television systems, but also by telephone companies offering to provide so-called video dial-tone services.

Fiber Optics

4. Recent developments confirm that fiber optics is becoming increasingly prevalent in cable television systems. There are more than 1 million miles of fiber-optic cable in cable systems throughout the U.S. and another 620,000 miles is expected to be installed this year.[1/] In fact, the Myers Reports survey of 834 cable system operators reported that 38% of systems with 12-36 channels, and 40.6% of systems with 37 or more channels, plan to install fiber optic technology.[2/] Overall, 3 out of 4 cable operators are making plans to expand channel capacity.[3/]

5. For example, Time Warner has announced that it plans to upgrade its U.S. cable systems, serving 6.8 million

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[1/] Kathy Berlin, *Fiber Deployment '93: 85 Miles an Hour, Every Day*, Cable World, January 18, 1993, at 32.

[2/] Rich Brown, *Operators Plan Growth Along Fiber Lines*, Broadcasting, February 1, 1993, at 29.

[3/] *Id.*

subscribers, to fiber.[4/] Likewise, Tele-Communications, Inc. (TCI) plans to provide fiber to 90% of its subscribers over the next 4 years.[5/] TCI's Barry Marshall estimates that the use of fiber in multiple system operators' (MSO's) cable trunks will expand from its present percentage of 20% to as much as 40% by the end of 1993.[6/]

6. Technology and cost improvements continue to drive the use of fiber. For example, Jerrold has advertised that its STARFIRE 750 fiber optic laser system can provide 60 analog, or 500 digitally compressed, TV channels on a single fiber. Thus the technology is now in place to expand cable channel capacity to 500 or more channels and cable operators are beginning to implement it.

Video Compression

7. Video compression is the technology that is "launching the era of 500-channel cable systems."[7/] In the past three months, major cable MSOs (Multiple System Operators) have announced plans for systems which will deliver digitally compressed cable television signals into viewers' homes by 1994. This will dramatically multiply the number of signals which can be carried on *existing* cable systems without the need to replace the cable lines.

8. On December 2, 1992, TCI announced that it had agreed to purchase up to 1 million home set-top terminals for

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[4/] Carl Weinschenk, *Time Warner's Billion-Dollar Fiber Plan*, Cable World, December 14, 1992, at 44.

[5/] *TCI Boosts Spending*, TV Digest, January 18, 1993, at 4.

[6/] *Id.*

[7/] Carl Weinschenk, *Compression Kickstart*, Cable World, December 9, 1992, at 1.

receiving compressed digital video signals.[8/] TCI, which operates 443 local cable systems, expects to begin installing the technology in late 1993 or 1994 and expects compression to be available to as many as 95% of its systems by 1995.[9/] It will offer compressed digital video to 1 million of its 9.2 million customers beginning this year.[10/] As a spokesman for Time Warner noted, the TCI venture "absolutely accelerates compression into the here and now."[11/]

9. Initially, TCI plans to convert six or seven analog channels to digital, yielding a total of 60-70 new channels.[12/] Eventually, a 50-channel system will be able to offer 500 channels with this compression technology. TCI expects the near term cost of implementing digital compression to be "de minimis," in part because existing analog set-top converters can be upgraded and reused for roughly $80 each.[13/]

10. On January 26, 1993, Time Warner announced its own digital compression plans.[14/] Time Warner announced that it will use digital compression to provide hundreds of

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[8/] Peter Lambert, *TCI: $200 Million for Channel Explosion*, Broadcasting, December 7, 1992, at 4, 15.

[9/] Geoffrey Foisie, *TCI Sees Compression Paying For Itself*, Broadcasting, December 21, 1992, at 31.

[10/] Kevin Maney, *Technology to Expand Cable TV Services*, USA Today, December 3, 1992, at B1.

[11/] Lambert, *supra* at 4.

[12/] Carl Weinschenk, *Compression Kickstart*, Cable World, December 7, 1992, at 1. *See also* Edmund L. Andrews, *Cable Concern Plans to Offer 500 Channels*, N.Y. Times, December 3, 1992, at A1.

[13/] Foisie, *supra*.

[14/] Geraldine Fabrikant, *Time Warner Plans Cable System of Hundreds of Channels*, N.Y. Times, January 28, 1993, at D15.

channels to its customers as part of its "Full Service Network" serving residential cable subscribers in Orlando, Florida by 1994.[15/] Time Warner emphasized that the Orlando system is not a test and that it is "completely committed to putting this endpoint system" into all its cable clusters.[16/] Other companies have also announced plans to implement digital compression. Viacom, the Public Broadcasting Service, and Request TV have all announced deals to upgrade to digitally compressed video.[17/]

11. Realizing that the 500 channel cable system is imminent, Discovery Communications has developed Your Choice TV, an interactive menu system for accessing hundreds of channels of digital programming.[18/] Viewers will use the menu-driven, remote control system to navigate their way through the hundreds of viewing options which will soon be available to them. First generation equipment is expected by the end of 1993.[19/]

Video Server Technology

12. As digital video compression is being combined with video server and switching technology, cable systems are now entering an era, as described by a Time Warner spokesman,

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[15/] Randy Sukow & Rich Brown, *Time Warner Unveils 'Full Service' TV*, Broadcasting, February 1, 1993, at 6.

[16/] *Time Warner's 'Electronic Superhighway Into The Home'*, TV Digest, February 1, 1993, at 3. *See also* Johnnie L. Roberts & Mary Lu Carnevale, *Time Warner Plans Electronic 'Superhighway'*, Wall St. J., January 27, 1993, at B1.

[17/] Weinschenk, *Compression Kickstart*, *supra*. *See also*, Lambert, *supra*.

[18/] Peggy Ziegler, *500-Channel Future Prompts Menu System from Discovery Comm.*, Cable World, December 14, 1992, at 1.

[19/] *Id.*

of "infinite capacity."[20/] Video server technology is the key to providing true "video on-demand" to cable television viewers.

13. Video server technology fundamentally changes the way in which a cable system delivers video programming to the home. In a conventional cable system, all available programs are simultaneously transmitted through the entire cable system to every television receiver, even though each individual television set can only display one program at a time. Thus, to increase the number of channels available to the viewer, the cable must have the capacity to deliver all of these channels simultaneously to every viewer.

14. Video server technology changes all of this by effectively implementing the channel selector switch upstream in the cable system, toward the cable headend. so that only a single program is transmitted at a time to each receiver, much in the way the telephone system works. This means that the cable to the television receiver no longer needs the capacity to carry dozens of channels simultaneously, but only enough capacity to carry the program to be viewed. Thus, even without the use of fiber optics or video compression, existing cable infrastructure can carry a virtually limitless number of programming choices by use of video server technology.

15. In the Time Warner system being built in Orlando, Florida, homes are to be equipped with high-capacity, random access, digital storage devices capable of holding hundreds or even thousands of video programs.[21/] Digitally compressed video programs will be sent in high speed bursts to the customer's home storage device and accessed "on demand" by the home viewer. High speed digital switching will handle the traffic flow of data bursts to the home storage device and

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[20/] Sukow & Brown, *supra*.

[21/] *Id*.

allow Time Warner to offer telephone and data transmissions over the two-way system.[22/]

16. Video server and switching technology is being aggressively developed and implemented, not only by cable operators, but by the telephone companies to provide "video-on-demand."[23/] It can and will provide virtually infinite capacity, since it eliminates the need to simultaneously transmit all available channels to each TV receiver.

17. Bell Atlantic is using digital compression and video server technology in its video dial tone systems.[24/] Later this year, Bell Atlantic plans to begin offering this video-on-demand service over existing copper wires to 400 subscribers in Fairfax County, Virginia.[25/] The Bell Atlantic system will store digitally compressed video on large, random access storage devices. A viewer will dial up the program of choice which will be routed through a video server, over existing copper wire telephone lines, to the viewer's home. Bell Atlantic will build two-way video server-based networks this summer in Morris County and Dover Township in New

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[22/] *Id*.

[23/] For example, US West recently announced a plan to build a fiber-based broadband network to deliver telephone, interactive video, and video-on-demand services to its 13 million customers in 14 western states. The system will reach its first 100,000 customers by 1994, with half a million new customers a year to be added after that. The US West system initially will be capable of carrying 70-100 video channels, expandable to 500 with compression. *US West Answers Video Dialtone Call*, Broadcasting, February 8, 1992.

[24/] Harry A. Jessell, *Bell Atlantic Takes Early Lead*, Broadcasting, January 4, 1993, at 45. *See also* Carl Weinschenk, *Bell to Cable Industry: We'll See You in Court*, Cable World, December 21, 1992, at 1, 25.

[25/] Jessell, *supra*.

Jersey.[26/] In each case, video server and video switching technology will be used to provide video dial tone service.

Conclusion

18. Recent events have confirmed that channel capacity limitations in cable television systems are vanishing and will shortly be a thing of the past. Cable operators are deploying fiber optics at a rapid pace. Video compression is being aggressively implemented as a cost effective method for literally multiplying the number of channels available. And, with the implementation of video server technology, we are witnessing the initiation of truly "infinite capacity" cable TV systems.

/s/
Michael C. Rau

Subscribed and sworn to before me
this 12th day of February, 1993.

/s/
Notary Public

My Commission Expires February 28, 1994

[26/] *Id. See also*, Rich Brown, *Twain Meet Over Video Dial Tone*, Broadcasting, November 23, 1992, at 4.

(34)

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No. 93-44

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

Appeal from the United States District Court
for the District Of Columbia

MOTION TO AFFIRM OF INTERVENORS ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS, PUBLIC BROADCASTING SERVICE, AND CORPORATION FOR PUBLIC BROADCASTING

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QUESTION PRESENTED

Whether Congress, consistent with the First Amendment, may require cable operators to carry a limited number of noncommercial educational television stations in order to redress the severe competitive imbalances that exist in the video marketplace and preserve the institution of local public broadcasting.

RULE 29.1 LIST OF PARENT COMPANIES AND SUBSIDIARIES

Pursuant to Rule 29.1, the Association of America's Public Television Stations, Public Broadcasting Service, and Corporation for Public Broadcasting, Inc., through undersigned counsel, hereby certify that they have no parent companies, subsidiaries, or affiliates that have any outstanding securities in the hands of the public.

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Associated Press v. United States, 326 U.S. 1 (1945) 10, 15, 21, 26

Berkshire Cablevision v. Burke, 571 F. Supp. 976 (D.R.I. 1983), *vacated as moot*, 773 F.2d 382 (1st Cir. 1985) 25

Brown v. Kendrick, 487 U.S. 589 (1988) 18

Buckley v. Valeo, 424 U.S. 1 (1976) 24

Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) 27

Carlson v. Village of Union City, 601 F. Supp. 801 (W.D. Mich. 1985) 25

Central Telecommunications, Inc. v. TCI Cablevision, Inc., 800 F.2d 711 (8th Cir. 1986), *cert. denied*, 480 U.S. 910 (1987) 25

Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988) 7, 8

Century Federal, Inc. v. City of Palo Alto, 710 F. Supp. 1552 (N.D. Cal. 1987) 25

Chicago Cable Communications v. Chicago Cable Commission, 879 F.2d 1540 (7th Cir. 1989), *cert. denied*, 493 U.S. 1044 (1990) 25

City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488 (1986) 16

Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973) 18

Community Communications Co. v. City of Boulder, 660 F.2d 1370 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982) 25

Erie Telecommunications, Inc. v. City of Erie, 659 F. Supp. 580 (W.D. Pa. 1987), *aff'd*, 853 F.2d 1084 (3d Cir. 1988) 25

FCC v. National Citizens Coalition For Broadcasting, 436 U.S. 775 (1978) 23

Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968) 6

Group W Cable, Inc. v. City of Santo Cruz, 669 F. Supp. 954 (N.D. Cal. 1987) 25

Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1977) 22

Kovacs v. Cooper, 336 U.S. 77 (1949) 23

Leathers v. Medlock, 111 S. Ct. 1438 (1991) 16, 23

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 24

Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) 19, 27

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) 16, 22, 26

Omega Satellite Products Co. v. City of Indianapolis, 694 F.2d 119 (7th Cir. 1982) 25

Preferred Communications, Inc. v. City of Los Angeles, 68 Rad Reg.2d (P&F) 121 (C.D. Cal. 1990) 25

Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) 22

Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986) 7, 8

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) 16

Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986) 20

Riley v. National Federation of the Blind, Inc., 487 U.S. 781 (1988) 22

Rostker v. Goldberg, 453 U.S. 57 (1981) 18, 19

Rust v. Sullivan, 111 S. Ct. 1759 (1991) 19

Teleprompter Corp. v. Columbia Broadcasting System, 415 U.S. 394 (1974) 6

Telesat Cablevision, Inc. v. City of Riviera Beach, 773 F. Supp. 383 (S.D. Fla. 1991) 25

Texas v. Johnson, 491 U.S. 397 (1989) 20

Turner v. FCC, 810 F. Supp. 1308 (D.D.C. 1992) 12, 13

United States v. O'Brien, 391 U.S. 367 (1968) . . . . . *passim*

United States v. Southwestern Cable Co., 392 U.S. 157 (1968) 27

Walters v. National Association of Radiation Survivors, 473 U.S. 305 (1985) 18

Ward v. Rock Against Racism, 491 U.S. 781 (1989) . . . . . *passim*

Warner Cable Communications v. City of Niceville, 911 F.2d 634 (11th Cir. 1990) *cert. denied*, 111 S. Ct. 2839 (1991) 25

Younger v. Harris, 401 U.S. 37 (1971) 19

Statutory & Congressional Material

Cable Communications Policy Act of 1984, 47 U.S.C. § 521 *et seq.* 7, 11

Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. § 535 . . . . . *passim*

Copyright Revision Act of 1976, 17 U.S.C. § 111 (1988) 6, 25

47 U.S.C. § 224 24

47 U.S.C. § 325(b)(2)(A) 25

47 U.S.C. § 531 11

47 U.S.C. § 541 25

47 U.S.C. § 542 24

H.R. Rep. No. 102-628, 102d Cong., 2d Sess. (1992) ("1992 House Report) . . . . . *passim*

H.R. Rep. No. 1476, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5704-05 7

Public Telecommunications Act of 1992, Pub. L. No. 102-356, 106 Stat. 949 (1992) (amending 47 U.S.C. § 396(a)) 4, 28

S. Rep. No. 102-92, 102d Cong., 1st Sess. (1991) ("1991 Senate Report") . . 4, 10, 26

S. Rep. No. 98-67, 98th Cong., 1st Sess. (1983) 7

S. Rep. No. 102-221, 102d Cong., 2d Sess. (1992), *reprinted in* 1992 U.S.C.C.A.N. 839-40 3

Other Materials

Cable System Broadcast Signal Carriage Survey, A Staff Report by the Policy and Rules Division, FCC Mass Media Bureau (Sept. 1, 1988) 9

Cable Television Regulation (Part 2): Hearings Before the Subcommittee on Telecommunications and Finance of the House Comm. on Energy and Commerce, 101st Cong., 2d Sess. (March 1 and Apr. 19, 1990) 9

FCC Final Report and Order, 58 Fed. Reg. 17350, (1993) (to be codified at 47 C.F.R. Part 76) 11

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MOTION TO AFFIRM OF INTERVENORS ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS, PUBLIC BROADCASTING SERVICE, AND CORPORATION FOR PUBLIC BROADCASTING

Appellees, the Association of America's Public Television Stations, Public Broadcasting Service, and Corporation for Public Broadcasting (collectively "the public broadcasters"), who were granted leave to intervene as defendants below, hereby move to affirm the judgment of the three-judge district court that Section 5 of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. § 535 (1992) ("1992 Cable Act") does not violate the First Amendment.

Section 5 requires cable operators to carry, with certain important limitations, the signals of noncommercial educational television stations. Section 4 of the 1992 Cable Act, which appellants also challenge, enacts must carry require-

ments with respect to commercial television stations. Although appellants have indiscriminately lumped Sections 4 and 5 together, the two provisions are in fact distinct and severable. Section 5 is supported not only by the same substantial governmental interests that support Section 4, but also by important governmental interests that apply only to public television stations. Furthermore, Section 5 will have a substantially more limited impact on cable operators than Section 4. Thus, while the public broadcasters endorse the constitutionality of Section 4, they also submit that there are independent reasons to affirm the decision below with respect to Section 5 even if the Court determines that it should hear further argument with respect to Section 4.

STATEMENT

Section 5 of the 1992 Cable Act was enacted against the backdrop of public television's special position in the telecommunications infrastructure, the unique characteristics of cable television, and the threat that cable presents to the continued viability of local public television.

A. The Special Position of Public Television.

Since 1952, when the FCC reserved nearly one-third of the nation's broadcast television channels for noncommercial educational licensees, a primary objective of our national telecommunications policy has been to assure that all Americans have access to locally-controlled public television services. *See* Television Table of Allotments, 47 C.F.R. § 73.606. Today, the noncommercial television infrastructure includes more than 347 stations spread across the country's approximately 211 television markets. These noncommercial licensees include a diverse array of local school boards and

other state and local agencies, colleges and universities, and a variety of other community-based nonprofit organizations.[1/]

Nowhere is the local orientation of public television more evident than in its commitment to educational programming. Nearly 70,000 schools with over 29 million elementary and secondary students use public television instructional programming. Public television stations have prepared thousands of adults, many of them disabled or of modest means, to earn the equivalent of a high-school diploma through telecourses. Since 1981, local stations, in conjunction with more than 1,800 colleges and universities, have brought telecourses to 1.4 million college students.

Public television stations also serve as vital local community institutions, serving as catalysts for action on issues of local importance such as literacy, racial harmony, AIDS, and the environment. *See* S. Rep. No. 102-221, 102d Cong., 2d Sess. 6-7 (1992), reprinted in 1992 U.S.C.C.A.N. 839-40. In addition, public television has become a leader in providing innovative video services to groups of viewers — such as the visually and hearing impaired, and non-English speakers — that are too small or too impoverished to attract other broadcast services. Indeed, just prior to passage of the 1992 Cable Act, Congress found in related legislation that public television is a "valuable local community resource . . . to address national concerns and solve local problems" and that "it is in the public interest for the Federal Government to ensure that all citizens of the United States have access to

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1/ The substantial funding necessary to construct and operate this infrastructure has come from a wide variety of public and private sources. As recited in the 1992 Cable Act, the federal government has expended nearly $3 billion on public broadcasting since 1969. § 2(a)(8). State and local governments have contributed nearly $5 billion since 1972. H.R. Rep. No. 102-628, 102d Cong., 2d Sess. 69 (1992). Despite these substantial governmental expenditures, the development and operation of the system would not have been possible without private contributions (primarily from viewers), totalling over $6 billion during the same period. *Id.* *See* 1992 Cable Act § 2(a)(8).

public telecommunications services." Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 4, 106 Stat. 949 (1992) (amending 47 U.S.C. § 396(a)).

B. Cable Television Is A Dynamic And Still-Evolving Technology.

Cable television operators perform three distinct functions. First, in its original and still primary role, cable serves as a "community antenna" service, passively transmitting the signals of broadcast television stations to viewers. Second, cable operators purchase and transmit programming produced by cable programmers. The average cable system presently has the capacity to carry about 36 channels, *see* S. Rep. No. 102-92, 102d Cong., 1st Sess. 3 (1991) ("1991 Senate Report"), although there are more than 75 cable programmers. *See* Jurisdictional Statement ("J.S.") at 4.[2/] Consequently, not all cable programmers can obtain carriage on most cable systems, even without any requirement that cable operators carry broadcast signals.[3/]

Third, and most recently, a few cable operators have begun to produce and transmit their own original programming. In this capacity, cable comes closest to resembling the print medium. However, there was no showing in the district court that the must carry requirements

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[2/] In the district court, appellant National Cable Television Association asserted that the average cable system has the capacity to carry 40 channels and that there are 80 national and 48 regional cable programming networks. *See* NCTA Statement of Material Facts ¶¶ 3, 5 (February 12, 1993) (Court Record ("CR") 147).

[3/] Some cable programmers are owned by, or are otherwise affiliated with, entities that own multiple cable systems. In these circumstances, as Congress found, a cable operator will often give preference to programming produced by cable programmers with which it is affiliated. *See, e.g.*, 1991 Senate Report at 24-26.

of the 1992 Cable Act threaten to displace any of the *de minimis* original programming produced by cable operators.

Today, cable television is a highly dynamic and still evolving technology. While the average system has a capacity of about 36 channels, some cable systems have as many as 150 useable channels. Technological developments have placed channel capacity of this magnitude within reach of nearly all cable systems, and further developments promise to provide virtually unlimited channel capacity (500 or more channels) within a few years. Thus, in the not too distant future, cable systems will have the capacity to carry all broadcast signals and all cable programming.[4/]

C. Cable's Role As A Gatekeeper And Prior Regulatory Responses.

Cable's role as a conduit gives it a unique status as the "gatekeeper" into cable homes. This is because, as Congress found, "[a]ll evidence indicates that, once a television set is connected to a cable system, consumers will not watch signals available only over the air." H.R. Rep. No. 102-628, 102d

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[4/] The dynamic state of cable system technology is set forth in detail in the Affirmations of Michael C. Rau, Senior Vice President, Science & Technology, of the National Association of Broadcasters. These Affirmations were submitted to the district court below and are included in the accompanying Public Broadcasters' Appendix to this Motion to Affirm ("Pub. Broad. App.") at 5a, 18a. As Mr. Rau makes clear, expanding channel capacity for cable systems is being driven by three revolutionary technologies: fiber optics, video compression, and video server technology. Fiber optics increases the physical channel capacity of the cable system. Video compression makes more efficient use of (and thereby expands) whatever physical channel capacity the cable system possesses. *See* 11/23/92 Rau Aff. ¶ 15 (Pub. Broad. App. at 11a). Video server technology may render even these advances obsolete, as it effectively moves the channel selector switch upstream in the cable system so that the television receiver only needs the capacity to carry the program being viewed. The sum total of these developments is that "*channel capacity limitations in cable television systems are vanishing and will shortly be a thing of the past.*" 2/12/93 Rau Aff. ¶ 18 (Pub. Broad. App. at 26a) (emphasis added).

Cong., 2d Sess. 54 (1992) ("1992 House Report"). With over 60% of all television households now receiving cable, 1991 Senate Report at 3, cable operators have enormous control over what programming viewers can see. This gatekeeper function, unless otherwise restrained, gives cable systems the ability to "cherry pick" broadcast stations, dropping or giving unfavorable channel placement to any station perceived to be in competition with the cable operator's preferred programming, or otherwise considered to be less desirable, less popular, or less profitable.

Cable's power as gatekeeper has been greatly enhanced by its freedom to use the programming of broadcast stations without their consent. When cable was a pure "conduit," doing nothing but retransmitting broadcast signals, the Supreme Court found this passive activity to be so devoid of expressive content that it did not constitute a "performance" for purposes of the copyright laws.[5/] When Congress finally did subject cable to copyright liability for carrying broadcast signals, it granted cable a "compulsory" license to carry all local signals without consent or cost. *See* Copyright Revision Act of 1976, 17 U.S.C. § 111 (1988). The FCC has concluded that the compulsory license scheme "forced the cable television industry and the broadcast television industry into a significantly imbalanced contract" and contributed significantly to the cable industry's "explosive" growth. 1990 FCC Cable Report, 5 F.C.C.R. 4962, 5038 (1990).

In adopting the 1976 Copyright Act, Congress was aware that cable systems might abuse their power and deny local broadcast stations access to the viewers they were licensed to serve. But Congress relied on the fact that, in 1965, the FCC had adopted a careful array of regulations governing

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[5/] *See Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390 (1968); *Teleprompter Corp.* v. *Columbia Broadcasting System*, 415 U.S. 394, 402-05 (1974) (extending *Fortnightly* to cable systems that import distant broadcast signals).

cable's use of broadcast signals — foremost of which were the must carry rules — that were designed to protect the universal reach of the local broadcast system.[6/]

In 1984, Congress substantially deregulated the cable industry,[7/] but left the compulsory license in place. In so doing, Congress relied on the fact that the FCC's must carry rules would remain operative as a crucial counterweight to cable's freedom from copyright liability. "Given the current compulsory licensing system for cable systems under the copyright laws, if the 'must carry' rules were eliminated, local cable operators might not carry some local broadcast stations." S. Rep. No. 98-67, 98th Cong., 1st Sess. 11 (1983). Because of "the importance of local programming," Congress saw "a need to continue the existing 'must carry' rules to protect the public interest." *Id.* at 11-12.

This careful balance between the compulsory license and the FCC's must carry rules was upset in 1985 in *Quincy*,[8/] and again in 1987 in *Century*,[9/] when the D.C. Circuit found two different versions of the Commission's must carry rules invalid under the First Amendment. Although both decisions stressed that must carry requirements were not *per se* invalid under the First Amendment,[10/] both concluded that the

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[6/] *See* H.R. Rep. No. 1476, 94th Cong., 2d Sess. 89 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5704-05; 1992 House Report at 48.

[7/] Cable Communications Policy Act of 1984, 47 U.S.C. § 521 *et seq.*

[8/] *Quincy Cable TV, Inc.* v. *FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

[9/] *Century Communications Corp.* v. *FCC*, 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988).

[10/] *See Century*, 835 F.2d at 304 ("We do not suggest that must-carry rules are per se unconstitutional, and we certainly do not mean to intimate that the FCC may not regulate the cable industry so as to advance

(continued...)

Commission had failed to justify its rules on the factual record. The net effect of these decisions was to eliminate the must carry rules and throw the video industry into significant imbalance. As the FCC found in 1990, the elimination of must carry rules "drastically" and unfairly changed the relationship between the cable and broadcast industries and threatened the universal availability of public broadcast signals. *See* 1990 FCC Cable Report, 5 F.C.C.R. at 5038. The Commission therefore unequivocally recommended that Congress enact must carry requirements for public television. *Id.* at 5044.

D. The Congressional Response To *Quincy* And *Century*.

Following *Quincy* and *Century*, Congress undertook a comprehensive five-year investigation into the cable-broadcast relationship. The results of this inquiry were clear and unequivocal. *First*, Congress found that the cable industry has monopoly status in the market — *i.e.*, that it has become "highly concentrated" and "vertically integrated," "making it more difficult for noncable-affiliated programmers [such as public broadcasters] to secure carriage on cable systems." 1992 Cable Act § 2(a)(3), (4) & (5). "As a result of the economic incentive that cable systems have to delete, reposition, or not carry local broadcast signals," Congress found that "the economic viability of free local broadcast television . . . will be seriously jeopardized." § 2(a)(16).

Second, Congress found extensive evidence of discriminatory behavior by cable operators against public television stations, especially those that offer educational and instructional programming. *See* 1992 House Report at 70.

[10/](...continued)
substantial government interests."); *Quincy*, 768 F.2d at 1463 ("[W]e have not found it necessary to decide whether any version of the mandatory carriage rules would contravene the First Amendment.").

For example, an FCC study submitted to Congress revealed that between 1985 and 1988, 153 public television stations, nearly half of all such stations, were dropped or denied carriage 463 times by 347 cable systems. *Cable System Broadcast Signal Carriage Survey, A Staff Report by the Policy and Rules Division, FCC Mass Media Bureau*, at 10 (Sept. 1, 1988) (cited, *e.g.*, in 1991 Senate Report at 42 n.102; 1992 House Report at 52 n.51). The FCC study also showed that 182 stations had been involuntarily repositioned on 541 occasions between 1985 and 1988. *Id.* at 19.

Third, Congress found that a must carry requirement for public television stations would impose only a minimal burden on the cable industry. *See* 1992 House Report at 71. Data supplied to the Congress showed that a blanket requirement for carriage of *all* substantially unduplicated public television programming would have the following effects:

- 84 percent of all cable systems would be required to carry one public station;
- 13 percent would be required to carry two public stations; and
- 3 percent would be required to carry more than two public stations.

Id.[11/]

[11/] The 1992 Cable Act has even less impact than this hypothetical "blanket" requirement because it limits the number of public television stations that must be carried (depending on cable channel capacity) and eliminates substantial duplication. Indeed, the impact is so minimal that the National Cable Television Association, an appellant here, agreed in 1990 to support must carry legislation limited to public television. *See Cable Television Regulation (Part 2): Hearings Before the Subcommittee on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 101st Cong., 2d Sess. 85 (March 1 and Apr. 19, 1990).

Fourth, Congress found that "there is a substantial governmental and First Amendment interest in ensuring that cable subscribers have access to local noncommercial educational stations." 1992 Cable Act § 2(a)(7). Those substantial government interests include "provid[ing] public service programming that is responsive to the needs of the local community," "furthering the educational development of all citizens," and "protect[ing] the nation's substantial investment in and commitment to public television services." *Id.* § 2(a)(8)(A) and (B); 1992 House Report at 68. Congress further concluded that "absent carriage requirements there is a substantial likelihood that citizens, who have supported local public television stations, will be deprived of those services." 1992 Cable Act § 2(a)(8)(D).

Fifth, Congress also gave careful and extended consideration to the constitutionality of the must carry provisions. *See, e.g.*, 1992 House Report at 58-74; 1991 Senate Report at 53-62. In Congress' view, the must carry requirements are nothing more than "economic regulations designed to promote competition and diversity of voices in communications services," 1991 Senate Report at 55, and, as such, should be upheld under the minimal standard of First Amendment review set forth in *Associated Press* v. *United States*, 326 U.S. 1 (1945). *Id.*; *see* 1992 House Report at 72. In addition, Congress cited Section 5's content-neutrality, its service of substantial government interests, and its minimal burden on the cable industry as grounds for upholding that provision under *United States* v. *O'Brien*, 391 U.S. 367 (1968). *See* 1992 House Report at 62-67, 72-74; 1991 Senate Report at 57-62.

E. Section 5 of the 1992 Cable Act.

Section 5 of the 1992 Cable Act requires cable operators to carry the signals of qualified local noncommercial educational ("NCE") television stations that request carriage.

§ 5(e).[12] The number of NCE stations that must be carried under Section 5 depends on the channel capacity of the cable system. Systems with twelve or fewer useable activated channels are required to carry the signal of only one NCE station. § 5(b)(2)(A). Cable systems with thirteen to thirty-six channels are required to carry at least one NCE station, but not more than three. § 5(b)(3)(A). Cable systems with capacities of more than thirty-six channels are required to carry all NCE stations that request carriage. The requirements for systems with thirteen or more channels, however, are modified where there is substantial duplication in the programming of the eligible NCE stations. § 5(b)(1) & 5(e).[13]

The limited burden of Section 5's must carry obligations on cable operators is further reduced by the statute's interrelationship with the scheme for public, educational and government ("PEG") channels established in the Cable Communications Policy Act of 1984, 47 U.S.C. § 521 *et seq.* Under that statute, a franchising authority may require a cable operator, as one of the terms of its franchise, to designate channels for public, educational, or governmental use. 47 U.S.C. § 531. When a cable operator is required under Section 5 of the Cable Act to add the signal of an NCE station, the cable operator may do so, subject to approval by the franchising authority, by placing that additional signal on a PEG channel that is not in use for its designated purpose. § 5(d). In these circumstances, the must carry obligation is

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[12] A qualified noncommercial educational television station is (1) a station licensed by the FCC as such, owned by a public agency or nonprofit entity, and eligible to receive a grant from the Corporation for Public Broadcasting; or (2) a station that is owned and operated by a municipality and transmits predominantly noncommercial programs for educational purposes. 1992 Cable Act § 5(l)(1).

[13] Substantial duplication has been defined by the FCC. *See* FCC Final Report and Order, 58 Fed. Reg. 17350, 17351 (1993) (to be codified at 47 C.F.R. Part 76).

fulfilled without any additional loss of current channel availability by the cable operator.[14/]

Section 5 also creates certain channel positioning rights. Each NCE station having a mandatory carriage right under Section 5 must be carried, at its election, on its current over-the-air channel, its channel position as of July 19, 1985, or on such other channel number that is mutually agreed upon by the station and the cable operator. § 5(g)(5).

F. The Decisions Below.

On April 8, 1993, the three-judge district court (by a 2-1 decision) held that Sections 4 and 5 of the Cable Act do not violate the First Amendment freedoms of speech and press. The court prefaced its opinion with a careful review of the "exhaustive" Congressional fact-finding process (discussed above) that resulted in the enactment of the Cable Act. J.S. App. 10a. In particular, the court took note of the "indisputable" evidence before Congress concerning the cable industry's dominance of the video signal distribution market, *id.* at 24a. and the corresponding evidence of the dangers facing local broadcasting, *id.* at 12a, 25a. As aptly summarized by the district court, "unrestrained, cable holds the future of local broadcasting at its mercy." *Id.* at 26a.

In light of this record, the district court held that the Act "is simply industry-specific antitrust and fair trade practice regulatory legislation" that is "justified by the existing

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14/ Neither the section of the 1984 Act authorizing the reservation of PEG channels nor the action of any franchising authority pursuant to that section is being challenged on this appeal. However, appellant Time Warner's omnibus complaint in this action did include such a challenge; that claim is currently pending before the single-judge district court. *See Turner* v. *FCC*, 810 F. Supp. 1308 (D.D.C. 1992) (severing Time Warner's challenge to the 1984 Act, as well as all challenges to provisions of the 1992 Act other than sections 4 and 5, from the three-judge district court's jurisdiction).

structure of the cable business itself" and designed to "create competitive balance in the video industry as a whole, and to redress the effects of cable operators' anticompetitive practices." J.S. App. 13a. As such, "the must carry provisions are, in intent as well as form, unrelated (in all but the most recondite sense) to the content of any messages" that the cable industry might convey. *Id.*

Accordingly, the district court applied the First Amendment balancing test for content-neutral regulation established in *United States* v. *O'Brien*, 391 U.S. 367 (1968), as modified by *Ward* v. *Rock Against Racism*, 491 U.S. 781 (1989). The must carry requirements meet this test, the court held, because they are supported by substantial government interests, including the promotion of fair competition among video "speakers" and the preservation of local broadcasting, J.S. App. 23a, and because they serve those substantial government interests effectively without unnecessarily burdening a significant amount of the cable industry's speech, *id.* at 27a. Indeed, on the latter point, the district court specifically noted the minimal burden imposed by Section 5. *Id.*

Judge Williams dissented. Although he agreed with Congress and the majority that cable industry "bottlenecks" in the free flow of video information pose "a very real problem," he asserted that the remedy chosen by Congress — must carry — is not the least restrictive alternative available for solving the problem. J.S. App. 50a, 66a. Judge Williams also disagreed with Congress' (and the majority's) factual finding that cable poses substantial dangers to the continued vitality of local broadcasting. *Id.* at 60a-67a. Thus, he concluded that the must carry provisions should be reviewed, and struck down, under strict First Amendment scrutiny. In so doing, however, Judge Williams plainly rejected plaintiffs' contention that Congress is constitutionally barred from imposing any type of access requirements on cable operators. *Id.* at 51a.

On April 14, 1993, the district court denied plaintiffs' request for an injunction pending appeal. On April 29, 1993, Chief Justice Rehnquist (as Circuit Justice for the District of Columbia Circuit) denied the same request. The Chief Justice found that "[t]he 1992 Cable Act, like all Acts of Congress, is presumptively constitutional." Pub. Broad. App. at 1a.[15/] He further noted that "even the dissenting judge [below] rejected the argument now urged by applicants — that Congress may not compel cable operators to carry the video signals of programmers they would otherwise choose not to carry." *Id.* at 2a. Indeed, all judges on the district court "recognize[d] that the government may regulate cable television as a medium of communication." *Id.*

THE DISTRICT COURT'S DECISION SHOULD BE AFFIRMED

This Court should affirm the three-judge district court's determination that Section 5 of the Cable Act does not violate the First Amendment. As an initial matter, this case is not appropriate for the Court's review because the cable industry is on the verge of a revolutionary increase in channel capacity. The First Amendment standard to be applied to each medium of communication depends on the special characteristics of that medium; accordingly, this Court should not undertake to fashion a standard for cable television at a time when its fundamental technological characteristics are in a state of such significant flux.

Even if the Court determines that it must reach the merits of this appeal, it should nonetheless affirm the district court's conclusion that Section 5 is constitutional. Appellants face a heavy burden in attempting to overturn a presumptively

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15/ Chief Justice Rehnquist's denial of appellants' request for an injunction pending appeal is reported at 113 S. Ct. 1806 (1993), and is reprinted in the accompanying Public Broadcasters' Appendix. Pub. Broad. App. at 1a.

constitutional Act of Congress. That burden is only increased by the facial posture of appellants' claims and the deference owed by this Court to the extensively detailed findings of fact made by Congress in support of Section 5. Appellants cannot overcome this extraordinary burden here.

In order to affirm the constitutionality of Section 5, the Court need only apply the intermediate First Amendment balancing test established in *O'Brien* for content-neutral regulation. This standard is appropriate because of Section 5's content-neutrality, its incidental impact on speech, and the many factors distinguishing the cable industry from traditional print media — including the longstanding regulatory relationship between government and cable, and the bottleneck characteristics of cable operators. Further, Section 5 meets the *O'Brien* standard because it serves several substantial government interests and is no broader than reasonably necessary in doing so.[16/]

I. CABLE TELEVISION TECHNOLOGY IS ON THE VERGE OF DRAMATIC CHANGE, RENDERING THIS CASE INAPPROPRIATE FOR THE COURT'S REVIEW.

The issues presented by appellants are not appropriate for the Court's review at this time. As noted in the Statement, cable technology is in a state of significant flux. Accordingly, it would be premature for the Court to grapple

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16/ As content-neutral economic regulation, Section 5 is appropriately analyzed for First Amendment purposes under the rational basis review standard established in *Associated Press* v. *United States*, 326 U.S. 1 (1945), and related cases. However, as the public broadcasters make clear below, the Court need not apply the lower level of First Amendment review set forth in *Associated Press* in order to grant this motion to affirm. However, if the Court notes probable jurisdiction, the public broadcasters reserve the opportunity to argue, as they did below, that rational basis scrutiny is appropriate in this case.

with the question of what First Amendment standard should apply to this technology.

Although cable operators are entitled to First Amendment protection, *see Leathers* v. *Medlock*, 111 S. Ct. 1438, 1442 (1991), that conclusion does not answer the question of precisely what First Amendment standard should be applied to their claims. *See City of Los Angeles* v. *Preferred Communications, Inc.*, 476 U.S. 488, 495 (1986). As the Court has pointed out, the characteristics of a particular medium may justify "differences in the First Amendment standards applied to [that medium]." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 386 (1969).

In *Preferred Communications*, the Court declined to address cable operators' First Amendment claims because the Court did not know enough about the nature of the cable industry. *See* 476 U.S. at 495. As Justice Blackmun wrote in his concurrence, "[i]n assessing First Amendment claims concerning cable access, the Court must determine whether the characteristics of cable television make it sufficiently analogous to another medium to warrant application of an already existing standard or whether those characteristics require a new analysis." 476 U.S. at 496. Most recently, in denying appellants' application for an injunction pending appeal, Chief Justice Rehnquist observed that "we have not decided whether the activities of cable operators are more akin to that of newspapers or wireless broadcasters." Aff. App. at 3a.

Thus, this case, if accepted for plenary review, may require the Court to decide whether the characteristics of cable television, as presented on the record of this case, warrant application of the First Amendment standard traditionally applied to newspapers, *see Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), that applied to wireless broadcasters, *see Red Lion*, 395 U.S. 367, or some new and unique standard. This would be a challenging task under any

circumstances, but it is a task the Court ought not to take up at a time when the fundamental characteristics of cable television are still evolving. In short, appellants ask the Court to fashion a First Amendment standard for a moving target.

For example, technological developments promise to moot entirely the claims of the cable programmers. As discussed above, although the number of cable programmers presently exceeds the capacity of the average cable system, this balance will shortly be reversed. Some cable systems already have as many as 150 channels — a capacity that exceeds the number of programmers — and within two or three years many more systems will reach this same level of capacity. Indeed, capacity of as many as 500 channels is on the immediate horizon. *See supra* at 5; 2/12/93 Rau Aff. ¶¶ 9, 11 (Pub. Broad. App. at 22a-23a). When channel capacity exceeds the number of programmers vying for carriage, programmers cannot attribute their failure to achieve carriage to must carry requirements.[17/]

Cable operators no doubt will continue to argue that their First Amendment rights are violated so long as they are required to carry any broadcast signal they would not otherwise choose to carry. Assuming *arguendo* that the must carry requirements cause any such injury (a proposition with which we disagree), the need for this Court's attention, from a practical perspective, is much reduced if cable systems with

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17/ Appellants may respond that the number of cable program networks and other uses of cable channels will expand at the same rate as channel capacity, but that is no response to the point made in text. To begin with, the record does not demonstrate that cable systems with capacities of 150 channels currently carry all available programming. Instead, such systems continue to make commercial judgments about the appeal of various programming. *See* Affidavit of Joseph J. Collins at ¶ 17 (Feb. 12, 1993) (CR 152). Moreover, the question of whether the supply of programming will keep up with expanded channel capacity is precisely the sort of speculative factor that makes the fashioning of a First Amendment standard for cable television inappropriate at this time.

150 or 500, rather than the current average of 36, channels are required by statute to carry a handful of broadcast signals. Thus, assuming that cable operators have suffered any First Amendment injury, technological developments have already reduced that injury to a *de minimis* level for some cable systems and promise to do so for other systems within the near future.

II. THE DISTRICT COURT'S DECISION SHOULD BE AFFIRMED ON THE MERITS.

A. Appellants Face An Insurmountable Burden.

Appellants face an insurmountable burden in attempting to strike down the 1992 Cable Act. First, as Chief Justice Rehnquist confirmed in denying appellants' request for an injunction pending appeal, "[t]he 1992 Cable Act, like all Acts of Congress, is presumptively constitutional." Pub. Broad. App. at 1a. This presumption is a factor that should be taken into account in evaluating appellants' claim on the merits, especially where, as here, Congress gave extensive and deliberate consideration to the question of the Cable Act's constitutionality. *See Brown* v. *Kendrick*, 487 U.S. 589, 617 (1988); *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981); *supra* page 10. In short, the judgment of the 102d Congress "cannot be ignored or undervalued simply because one segment of the broadcast constituency casts its claims under the umbrella of the First Amendment." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 103 (1973).

Second, appellants must overcome the even greater deference owed by this Court to the extensive and detailed Congressional findings of fact underlying the Cable Act. Such deference is compelled by the fact that "Congress is an institution better equipped [than a court] to assess and evaluate the vast amounts of data bearing on [the] issue[s]." *Walters* v. *Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305,

331 n.12 (1985); *accord Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547, 563 (1990); *Rostker*, 453 U.S. at 72-73. Accordingly, there is no basis for appellants' contention that the Court should re-weigh the massive factual record analyzed by Congress.

Finally, the facial posture of appellants' constitutional challenge imposes an additional burden on their claim. As this Court has stated, "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *Rust* v. *Sullivan*, 111 S. Ct. 1759, 1767 (1991) (internal quotation omitted).[18] Indeed, all that a defendant need do to defeat a facial challenge is to demonstrate some set of circumstances under which the statute could be constitutionally applied. *Id.*

There is at least one circumstance in which Section 5 can be applied without causing any of the constitutional harm alleged in this case. As noted above, cable systems can comply with Section 5 by placing noncommercial stations on unused PEG channels. Thus, it is entirely conceivable that for some cable operators compliance with Section 5 will not involve any loss of channels otherwise available to them.[19] Because there is a set of circumstances under which Section 5 can be constitutionally applied, appellants' facial challenge to that section is doomed.

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[18] *See also Younger* v. *Harris*, 401 U.S. 37, 52 (1971) (courts passing on the constitutionality of statutes on their face are acting "fundamentally at odds with the function of the federal courts in our constitutional plan").

[19] All that is required for such a scenario is a willing franchising authority and a cable operator with unused PEG channels that equal or exceed the number of qualified local noncommercial educational television stations required to be carried (*i.e.*, only one station for more than 80 percent of the cable systems).

B. Section 5 Should Be Reviewed Under A First Amendment Standard No More Stringent Than That Set Forth In *O'Brien-Ward*.

The district court's denial of appellants' constitutional challenge to Section 5 can be affirmed by applying an intermediate level of First Amendment scrutiny, as established in *United States* v. *O'Brien*, 391 U.S. 367 (1968), and *Ward* v. *Rock Against Racism*, 491 U.S. 781 (1989). As demonstrated below, several factors justify the choice of this standard, including Section 5's content neutrality, its incidental impact on speech, and the special characteristics of the cable industry.

1. Section 5 Is Content-Neutral.

It is well-settled that the core of First Amendment protection is a bar against regulation directed to suppressing the content of free expression. *See, e.g., Texas* v. *Johnson*, 491 U.S. 397, 414 (1989). This Court has counseled that, in determining content neutrality, "[t]he government's purpose is the controlling consideration." *Ward*, 491 U.S. at 791. Thus, "[g]overnment regulation of expressive activity is content neutral so long as it is justified without reference to the content of the regulated speech." *Id.*; *accord Renton* v. *Playtime Theaters, Inc.*, 475 U.S. 41, 47-48 (1986).

Applying this standard here, it is clear that Section 5's must carry provisions are content-neutral. As set forth in substantial detail in the Act itself, these provisions are based on Congress' concern over the monopolistic position of cable systems, the corresponding likelihood that citizens will be deprived of local public television programming, and the consequent demise of local public television stations, which Congress found to be vital community institutions in which the nation has made an enormous investment. 1992 Cable

Act, § 2(a)(2), (3), (4), (5), (6), & (8). *See supra* pp. 8-10.[20/] In short, Congress' purpose in enacting Section 5 was to preserve and promote continued access to the institution of public television — not to any particular programming — in the face of economic conditions that are denying viewers that access now and may increasingly do so in the future. *See, e.g.*, 1992 Cable Act § 2(a)(8); 1992 House Report at 68.

Despite appellants' protestations, *see* J.S. at 20-21, Section 5 cannot be considered content-based because it fosters — through public television — the substantial government interests in education, localism, diversity, and community service. These interests are institutional ones, similar to those served by universities or libraries, and are not, therefore, associated with any particular speech or point of view.[21/] Instead, Section 5 is nothing more than content-neutral economic regulation — akin to the antitrust laws or commercial regulations — designed to eradicate market imbalances and ensure "the widest possible dissemination of information from diverse and antagonistic sources." *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945).

2. Section 5 Has Only An Incidental Impact On Speech.

Because Section 5 of the Cable Act is content-neutral, and does not compel or prohibit the expression of any

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[20/] The legislative history of the Act contains a similar analysis. *See, e.g.*, 1992 House Report at 68-72.

[21/] No one could argue that government support for a library or university constitutes government preferment for the books the library chooses for its shelves or the university chooses for its courses. Similarly, because Section 5 does not dictate the content of public television programming that must be carried by cable operators, the governmental support for the institution of public television does not offend the First Amendment.

particular viewpoint or message, its impact on speech is entirely incidental. As the district court correctly found, the indirect impact of Section 5 is another factor weighing in favor of a low level of First Amendment review. *See* J.S. App. 15a-19a; *Home Box Office, Inc.* v. *FCC*, 567 F.2d 9, 47-48 (D.C. Cir. 1977).

Appellants contest this conclusion on the ground that the must carry provisions impermissibly infringe on cable operators' "right not to speak" — previously described in this litigation as the cable operators' "editorial discretion." J.S. at 16-18. For this, appellants rely on *Miami Herald* v. *Tornillo*, 418 U.S. 241 (1974), in which the Court struck down a Florida statute granting political candidates the right to reply to criticisms published in newspaper editorials. Unlike the statute in *Tornillo*, however, which authorized a right of access predicated on content (*i.e.*, a "response" to the newspaper's view), the must carry rules do not dictate that cable systems carry broadcast "speech" having any particular content. *Cf.* 1992 House Report at 69, 72 (discussing enormous variety of public television content). Nor are cable operators "being compelled to affirm their belief in any governmentally prescribed position or view." *Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74, 88 (1980).[22/] Given the minimal burden on cable systems imposed by Section 5, *see supra* p. 9, this provision will not impose any

[22/] For these same reasons, appellants' reliance on *Riley* v. *Nat'l Fed'n of the Blind, Inc.*, 487 U.S. 781 (1988), is misplaced. In *Riley*, the Court struck down a state law that required entities engaging in particular speech (charitable solicitation) to engage in other particular speech (the disclosure of certain information). Here, Section 5 is not based on the content of the cable operators' speech, nor does it require carriage of programming with any particular content.

limitation — substantial or otherwise — on a cable operator's "right not to speak" or alleged "editorial discretion."[23/]

Second, plaintiff argues that the must carry provisions discriminate against the cable industry in order to promote the speech of broadcasters. J.S. at 19-20. This argument, however, has been rejected by the Court on several occasions. For example, in *FCC* v. *National Citizens Coalition For Broadcasting*, 436 U.S. 775 (1978) ("*NCCB*"), the Court upheld the FCC's rules restricting cross-ownership of same-market media outlets as "a reasonable means of promoting the public interest in diversified mass communications." *Id.* at 802. The Court held that "efforts to enhance the volume and quality of coverage of public issues through regulation of broadcasting may be permissible where similar efforts to regulate the print media would not be." *Id.* at 800 (internal citations omitted).

More recently, in *Leathers* v. *Medlock*, 111 S. Ct. 1438, 1446 (1991), the Court explicitly stated that "a differential burden on speakers is insufficient by itself to raise First Amendment concerns." Indeed, if it were true that strict scrutiny applied to any regulation favoring one member of the media over another, then there would be no basis for the government's well-settled right to arbitrate between the claims of competing speakers under valid time, place, and manner restrictions. *See, e.g.*, *Kovacs* v. *Cooper*, 336 U.S. 77 (1949) (favoring the "natural speech" of residents and

[23/] In addition, the nature of the "editorial discretion" exercised by cable operators is far removed from that exercised by newspaper editors. Except for the few cable operators who produce their own programming, cable systems are passive conduits for the speech of others. While there may be some discretion involved in choosing which programming to transmit, it is plainly not the same discretion exercised by newspaper editors.

denizens of public fora over the "amplified" speech of persons driving sound trucks).[24/]

3. The Cable Industry Is Unlike The Print Medium.

A final factor justifying a low level of First Amendment scrutiny is that the cable industry possesses a number of unique characteristics that distinguish it from the traditionally-protected print medium. First, unlike the print medium, the cable industry has for almost thirty years been the recipient of substantial government assistance. For example, unlike *any* business entity other than traditional public utilities, cable relies for dissemination of its message upon the permanent physical occupation of governmental resources. In order to provide cable service to subscribers, cable wires and associated equipment must be hung from utility poles, housed in underground utility ducts, or otherwise placed in or across public rights-of-way. Further, cable operators necessarily depend upon franchising authorities to exercise their powers of eminent domain in order to ensure cable's access to private property. *See Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

Cable operators also receive a host of statutory benefits. For example, government regulates the rates for cable's access to utility poles. *See* 47 U.S.C. § 224. Congress also imposes a limit on the amount of the fees local franchising authorities can extract from cable operators. *See* 47 U.S.C. § 542. Indeed, even the existence of the franchising authority is a benefit to the cable industry, because, as a practical

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[24/] Appellants' argument is based on a vastly overstated reading of *Buckley* v. *Valeo*, 424 U.S. 1, 48-49 (1976). But even the *Buckley* Court recognized that this "favoritism" principle applies only in "traditional free speech case[s]" and not in cases, such as those involving the broadcast media or, indeed, the cable industry, posing "unique and special problems." 424 U.S. at 50 n.55. *See also* J.S. App. 17a-18a (finding that *Buckley* does not support appellants' favoritism argument).

matter, the number of such franchises is necessarily limited. *See* 47 U.S.C. § 541.

In addition, under the provisions of the Copyright Act, cable operators are granted a compulsory license to retransmit broadcast signals. *See* 17 U.S.C. § 111(c) & (d) (1992). Thus, government (and the broadcasting industry) essentially subsidizes cable operators by granting them free and unrestricted access to local broadcasting. While Section 6 of the Cable Act alters this regime to some extent for commercial broadcasters, the retransmission consent scheme established by Section 6 does not apply to public broadcasters. *See* 47 U.S.C. § 325(b)(2)(A).

The existence of these numerous government benefits is a characteristic unique to the cable industry and stands in stark contrast to the historic independence (and even antagonism) of the print medium vis à vis the government. Moreover, as numerous courts have found, the existence of these benefits justifies a less searching First Amendment standard than that traditionally applied to the print media.[25/]

[25/] *See, e.g., Warner Cable Communications* v. *City of Niceville*, 911 F.2d 634 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 2839 (1991); *Chicago Cable Communications* v. *Chicago Cable Comm'n*, 879 F.2d 1540 (7th Cir. 1989), *cert. denied*, 493 U.S. 1044 (1990); *Central Telecommunications, Inc.* v. *TCI Cablevision, Inc.*, 800 F.2d 711 (8th Cir. 1986), *cert. denied*, 480 U.S. 910 (1987); *Omega Satellite Products Co.* v. *City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982) (Posner, J.); *Community Communications Co.* v. *City of Boulder*, 660 F.2d 1370, 1377 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982); *Telesat Cablevision, Inc.* v. *City of Riviera Beach*, 773 F. Supp. 383 (S.D. Fla. 1991); *Erie Telecommunications, Inc.* v. *City of Erie*, 659 F. Supp. 580, 599-600 (W.D. Pa. 1987), *aff'd*, 853 F.2d 1084 (3d Cir. 1988); *Carlson* v. *Village of Union City*, 601 F. Supp. 801, 809-12 (W.D. Mich. 1985); *Berkshire Cablevision* v. *Burke*, 571 F. Supp. 976, 985-88 (D.R.I. 1983), *vacated as moot*, 773 F.2d 382 (1st Cir. 1985). *But see Preferred Communications, Inc.* v. *City of Los Angeles*, 68 Rad Reg.2d (P&F) 121 (C.D. Cal. 1990); *Century Federal, Inc.* v. *City of Palo Alto*, 710 F. Supp. 1552 (N.D. Cal. 1987); *Group W Cable, Inc.* v. *City of Santo Cruz*, 669 F. Supp. 954 (N.D. Cal. 1987).

Second, the cable industry is also distinguishable from print because of its increasingly dominant position as a distributor of information to household televisions. Cable's role as an information bottleneck results from the physical scarcity of public rights-of-way — scarcity that, as a practical matter, completely insulates most cable operators from competition. Indeed, Congress cited the "necessarily severely limited number of franchised cable systems able to operate in any one community," as grounds for ensuring, through must carry, that "the diversification principle is not undermined in this increasingly important governmentally franchised medium." 1991 Senate Report at 51-52.

Congress' findings have been echoed by numerous courts in their review of cable regulations. *See supra* note 25. Because cable operators are increasingly acting as impediments, rather than facilitators, to the "widest possible dissemination of information from diverse and antagonistic sources," *Associated Press*, 326 U.S. at 20, regulations governing their activity need not be accorded the highest standard of First Amendment review.[26/]

C. Section 5 Should Be Upheld Under *O'Brien-Ward*.

Under *O'Brien-Ward*, the must carry rules clearly satisfy the First Amendment because they serve "substantial"

[26/] As the district court made clear, the *Tornillo* Court's rejection of a similar economic scarcity argument is distinguishable here because of the content-based nature of the right-of-reply law at issue in that case. J.S. App. 22a n.25. *Tornillo* is also distinguishable because newspapers do not function in the same "bottleneck" capacity as do cable operators. Even in one-newspaper communities, there are a myriad of ways for print speakers to reach their audiences — flyers, leaflets, newsletters, alternative newspapers, and the like. In contrast, the sole cable operator in a community typically determines which voices will be heard by cable subscribers in that community. This peculiar characteristic of cable compels a lower level of First Amendment scrutiny than that applied to print.

government interests and are no broader than necessary in doing so.[27/]

As set forth in the Act and its legislative history, the Cable Act's must carry provisions are intended to further several longstanding government interests: (1) preserving for the public the benefits of local television service, (2) promoting the widespread dissemination of information from diverse sources, and (3) promoting fair competition in the video marketplace. *See generally* 1992 Cable Act § 2(a). With respect to Section 5 in particular, the must carry rules also serve the goals "of furthering the educational development of all citizens and . . . protect[ing] the nation's substantial investment in and commitment to public television services." 1992 House Report at 68; *see id.* at 68-74; 1992 Cable Act § 2(a)(8).

As the district court found, the substantiality of each of these interests is "beyond dispute." J.S. App. 23a. Localism, diversity, and fair competition have served as the touchstones of Congressional regulation of the television industry — and judicial review of that regulation under the First Amendment — since 1934.[28/] More recently, in its amendments to the 1934 Communications Act, Congress made the point as clearly as it can be made: "public television

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[27/] As made clear above, Section 5 meets *O'Brien*'s requirement that "the governmental interest [underlying the regulation] is unrelated to the suppression of free expression." 391 U.S. at 377. As demonstrated by the entirety of this Motion to Affirm, Section 5 also meets *O'Brien's* requirement that the government regulation at issue be "within the constitutional power of the Government." *Id.*

[28/] *See, e.g., Metro Broadcasting, Inc.*, 497 U.S. at 567 ("the interest in enhancing broadcast diversity is, at the very least, an important governmental objective"); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 714 (1984) ("There can be little doubt that the comprehensive regulations developed over the past 20 years by the FCC to govern signal carriage by cable television systems reflect an important and substantial federal interest."); *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 172-73 & nn.38-39 (1968).

and radio stations and public telecommunications services constitute valuable local community resources for utilizing electronic media to address national concerns and solve local problems through community programs and outreach programs." Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 4, 106 Stat. 949 (1992) (amending 47 U.S.C. § 396(a)). Thus, "it is in the public interest for the Federal Government to ensure that all citizens of the United States have access to public telecommunication services through all appropriate available telecommunications distribution technologies." *Id.* Indeed, appellants do not even appear to contest the point in their Jurisdictional Statement.[29/]

The Cable Act's must carry rules are also no broader than reasonably necessary to achieve the government's interest, thus satisfying the second major prong of the *O'Brien* test. Congress has carefully crafted the requirements of Section 5 of the Cable Act to achieve its objectives with minimal burden on cable operators. Among other provisions, the must carry requirements of Section 5 are circumscribed in the following ways:

- The number of public television stations that a cable operator must carry is limited, depending on the number of channels available on the system. § 5(b)(1), (2) & (3).[30/]

[29/] Appellants do attack as "speculative" and "fanciful" Congress' finding that cable poses a threat to local broadcasting. J.S. at 25. That contention is both misplaced and wrong. Even if it was proper for this Court to re-weigh the factual evidence presented to Congress (which it plainly is not), that evidence clearly establishes the anticompetitive treatment accorded to local public television stations by cable operators following the demise of the FCC's must-carry rules. *See supra* pp. 8-9.

[30/] In general, systems with 12 or fewer channels are required to carry only one public television station; systems with 13-36 channels must carry one but no more than three public television stations; and systems with more than 36 channels must carry all public television stations that request carriage.

- The cable operator is not obligated to carry duplicate qualified signals. § 5(b)(3)(C).

- If the cable operator is obliged to add a public television station under the must carry rules, it can choose to carry that station on a PEG channel not then being used for its designated purpose, subject to the agreement of the franchising authority. § 5(d). *See* 1992 House Report at 100.

Section 5 is also congruent with Congress' interest in preserving and promoting localism. As Congress found, noncommercial stations have long been the beacon of localism in the television industry. Not only have they served the needs of local communities since noncommercial spectrum channels were allocated in 1952, but local governments and citizens have supported the continued provision of these services through substantial tax dollars and voluntary contributions. *See* 1992 Cable Act § 2(a)(8). In light of the economic structure and incentives of the cable industry, it cannot seriously be argued that Congress has overreached in preserving this locally supported educational service through modest must carry rules.

Finally, the channel position aspects of Section 5 serve the goal of promoting competition in the video services market. At the outset, it is difficult to conceive how positioning requirements burden any First Amendment interest, because they do not suppress any speech. Assuming that such a First Amendment interest exists, however, the channel positioning provisions are clearly justified. As found by Congress, if left unregulated, cable operators will have every incentive to shunt public television stations to even less desirable channels than they currently occupy. 1992 House Report at 71. Under these circumstances, the channel position requirements are clearly no broader than necessary to support the government's interest in meaningful access to public television services.

CONCLUSION

For the reasons stated above, the Court should affirm the district court's judgment upholding the constitutionality of Section 5.

Respectfully submitted,

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Dated: September 7, 1993

APPENDICES

SUPREME COURT OF THE UNITED STATES

No. A-798

TURNER BROADCASTING SYSTEM, INC., ET AL.
v.
FEDERAL COMMUNICATIONS COMMISSION ET AL.

ON APPLICATION FOR AN INJUNCTION

[April 29, 1993]

CHIEF JUSTICE REHNQUIST, Circuit Justice.

Applicants have asked me, as Circuit Justice for the District of Columbia Circuit, to enjoin enforcement of §§ 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat. 1471-1481, which require cable operators to reserve a portion of their channel capacity for carrying local commercial and noncommercial educational broadcast stations. Applicants, cable operators and programmers, contend that these "must-carry" provisions violate the First Amendment because (1) they tell cable operators what speakers they must carry, thereby controlling the content of the operator's speech and shrinking the number of channels available for programming they might prefer to carry; (2) they inhibit the operators' editorial discretion to determine what programming messages to provide to subscribers; and (3) they give local broadcast "speakers" a preferred status. I herewith deny the application.

The 1992 Cable Act, like all Acts of Congress, is presumptively constitutional. As such, it "should remain in effect pending a final decision on the merits by this Court." *Marshall* v. *Barlow's, Inc.*, 429 U.S. 1347, 1348 (1977)

(REHNQUIST, J., in chambers). Moreover, the Act was upheld by the three-judge District Court, and even the dissenting judge rejected the argument now urged by applicants — that Congress may not compel cable operators to carry the video signals of programmers they would otherwise choose not to carry. __ F. Supp. __, __ (DC 1993). Unlike applicants, therefore, all three judges below would recognize that the government may regulate cable television as a medium of communication. *Ibid.*

Equally important is the fact that applicants are not merely seeking a stay of a lower court's order, but an injunction against the enforcement of a presumptively valid Act of Congress. Unlike a stay, which temporarily suspends "judicial alteration of the status quo," an injunction "grants judicial intervention that has been withheld by the lower courts." *Ohio Citizens For Responsible Energy, Inc.* v. *NRC*, 479 U.S. 1312, 1313 (1986) (SCALIA, J., in chambers). By seeking an injunction, applicants request that I issue an order *altering* the legal status quo. Not surprisingly, they do not cite any case in which such extraordinary relief has been granted, either by a single Justice or by the whole Court.

The All Writs Act, 28 U.S.C. § 1651(a), is the only source of this Court's authority to issue an injunction. We have consistently stated, and our own Rules so require, that such power is to be used sparingly. See, *e.g.*, *Ohio Citizens For Responsible Energy, supra*, at 1313; this Court's Rule 20.1 ("The issuance by the Court of an extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion sparingly exercised"). "[J]udicial power to stay an act of Congress, like judicial power to hold that act unconstitutional, is an awesome responsibility calling for the utmost circumspection in its exercise. This factor is all the more important where, as here, a single member of the Court is asked to delay the will of Congress to put its policies into effect at the time it desires." *Heart of Atlanta Motel, Inc.* v. *United States*, 85 S. Ct. 1, 2, 13 L. Ed. 12 (1964) (BLACK, J., in chambers).

An injunction is appropriate only if (1) it is "necessary or appropriate in aid or [our] jurisdiction," 28 U.S.C. § 1651(a), and (2) the legal rights at issue are "indisputably clear." *Communist Party of Indiana* v. *Whitcomb*, 409 U.S. 1235 (1972) (REHNQUIST, J., in chambers); *Ohio Citizens For Responsible Energy, supra*, at 1313. [illegible]t doubt, implementation of §§ 4 and 5 would not prevent this Court's exercise of its appellate jurisdiction to decide the merits of applicants' appeal. Nor is it "indisputably clear" that applicants have a First Amendment right to be free of the must-carry provisions. In *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), we struck down Florida's right of reply statute, holding that the State may not compel "editors or publishers to publish that which reason tells them should not be published." *Id.*, at 256 (internal quotation marks omitted). Under *Tornillo*, Congress plainly could not impose the must-carry provisions on privately owned newspapers. In *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), however, we upheld the Federal Communications Commission's requirement that broadcasters cover public issues, and give each side of the issue fair coverage. Noting that there is a finite number of frequencies available, we stated that "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." *Id.*, at 390. Although we have recognized that cable operators engage in speech protected by the First Amendment, *Leathers v. Medlock*, 499 U.S. ___, ___ (1991); *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986), we have not decided whether the activities of cable operators are more akin to that of newspapers or wireless broadcasters. *Id.*, at 494-495.

In light of these two lines of authority, it simply is not indisputably clear that applicants have a First Amendment right to be free from government regulation. The application for an injunction pending appeal to this Court is therefore denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Turner Broadcasting System, Inc., *et al.*,	)	
Plaintiffs,	)	
v.	)	Civ. Action No. 92-2247 (SFW, TPJ, SS)
FCC and United States,	)	
Defendants,	)	
Daniels Cablevision, Inc.,	)	
Plaintiff,	)	
v.	)	Civ. Action No. 92-2292 (SFW, TPJ, SS)
United States,	)	
Defendant.	)	

AFFIRMATION OF MICHAEL C. RAU

District of Columbia: ss

I, Michael C. Rau, affirm pursuant to 28 U.S.C. § 1746, as follows:

1. I am the Senior Vice President, Science & Technology, of the National Association of Broadcasters. I submit this affidavit in support of the Opposition to Plaintiffs' Motion for Preliminary Injunction and the Opposition to Plaintiff's Motion for Summary Judgment filed by the National Association of Broadcasters in these cases.

2. I am responsible for a broad range of NAB technical affairs and for providing technical advice and guidance to the membership and Board of Directors of the Association. As part of my duties, I review technological developments which may affect the television industry, either through changes in broadcast television systems or changes in other technologies used to distribute television signals, including in particular cable television. Prior to joining NAB in 1981, I was employed by Jules Cohen & Associates, an engineering consulting firm, and by Rau Radio Stations, Inc., a broadcasting company with cable television interests.

3. Plaintiffs have alleged that the must carry requirements of the 1992 Cable Act may cause displacement of certain cable program services because of a lack of capacity on cable systems. Briefly, technology improvements and increased customer expectations have resulted in a strong and unmistakable trend toward expanding channel capacity on cable television systems, especially at franchise renewal time, developments which make displacement either unlikely or unnecessary. Even without exploiting new technologies such as fiber optics and signal compression, today's cable and electronics technology easily allows substantial improvements in channel capacity. Often even the most primitive systems, with only 12-22 channels, can be upgraded to provide 40 channels without overhauling the system. Most new builds and rebuilds are for high capacity systems which can provide at least 80 channels. Some systems are now appearing with capacity of 150 channels or more.

4. There are two new technologies which are being used to dramatically expand the channel capacity of cable television systems: fiber optics and video compression. Installation of fiber optic networks is already proceeding for many cable operators. The capacity on optical fibers is only limited by the electronics necessary to interface with the fiber. With today's electronics technology, a single fiber can carry up to

80 NTSC television signals. NTSC is the current technical standard for U.S. television signals.

5. Video compression provides the greatest promise for long term expansion of cable channel capacity. Cable Laboratories (CableLabs), a technical facility funded completely by the cable industry, is evaluating standards proposals to develop a system for delivering compressed television signals from the cable head-end to consumers. Compression technologies already exist which can fit 4 NTSC quality video signals in an existing 6 MHz television channel. CableLabs expects to have a system available for cable operators' use by 1994.

6. Therefore, industry trends are combining with new technologies to expand the capacity of cable television systems. Systems such as one in Queens, New York, with 150 channels, are pointing the way to the future. If technology developments continue as most experts expect, compression will allow channel capacity on a cable television system to be multiplied by a factor of four, with compression equipment availability expected by 1994. Cable operators, foreseeing the imminent arrival of excess capacity, are exploring how to use these channels to branch out into personal communications and other businesses. A more detailed description of these developments follows.

Background

7. Channel capacity for a cable television (CATV) system is limited by the band-width available in the system. Every television channel carried on a cable system requires 6 MHz of bandwidth. Total system bandwidth, in turn, is limited by the physical properties of the cable system equipment.

8. A cable system can be divided into 5 parts: (1) the headend, (2) the trunk, (3) the distribution system, (4) the

drop cable, and (5) the customer premises equipment.[1/] The trunk is the long backbone cable that runs through the system to within a mile or so of each subscriber. The distribution system distributes the signal from the trunk throughout the various neighborhoods served by the system. The drop cable is the line which connects an individual subscriber to the cable distribution system.

9. The bandwidth of a system is limited by the trunk and, to a lesser extent, the distribution system and the drop cable. Only 14% of all cable footage is in the trunk.[2/] Thus, when cable systems are upgraded to expand their channel capacity, most of the existing cable is left intact.[3/] This has made it easy and commonplace for cable systems to increase their capacity as technology has improved.

Current CATV Capacity

10. Because the cable and electronic components used in CATV systems are fairly standardized, these systems tend to operate at a few bandwidth plateaus. On the lowest plateau are very old, small systems which operate at an upper frequency at 220 MHz, yielding up to 22 channels of capacity.[4/] On the upper plateau are modern, urban systems

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1/ Ciciora, *An Overview of Cable Television*, National Association of Broadcasters Engineering Handbook 731, 732 (8th ed. 1992).

2/ *Id.* at 746.

3/ *Id.*

4/ In figuring the channel capacity of a cable system, not all frequencies are used for distribution of video programs. The lower 54 MHz, as well as 20 MHz for the FM radio band, are not occupied with television signals. Another two 6 MHz channels, designated A1 and A2, are typically used for isolating system faults. Thus a system with a 220 MHz upper bandwidth limit has capacity for: (220-54-20-12)/6 = 134/6 = 22 channels.

operating at 1 GHz with over 150 channels of capacity.[5/] In between are plateaus at 330 MHz, 450 MHz, 550 MHz, and 750 MHz with capacities of up to 40, 60, 80 and 110 channels respectively.[6/]

11. No more than ten percent of cable plant today operates at the lowest capacity plateau of 22 or fewer channels.[7/] Even these systems can be, and often are, upgraded to 330 MHz and 40 channels without a complete rebuild. Seventy-five percent of cable plant today consists of systems with 330 MHz bandwidth and up to 40 channels of capacity. However, few new systems are built with the limited capacity of a 330 MHz system.[8/] Most new systems are built with bandwidths of 550 MHz providing 80 channel capacity.[9/] Already, 15% of existing cable plant is in the "high capacity" category.[10/]

5/ *See, e.g.*, Jesuale, *Video on Demand: Cable's Next Step?*, TV Technology, Sept. 1992, at 1, 48. The Time-Warner system in Queens, New York provides 150 channels of programming, went on-line in February 1992 and uses fiber optics in its trunk.

6/ *See* Ciciora, *supra* note 1, at 736.

7/ *Id.* at 736, 738.

8/ *See id.*

9/ *See* Moloney, Schilling, and Marz, *Expanded Bandwidth Requirements in CATV Applications*, 1992 NCTA Technical Papers 200, 201 [hereinafter *Expanded Bandwidth*] (noting the rapid expansion of cable system bandwidth "to the current standard level of 550 MHz").

10/ Ciciora, *supra* note 1, at 738.

Trends

12. Bandwidth expansion in CATV has been routine since the early days of cable.[11/] Clearly the trend is for new systems and rebuilds to expand bandwidth to 550 MHz or more with a capacity of at least 80 channels.[12/] This trend is being driven by consumer demands,[13/] and technology improvements.[14/]

13. This high-capacity trend is reported in a recent poll by Midwest CATV and *Cablevision*.[15/] The pool of 200 general managers revealed that 43% of the managers would upgrade or rebuild their system in 1993.[16/] An earlier poll showed that 36% planned to modernize in 1992.[17/] Of the

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[11/] *Expanded Bandwidth*, *supra* note 9, at 201. The authors note that bandwidth, and hence capacity, has doubled every 12-15 years.

[12/] *See, e.g.*, *Expanded Bandwidth*, *supra* note 9, at 200; Brugliera, *Compression and its Impact on Cable*, Communications Technology, May 1992, at 18; Vaughan, *Upgrades with Fiber: Selecting Cost-Effective Architectures*, 1991 NCTA Technical Papers 273.

[13/] *See, e.g.*, Brugliera, *supra* note 12, at 18 (noting the growth in available programming choices); Ciciora, *Scenarios for Compressed Video in Cable Practice*, 1991 NCTA Technical Papers 123. Ciciora maintains that "[w]hen given a choice, the American consumer has always chosen 'more' over 'better'." He points out that most VCRs are used in the six hour "EP" format despite "the noticeably superior video and dramatically better audio" available in the two hour "SP" mode. *Id.*

[14/] *See* Chiddix and Vaughan, *Upgrading Coaxial Distribution Networks with Amplified Taps*, 1991 NCTA Technical Papers 245 (discussing how low cost fiber technology is allowing 1 GHz systems to be built); Brugliera, *supra* note 12, at 18 (noting that steady advances in technology are extending cable plant bandwidth beyond 350 MHz and 450 MHz bandwidths).

[15/] *Building Blocks*, Cablevision, September 21, 1992, at 44.

[16/] *Id.*

[17/] *Id.*

managers planning upgrades or rebuilds, 78% said that they would be expanding the capacity of their systems. And 15% of those surveyed will be expanding their systems to a 1 GHz bandwidth and its capacity for 150 channels.[18/]

14. Thus, steady bandwidth and channel capacity expansion has been, and continues to be, the trend for all cable systems. Customer demands and technology improvements have fueled this expansion. However, two new technologies, *fiber optics* and *video compression*, promise to turn this slow, steady expansion into an imminent explosion in available capacity.

New Technologies for Expanding Channel Capacity

15. Fiber optics and video compression are two revolutionary new technologies which are being used to expand the channel capacity of cable television systems. Fiber optics expands the effective bandwidth of the cable system. Video compression makes more efficient use of whatever bandwidth is already available in the system. If a CATV system is analogized to a water distribution system, then adding fiber optics is like using a bigger pipe, and adding signal compression is like using a more powerful pump.

16. The combined impact of these technologies is an imminent explosion in channel capacity on CATV systems. Indeed, the impact of fiber optics alone on cable television has been compared to the tremendous growth of cable

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[18/] *Id.*

television popularity following its marriage to satellite technology in the 1970's.[19/] "Technology is making channel capacity ubiquitous and low cost."[20/]

Fiber Optics

17. Installation of fiber optic networks in CATV systems is now commonplace.[21/] Fiber optics is an extremely cost-effective approach to upgrading a cable trunk.[22/] The capacity of an optical fiber is, in practice, only limited by the electronics necessary to interface with the fiber. With today's electronics technology, a single fiber can carry up to 80 NTSC television signals.[23/] Many systems are built with several fibers bundled together for even greater capacity.

[19/] Mattson, *Fiber to Feeder Design Study*, 1991 NCTA Technical Papers 309, 319.

[20/] Pollack, *Packing Cable with Programs*, New York Times, January 22, 1992, at D1 (quoting Mr. Craig Tanner, Vice President for Advanced Television Products at Cable Television Laboratories (CableLabs)).

[21/] *See, e.g.*, Holobrow, Bohn, and Das, *Passive Optical Network (PON) Architectures and Applications*, 1992 NCTA Technical Papers 364 (noting that "fiber systems have supplanted coaxial trunking in most new and rebuild construction in the last two years."); Ciciora, *supra* note 1, at 738, 740, 746 (noting that optical fiber is now "frequently used" in cable systems as part of upgrades, rebuilds, and new builds).

[22/] *See*, Ciciora, *supra* note 1, at 746 (noting that some studies have shown that the cost of upgrading a system's trunk to fiber is less than $25 per subscriber). *See also* McGrath, *The Evolution of Broadband Hybrid Networks*, 1992 NCTA Technical Papers 124, 126 (proclaiming that, "[f]iber trunking/coax distribution . . . with analog bandwidths of 600 MHz (to a demonstrated top of 1 GHz) is now the architecture of choice.").

[23/] *See, e.g.*, Weinschenk, *Jerrold to Extend Starfire Family*, Cable World, April 20, 1992, at 62; Kearns, *An 80-Channel High Performance Video Transport System Over Fiber Using FM-SCM Techniques for Super-Trunk Applications*, 1991 NCTA Technical Papers 71.

18. In fact, fiber use has been proposed to interconnect cable systems with one another.[24/] In this vein, Adelphia Communications is currently building a 165 mile, 1 GHz fiber optic loop around the state of Vermont.[25/] And New Jersey Bell recently announced a partnership with Sammons Communications to build a fiber-to-the-curb (FTTC) system to 11,700 customers in New Jersey.[26/]

19. Once installed, fiber eliminates the capacity bottleneck on the cable trunk. In fact, many cable industry executives see the tremendous capacity made available by fiber as a tool to allow them to expand into the telephone and personal communications industries.[27/] Tele-Communications, Inc. has been testing personal communications networks (PCNs) with McCaw Cellular in Oregon.[28/] Meanwhile, CableLabs has formed a PCN Technical Advisory Subcommittee to explore provision of these services using the excess capacity on cable networks.[29/]

20. In addition to PCN, cable executives appear to want to use their new-found excess capacity to provide more pay-

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[24/] Stratton, *A Future Without Satellites*, Cable Television Business, July 1, 1990, at 20A.

[25/] *See Ring Around the State*, Cablevision, September 21, 1992, at 40.

[26/] Communications Daily, November 17, 1992, at 6.

[27/] Hart, *Cost Effective Cable Television Transport for PCN*, 1992 NCTA Technical Papers 148; Gitten, Albagli, and Walker, *Planning CATV-Based Personal Communications Networks*, 1992 NCTA Technical Papers 129.

[28/] *Impact of Fiber Optics*, Communications Technology, May 1992, at 28, 40.

[29/] Dukes, *CableLabs 1991 Advanced Network Development Work*, 1991 NCTA Technical Papers 232, 234.

per-view channels.[30/] In fact, in one almost unbelievable trial, Comcast and Jerrold have teamed to design a system that would dedicate 25 channels to a single movie, with start times rotating at 5 minute delays.[31/] Indeed the Time-Warner 150-channel cable system in Queens, New York includes 57 channels of pay-per-view.[32/]

21. Fiber is available, cost effective, and is being used in most CATV trunk construction today. It is expanding cable system capacity beyond the number of conventional programming services available to cable systems today. The result is that plans are in the works to use the excess capacity for PCN, pay-per-view, and other subscription services.

Video Compression

22. If fiber optics is a crowbar to pry open previous bottlenecks in CATV systems, then video compression is a sledgehammer to smash the bottleneck to pieces. Fiber optics adds capacity to a cable system. Video compression literally multiplies that capacity by a factor of four or more. Video compression is the future of virtually every video transmission and storage system from CATV to High Definition Television (HDTV). And video compression has already moved from the laboratory to the marketplace.

23. Video compression eliminates redundancy and irrelevancy in video signals, thus reducing the bandwidth required for their transmission. An NTSC television signal requires 6 MHz of bandwidth, but it is possible to fit six

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30/ *See, e.g.*, Brugliera, *supra* note 12, at 18; *Multiple Channels Planned*, TV Digest, September 21, 1991, at 7.

31/ Jesuale, *supra* note 5, at 48.

32/ *Id.* at 48.

compressed NTSC signals in that same 6 MHz bandwidth.[33/] Thus, even a very limited capacity cable system operating at 220 MHz could be upgraded to provide over 100 video channels *without replacing the existing cable plant.*[34/] And 1 GHz systems will be able to provide over 500 channels of television programming. Although decompression converters would need to be provided for every customer, Hal Krisbergh, President of Jerrold, has estimated that these boxes will only cost about 35% more than existing boxes.[35/]

24. Video compression is already being installed in satellite transmission systems for cable programming distribution. National Technological University and Westcott Communications have recently converted to Compression Lab's SpectrumSaver system.[36/] Meanwhile Rogers Cable has been using the General Instruments DigiCipher compression system since July 1992 to provide 4 video signals over a single transponder.[37/] Cablevision Systems and Multivision of Mexico have also selected the DigiCipher system.[38/]

33/ *See, e.g.*, Weinschenk, *DigiCipher Gear Wins High Marks*, Cable World, September 21, 1992, at 46; *Westcott and NTU — Important End Users*, Satellite News, November 2, 1992, at 4; Communications Daily, September 16, 1992, at 5-6.

34/ *See* Tanner, *Digital Compression and Transmission: A Primer for Non-Technical Readers*, Specs, October 1992, at 3.

35/ Weinschenk, *Digital Compression: No Sure Thing*, Cable World, April 27, 1992, at 30.

36/ *Westcott and NTU - Important End Users*, *supra* note 33, at 4.

37/ Weinschenk, *supra* note 33, at 46.

38/ Lambert, *Digital Compression Now Arriving on the Fast Track*, Broadcasting, July 27, 1992, at 40; *Multivision to Use Digicipher*, TV Digest, June 8, 1992, at 7.

25. The migration of compression from the satellite feed to the cable distribution system would appear to be imminent. All of the systems being considered by the Federal Communications Commission for a U.S. standard for terrestrial HDTV use video compression, thus ensuring that integrated circuits will be mass produced as an important component of the next generation of home receivers.

26. Most experts are in agreement that video compression is coming soon to CATV systems and will be cost effective. CableLabs joined with Viacom, Tele-Communications Inc. (TCI), and the Public Broadcasting Systems (PBS) to issue a request for proposals for satellite transponder compression systems in the fall of 1991.[39] The process ultimately led to purchase negotiations between Viacom, TCI, and PBS, and the three compression finalists: AT&T, General Instruments, and Scientific-Atlanta.[40]

27. CableLabs is now focusing on development of headend-to-the-home compression systems.[41] And the experts are predicting that these systems will become available by 1994.[42] John Malone, President of TCI, has opined that compression will have as much impact on the

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[39] Lambert, *supra* note 38, at 40.

[40] *Id.*

[41] *Id.* at 42. CableLabs President Dick Green has said, "In general, I have a lot of faith in the entrepreneurial process that costs are tractable." Weinschenk, *supra* note 35, at 30.

[42] Tony Weselberger, Vice President at Oak Communications, believes compression will hit the market beginning in 1994. Lambert, *supra* note 38, at 44. Mike Harris, Senior Vice President of Century Communications also sees 1994 as a target date for compression in the distribution system. *Building Blocks*, *supra* note 15, at 44. AT&T has also said that their system will be available to cable television operators by 1994. Farhi, *AT&T Announces System to Expand Cable Offerings: Technology Could Allow Up to 500 Channels*, Washington Post, May 5, 1992, at C1.

development of the cable industry as did the availability of communications satellites which made national distribution of programming possible.[43]

Conclusions

28. The history of CATV systems has been a steady expansion of channel capacity. Systems are now in place with 1 GHz of bandwidth and 150 channels of capacity. These systems are pointing the way to the future. Most new systems and upgrades to old systems are providing at least 80 channels of capacity. This expansion is and will continue to be built on the availability of low cost, wide bandwidth fiber optics.

29. Meanwhile, a tremendous explosion in available capacity is at hand with the introduction of video compression technology. This technology has already moved out of the lab and into the marketplace. As systems are upgraded with video compression, their capacity will be multiplied by a factor of four or more. The outlook is for a future where capacity exceeds available programming. Cable industry executives, foreseeing that result, are investigating new services such as PCN to exploit that excess capacity.

/s/
Michael C. Rau

Subscribed and sworn to before me
this 23rd day of November, 1992.

/s/
Notary Public

My Commission Expires February 28, 1994

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[43] *MSO's Prime Compression*, TV Digest, April 22, 1991, at 2.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Time Warner Entertainment Company, L.P.,	)	
Plaintiff,	)	
v.	)	Civ. Action No. 92-2494 (SFW, TPJ, SS)
FCC and United States,	)	
Defendants,	)	
Discovery Communications, Inc., *et al.*,	)	
Plaintiffs,	)	
v.	)	Civ. Action No. 92-2558 (SFW, TPJ, SS)
United States, *et al.*,	)	
Defendants,	)	
National Cable Television Association, Inc.,	)	
Plaintiff,	)	
v.	)	Civ. Action No. 92-2495 (SFW, TPJ, SS)
United States, *et al.*,	)	
Defendants.	)	

AFFIRMATION OF MICHAEL C. RAU

District of Columbia: ss

I, Michael C. Rau, affirm pursuant to 28 U.S.C. § 1746, as follows:

1. I am the Senior Vice President, Science & Technology, of the National Association of Broadcasters. I submit this affidavit in support of the Opposition of Intervenor-Defendant Applicant National Association of Broadcasters to Motions for a Preliminary Injunction Restraining Enforcement of Sections 4 and 6 of the 1992 Cable Act Filed by Plaintiffs TWE, NCTA and Discovery in these cases. This affidavit supplements the information in my earlier affidavit submitted November 22, 1992, in *Turner Broadcasting System* v. *FCC*, Civ. Action No. 92-2247 (SFW, TPJ, SS), and describes recent developments in fiber optics, video compression, and digital video servers for cable television.

2. I am responsible for a broad range of NAB technical affairs and for providing technical advice and guidance to the membership and Board of Directors of the Association. As part of my duties, I review technological developments which may affect the television industry, either through changes in broadcast television systems or changes in other technologies used to distribute television signals, including in particular cable television. Prior to joining NAB in 1981, I was employed by Jules Cohen & Associates, an engineering consulting firm, and by Rau Radio Stations, Inc., a broadcasting company with cable television interests.

3. Plaintiffs have alleged that the must carry requirements of the 1992 Cable Act may cause displacement of certain cable program services because of a lack of capacity in cable systems. However, the channel capacity of cable television systems is being rapidly expanded by cable television companies. The increasing deployment of fiber optics and the use of video compression techniques will

expand significantly the number of channels of capacity available to all cable customers, eliminating any shortage of channel capacity for desirable programming. Perhaps more importantly, however, the development of cost-effective video switching devices to provide video-on-demand completely removes any ceiling or limits on the availability of video programs through cable systems. Video switches shift the program-delivery limitations of cable television systems from the channel-carrying capacity of the systems to the unlimited capacity to store programs in each system's video library. Video switching technology is being deployed not only by cable television systems, but also by telephone companies offering to provide so-called video dial-tone services.

Fiber Optics

4. Recent developments confirm that fiber optics is becoming increasingly prevalent in cable television systems. There are more than 1 million miles of fiber-optic cable in cable systems throughout the U.S. and another 620,000 miles is expected to be installed this year.[1/] In fact, the Myers Reports survey of 834 cable system operators reported that 38% of systems with 12-36 channels, and 40.6% of systems with 37 or more channels, plan to install fiber optic technology.[2/] Overall, 3 out of 4 cable operators are making plans to expand channel capacity.[3/]

5. For example, Time Warner has announced that it plans to upgrade its U.S. cable systems, serving 6.8 million

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[1/] Kathy Berlin, *Fiber Deployment '93: 85 Miles an Hour, Every Day*, Cable World, January 18, 1993, at 32.

[2/] Rich Brown, *Operators Plan Growth Along Fiber Lines*, Broadcasting, February 1, 1993, at 29.

[3/] *Id.*

subscribers, to fiber.[4/] Likewise, Tele-Communications, Inc. (TCI) plans to provide fiber to 90% of its subscribers over the next 4 years.[5/] TCI's Barry Marshall estimates that the use of fiber in multiple system operators' (MSO's) cable trunks will expand from its present percentage of 20% to as much as 40% by the end of 1993.[6/]

6. Technology and cost improvements continue to drive the use of fiber. For example, Jerrold has advertised that its STARFIRE 750 fiber optic laser system can provide 60 analog, or 500 digitally compressed, TV channels on a single fiber. Thus the technology is now in place to expand cable channel capacity to 500 or more channels and cable operators are beginning to implement it.

Video Compression

7. Video compression is the technology that is "launching the era of 500-channel cable systems."[7/] In the past three months, major cable MSOs (Multiple System Operators) have announced plans for systems which will deliver digitally compressed cable television signals into viewers' homes by 1994. This will dramatically multiply the number of signals which can be carried on *existing* cable systems without the need to replace the cable lines.

8. On December 2, 1992, TCI announced that it had agreed to purchase up to 1 million home set-top terminals for

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[4/] Carl Weinschenk, *Time Warner's Billion-Dollar Fiber Plan*, Cable World, December 14, 1992, at 44.

[5/] *TCI Boosts Spending*, TV Digest, January 18, 1993, at 4.

[6/] *Id.*

[7/] Carl Weinschenk, *Compression Kickstart*, Cable World, December 9, 1992, at 1.

receiving compressed digital video signals.[8/] TCI, which operates 443 local cable systems, expects to begin installing the technology in late 1993 or 1994 and expects compression to be available to as many as 95% of its systems by 1995.[9/] It will offer compressed digital video to 1 million of its 9.2 million customers beginning this year.[10/] As a spokesman for Time Warner noted, the TCI venture "absolutely accelerates compression into the here and now."[11/]

9. Initially, TCI plans to convert six or seven analog channels to digital, yielding a total of 60-70 new channels.[12/] Eventually, a 50-channel system will be able to offer 500 channels with this compression technology. TCI expects the near term cost of implementing digital compression to be "de minimis," in part because existing analog set-top converters can be upgraded and reused for roughly $80 each.[13/]

10. On January 26, 1993, Time Warner announced its own digital compression plans.[14/] Time Warner announced that it will use digital compression to provide hundreds of

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[8/] Peter Lambert, *TCI: $200 Million for Channel Explosion*, Broadcasting, December 7, 1992, at 4, 15.

[9/] Geoffrey Foisie, *TCI Sees Compression Paying For Itself*, Broadcasting, December 21, 1992, at 31.

[10/] Kevin Maney, *Technology to Expand Cable TV Services*, USA Today, December 3, 1992, at B1.

[11/] Lambert, *supra* at 4.

[12/] Carl Weinschenk, *Compression Kickstart*, Cable World, December 7, 1992, at 1. *See also* Edmund L. Andrews, *Cable Concern Plans to Offer 500 Channels*, N.Y. Times, December 3, 1992, at A1.

[13/] Foisie, *supra*.

[14/] Geraldine Fabrikant, *Time Warner Plans Cable System of Hundreds of Channels*, N.Y. Times, January 28, 1993, at D15.

channels to its customers as part of its "Full Service Network" serving residential cable subscribers in Orlando, Florida by 1994.[15/] Time Warner emphasized that the Orlando system is not a test and that it is "completely committed to putting this endpoint system" into all its cable clusters.[16/] Other companies have also announced plans to implement digital compression. Viacom, the Public Broadcasting Service, and Request TV have all announced deals to upgrade to digitally compressed video.[17/]

11. Realizing that the 500 channel cable system is imminent, Discovery Communications has developed Your Choice TV, an interactive menu system for accessing hundreds of channels of digital programming.[18/] Viewers will use the menu-driven, remote control system to navigate their way through the hundreds of viewing options which will soon be available to them. First generation equipment is expected by the end of 1993.[19/]

Video Server Technology

12. As digital video compression is being combined with video server and switching technology, cable systems are now entering an era, as described by a Time Warner spokesman,

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[15/] Randy Sukow & Rich Brown, *Time Warner Unveils 'Full Service' TV*, Broadcasting, February 1, 1993, at 6.

[16/] *Time Warner's 'Electronic Superhighway Into The Home'*, TV Digest, February 1, 1993, at 3. *See also* Johnnie L. Roberts & Mary Lu Carnevale, *Time Warner Plans Electronic 'Superhighway'*, Wall St. J., January 27, 1993, at B1.

[17/] Weinschenk, *Compression Kickstart*, *supra*. *See also*, Lambert, *supra*.

[18/] Peggy Ziegler, *500-Channel Future Prompts Menu System from Discovery Comm.*, Cable World, December 14, 1992, at 1.

[19/] *Id.*

of "infinite capacity."[20/] Video server technology is the key to providing true "video on-demand" to cable television viewers.

13. Video server technology fundamentally changes the way in which a cable system delivers video programming to the home. In a conventional cable system, all available programs are simultaneously transmitted through the entire cable system to every television receiver, even though each individual television set can only display one program at a time. Thus, to increase the number of channels available to the viewer, the cable must have the capacity to deliver all of these channels simultaneously to every viewer.

14. Video server technology changes all of this by effectively implementing the channel selector switch upstream in the cable system, toward the cable headend, so that only a single program is transmitted at a time to each receiver, much in the way the telephone system works. This means that the cable to the television receiver no longer needs the capacity to carry dozens of channels simultaneously, but only enough capacity to carry the program to be viewed. Thus, even without the use of fiber optics or video compression, existing cable infrastructure can carry a virtually limitless number of programming choices by use of video server technology.

15. In the Time Warner system being built in Orlando, Florida, homes are to be equipped with high-capacity, random access, digital storage devices capable of holding hundreds or even thousands of video programs.[21/] Digitally compressed video programs will be sent in high speed bursts to the customer's home storage device and accessed "on demand" by the home viewer. High speed digital switching will handle the traffic flow of data bursts to the home storage device and

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[20/] Sukow & Brown, *supra*.

[21/] *Id.*

allow Time Warner to offer telephone and data transmissions over the two-way system.[22/]

16. Video server and switching technology is being aggressively developed and implemented, not only by cable operators, but by the telephone companies to provide "video-on-demand."[23/] It can and will provide virtually infinite capacity, since it eliminates the need to simultaneously transmit all available channels to each TV receiver.

17. Bell Atlantic is using digital compression and video server technology in its video dial tone systems.[24/] Later this year, Bell Atlantic plans to begin offering this video-on-demand service over existing copper wires to 400 subscribers in Fairfax County, Virginia.[25/] The Bell Atlantic system will store digitally compressed video on large, random access storage devices. A viewer will dial up the program of choice which will be routed through a video server, over existing copper wire telephone lines, to the viewer's home. Bell Atlantic will build two-way video server-based networks this summer in Morris County and Dover Township in New

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[22/] *Id.*

[23/] For example, US West recently announced a plan to build a fiber-based broadband network to deliver telephone, interactive video, and video-on-demand services to its 13 million customers in 14 western states. The system will reach its first 100,000 customers by 1994, with half a million new customers a year to be added after that. The US West system initially will be capable of carrying 70-100 video channels, expandable to 500 with compression. *US West Answers Video Dialtone Call*, Broadcasting, February 8, 1992.

[24/] Harry A. Jessell, *Bell Atlantic Takes Early Lead*, Broadcasting, January 4, 1993, at 45. *See also* Carl Weinschenk, *Bell to Cable Industry: We'll See You in Court*, Cable World, December 21, 1992, at 1, 25.

[25/] Jessell, *supra*.

Jersey.[26/] In each case, video server and video switching technology will be used to provide video dial tone service.

Conclusion

18. Recent events have confirmed that channel capacity limitations in cable television systems are vanishing and will shortly be a thing of the past. Cable operators are deploying fiber optics at a rapid pace. Video compression is being aggressively implemented as a cost effective method for literally multiplying the number of channels available. And, with the implementation of video server technology, we are witnessing the initiation of truly "infinite capacity" cable TV systems.

/s/
Michael C. Rau

Subscribed and sworn to before me
this 12th day of February, 1993.

/s/
Notary Public

My Commission Expires February 28, 1994

[26/] *Id. See also*, Rich Brown, *Twain Meet Over Video Dial Tone*, Broadcasting, November 23, 1992, at 4.

No. 93-44

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,
v.
FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

REPLY BRIEF OF APPELLANTS TURNER BROADCASTING SYSTEM, INC., *ET AL.* IN OPPOSITION TO MOTIONS TO AFFIRM

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TURNER BROADCASTING SYSTEM, INC., *et al.*,
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On Appeal from the United States District Court for the District of Columbia

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REPLY BRIEF OF APPELLANTS TURNER BROADCASTING SYSTEM, INC., *ET AL.* IN OPPOSITION TO MOTIONS TO AFFIRM

Pursuant to Rule 18.8 of the Rules of this Court, appellants Turner Broadcasting System, Inc, *et al.*[1] submit this brief in opposition to the motions to affirm filed by the government ("Govt. Motion"), appellee National Association of Broadcasters ("NAB Motion"), appellee Association of Independent Television Stations, Inc. ("INTV Motion"), and appellees Association of America's Public Television Stations, Public Broadcasting Serv-

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[1] Appellants joining this motion are Turner Broadcasting System, Inc., Arts & Entertainment Network, Black Entertainment Television, Inc., E! Entertainment Television, Inc., Hearst/ABC-Viacom Entertainment Services, International Family Entertainment, Inc., National Cable Satellite Corporation, QVC Network, Inc., The Travel Channel, Inc., and USA Networks, all parties in Docket No. 92-2247 below; and Discovery Communications, Inc. and The Learning Channel, Inc., parties in Docket No. 92-2258 below.

ice and Corporation for Public Broadcasting ("PBS Motion"). For the reasons set forth below and in appellants' jurisdictional statement, the Court should deny appellees' motions, note probable jurisdiction, and order full briefing and oral argument on the merits. The constitutional questions are substantial, the divided district court is wrong, and full review by this Court is appropriate and necessary.

We concur in the arguments made in the reply brief filed by the other appellants. We highlight in this brief the constitutional infirmities, from the particular standpoint of cable programmers, of the so-called must carry provisions contained in sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"), 47 U.S.C. §§ 534, 535. Under the must carry provisions, the government has dictated that local broadcast stations are guaranteed access to viewers through cable carriage at the expense of competing speakers—cable programmers. The motions to affirm, particularly the government's, gloss over or ignore this infringement of cable programmers' First Amendment rights.

1. As the dissent recognized, consistent with the conclusion of the United States Court of Appeals for the District of Columbia Circuit invalidating previous must carry regulations,[2] the must carry statute unconstitutionally infringes upon rights of cable programmers by dictating that broadcasters be given preferred positions in the marketplace of speech at the programmers' expense. As Judge Williams noted, "[g]iven the finite number of cable channels, replacement of the cablecaster's choice of programs with those of local broadcasters suppresses the alternative programs as completely as if Congress had ordered them shut down" (J.S. App. 55a, footnote omitted). As this

[2] *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1451-52 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986). *See also Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988).

Court has long held, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . ." *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

The First Amendment violation of which the cable programmers complain is not the invasion of their editorial discretion or of their right to remain silent. Quite the contrary, it is the governmental invasion of their right to speak on equal terms with other speakers. From the programmers' point of view, the central vice of the must carry law is its speaker-partiality—its enactment of an explicit preference for one group of speakers (local broadcasters) at the direct expense of cable programmers in the marketplace of ideas. This government invasion is particularly harmful because cable programmers, like local broadcasters, must compete for a limited number of channels on a cable operator's system. However, unlike broadcasters, programmers have no governmentally-conferred access to the airwaves and thus no alternative means of disseminating their messages to the public.

Contrary to the district court's view, *Buckley* requires that this government interference in the marketplace of speech be subjected to exacting scrutiny.[3] Other decisions

[3] In *Buckley*, the expenditure limitations restricting the speech of some in order to give others better access to public audiences were subject to exacting scrutiny—and struck down—even though the restrictions were "neutral as to the ideas expressed." 424 U.S. at 39. And in so doing, the Court specifically reversed the court of appeals' conclusion that the *O'Brien* standard (*United States v. O'Brien*, 391 U.S. 367 (1968)) applied. 424 U.S. at 15-17. Appellees' attempts to distinguish *Buckley* are unavailing. (Govt. Motion at 27 n.23; NAB Motion at 21-22.) First of all, *Buckley* demonstrates that appellees' assertion that exacting scrutiny never applies unless the government seeks to suppress particular "ideas" or "viewpoints" is simply wrong. Exacting scrutiny applied in *Buckley* because the government purposefully sought to regulate protected expression. The Court did not suggest that the *O'Brien* test would have applied if the

of this Court make clear that government regulations, like the one here, aimed at protected expression itself are subject to the most rigorous First Amendment scrutiny.[4]

The district court's refusal to test the statute under exacting scrutiny seemingly reflects its belief that the law is not content-based. While the government and other appellees ask the Court to embrace the congressional findings in the 1992 Cable Act, they ignore those congressional findings that expose the content-based nature of Congress' justification for must carry. Congress granted local broadcast stations a governmental preference ahead of all cable programmers because of its belief that the former present "local news and public affairs programming and other local broadcast services critical to an informed electorate."[5] Thus, as Judge Williams' dissent recognized, Congress acted to promote local broadcasters' speech, at the expense of cable programmers, because it found the content of broadcasters' speech to be "especially worthy."[6] Indeed, because broadcasters' program-

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expression at issue had been "protected" but not "political" and, in any event, much of the speech that cable programmers offer (*e.g.*, CNN, C-SPAN and others) includes core "political" speech. Further, the Court's opinion in *Buckley* emphasized that the limitations at issue there, like the must carry provisions, could not be characterized as regulations of "conduct" which only "incidentally affected speech", *and* that the governmental interests asserted—promoting the speech of some by limiting the First Amendment rights of others—could not be deemed to be "unrelated" to the suppression of free expression. 424 U.S. at 15-17.

[4] *See Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781 (1988); *Meyer v. Grant*, 486 U.S. 414 (1988); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

[5] Findings, ¶ 11; *see also* S. Rep. 92, 102 Cong., 1st Sess. 59 (1991); H.R. Rep. No. 628, 102 Cong., 2d Sess. 64 (1992).

[6] J.S. App. 53a. Thus, this case presents the obverse of the situation presented to the Court last Term in *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993), where the government attempted to justify its regulations on the ground that certain

ming under federal licensing requirements "must, as a matter of law, include content of a type specified by the government" (J.S. App. 57a), the speech that the must carry law prefers is that over which the government exercises the most direct control. Under these circumstances, appellees' assertions that the Act's must carry requirements are content-neutral are demonstrably false.

2. The motions to affirm, particularly the government's, make no real attempt to defend the district court's analysis, only its conclusion. The thrust of the motions is that the must carry statute can be justified as an economic regulation of cable operators and that "salient features" of the cable industry, including a history of government regulation and physical scarcity in the marketplace, justify the government's intervention. The opposition filed by the other appellants forcefully refutes those arguments with respect to cable operators and to the industry viewed as a whole. But it is obvious that cable programmers in particular have not been the beneficiaries of any governmental largesse. In fact, appellees make no argument that either the federal government, or local governments for that matter, have granted any benefits to cable programmers or have regulated them in any fashion that could justify the First Amendment injuries must carry inflicts upon programmers.[7] Unlike broad-

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speech (commercial publications) were especially unworthy. Although the regulation manifested no discrimination against any particular viewpoint, the Court nevertheless found it impermissibly content-based. *Id.* at 1516-17.

[7] Certainly, for example, *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), provides no support for the violations of cable *programmers'* rights. *See* Govt. Motion at 28; INTV Motion at 23; NAB Motion at 16-17. In any event, as Judge Williams explained below (J.S. App. 52a-53a), a more apt analogy to the must carry law would be a variation of the *PruneYard* pattern where the privilege of access was restricted "to persons living within four miles of each shopping center"—a restriction that would plainly be unconstitutional.

casters, cable programmers do not hold government broadcast licenses and cannot alternatively transmit their message free over the air. In effect, the must carry provisions resurrect a repudiated—and unconstitutional—federal policy of promoting broadcasters as "society's chosen" speakers[8] by burdening the First Amendment rights of competing providers of video programming.

3. Appellants do not, as NAB argues (NAB Motion at 12), concede that must carry survives *O'Brien* scrutiny. *See* J.S. at 24. The asserted governmental interests are not sufficiently substantiated to justify the far-reaching government intrusion into First Amendment protected activities. The must carry provisions Congress enacted are grossly overinclusive in view of their purported objectives. Even assuming that some operators have dropped or refused to carry particular broadcasters for truly anticompetitive reasons, the must carry provisions—divesting editorial discretion from *all* cable operators *as a class* for the benefit of *all* broadcasters *as a class* at the expense of *all* cable programmers *as a class*—are about the most blunt instruments imaginable for protecting against genuinely anticompetitive actions. Even Congress acknowledged that most broadcasters were carried prior to 1992. The must carry provisions thus represent a regulation of expression "in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

Thus, unless the deference to Congress the motions to affirm urge[9] extends to insulate congressional action from any evaluation by this Court, the district court's decision cannot withstand review even under *O'Brien*. As Judge Williams emphasized, "the legislative findings simply do not support the inferences needed to sustain must-carry" and "[i]f findings as scantily connected to the conclusion as these can justify must-carry, then the door is open—even in the area of First Amendment rights—to exercise of the most naked interest-group preferences." (J.S. App. 67a.)

[8] *Inquiry into Economic Relationship Between Television Broadcasting and Cable Television*, 71 FCC2d 632, 645-46 (1979); *see Quincy*, 768 F.2d at 1440-43.

[9] Govt. Motion at 18-19; NAB Motion at 13-14; PBC Motion at 18-19; INTV Motion at 12-13.

4. There is no basis to the government's claim that the must carry requirements "constitute a carefully designed mechanism specifically aimed at promoting the First Amendment interests of viewers—interests this Court has described as 'paramount'." Govt. Motion at 2, *citing Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). First of all, in contrast to previously invalidated must carry requirements, there is no mechanism in this scheme for viewer preferences whatsoever.[10] The structure of the must carry regime itself shows that Congress aimed to protect broadcasters, not to protect local broadcasting for viewers. Congress never attempted to establish, in connection with must carry or otherwise, a baseline of "localism" that should be protected in all circumstances—a touchstone for determining whether government intervention is truly necessary.[11] Instead, the must carry scheme operates as a function of the entirely fortuitous element of the capacity of the cable system.

But perhaps most revealing is the existence and effect of Section 6 of the 1992 Cable Act, the retransmission consent provision. The 1992 Cable Act gives commercial broadcasters the option of demanding either must carry carriage of their signals under Section 4 or payment for carriage of their signals under Section 6. A broadcaster that elects retransmission consent rights under Section 6

[10] In the FCC must carry regulations invalidated in *Century*, a minimum viewing standard was required of a station to qualify for must carry. 835 F.2d at 297.

[11] The *Quincy* court held that in the absence of such a baseline "we simply cannot know if rules are adequately tailored to pass constitutional muster." 768 F.2d at 146.

forfeits must carry protection; if the broadcaster and cable operator cannot agree on appropriate compensation, the operator is not permited to carry the broadcaster's signal.

The Solicitor General (Govt. Motion at 3 n.3) and NAB (NAB Motion at 13 n.21) both candidly acknowledge the bottom line effect of Congress' scheme. Only broadcasters whose programming is relatively unpopular may ultimately need to seek must carry protection. Broadcasters with significant audience appeal will be able to demand payment (in cash or in kind) from cable operators desirous of including their signals. In fact, broadcasters are leveraging their governmentally-granted rights under Section 6 to create yet another favored class of speakers, cable programmers affiliated with broadcasters, who will have the ability to obtain cable carriage before appellants or supplant them entirely.[12]

Thus, the statutory scheme actually empowers broadcast stations to override the asserted—and allegedly substantial—government interest in assuring public access to local broadcast programming by withholding the signal from the cable operator unless the broadcaster gets paid (or for any other reason). Instead of furthering the paramount First Amendment interests of viewers, as the government claims, Congress has enacted a scheme with two basic elements: (1) redistribution of wealth from cable operators to powerful broadcasters; and (2) a legislative preference for less popular local broadcasters who otherwise might fail in the competition for public attention in the marketplace, but who obtain carriage under the statute even though viewers might prefer to watch CNN, C-SPAN, USA Network, The Learning Channel or the other appellants represented here. The must carry statute is under any standard of review punitive, protectionist, unjustified and unconstitutional.

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[12] Both national broadcast networks like CBS, ABC, NBC, and Fox, as well as local broadcast stations, have begun to tie the grant of retransmission rights to an agreement by the cable operators to carry a new, broadcaster-created cable program network.

CONCLUSION

This Court should deny appellees' motions to affirm and note probable jurisdiction.

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No. 93-44

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Supreme Court of the United States
OCTOBER TERM, 1993

SUPREME COURT, U.S.
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TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,
v.
FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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REPLY BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM

The United States does not deny in its Motion to Affirm that the question presented in appellants' Jurisdictional Statement is substantial nor does it urge that this Court summarily affirm the judgment below. This reticence by the United States contrasts with its practice in other cases. *See, e.g.*, Motion to Affirm in Part and Vacate in Part, *Wetherell v. De Grandy*, No. 92-519, at 8, 23 (finding of liability "should be summarily affirmed"); Motion to Affirm in *North Dakota v. United States*, No. 88-926, at 11 ("[p]lenary review is . . . unwarranted and the decision should be summarily affirmed"); Motion to Affirm in *Sable Communications of California, Inc. v. FCC*, No. 88-515, at 13 (same); Motion to Affirm in *City of Pleasant Grove v. United States*, No. 85-1244, at 6 (same). Thus, on the matter immediately before this Court—whether the question presented

is substantial and warrants plenary review—the United States has expressed no disagreement with appellants that plenary review is appropriate.[1]

Plenary review is warranted in any event. Although appellees seek affirmance on the basis of supposedly established doctrines, the doctrines that they actually advance are anything but established. Appellees urge this Court to hold, among other things, that Congress can use targeted legislation to dictate whose speech will be carried by the press; that cable operators and programmers may be given the lesser First Amendment protection given to holders of broadcast licenses, despite the fact that providers of cable television are not limited by conditions of spectrum scarcity; and that legislation directly and deliberately altering the content of speech uttered by private speakers is something other than "content-related." For the Court to adopt any of these theories would afford government hitherto unknown power to interfere in the private marketplace for speech and reshape that marketplace more to its own liking. Grounded in neither precedent nor principle, these arguments provide no basis for affirmance at all, much less for summary action.

1. a. The United States, as its principal argument, takes the position that Congress, with only modest judicial review, can broadly regulate the press to correct what it sees as "market failure" in the forum for speech and

[1] Appellees Association of America's Public Television Stations, *et al.*, oppose plenary review based upon their assertion that, at some point in the future, some cable systems may have enough channels to accommodate all potential programmers. Motion at 14-18. That speculation, even if relevant to the constitutional analysis, has little to do with the judgment currently before the Court, which upholds the right of Congress to mandate carriage of local broadcast stations under current conditions and regardless of the channel capacity of any particular system. And, unlike the circumstances presented in *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986), the Court has before it a sufficient record on which to decide the question presented.

to "ensur[e] that a diversity of programming and information will be available." Motion at 10. It is well-established, of course, that legislatures have broad power to regulate businesses generally and that economic regulation is typically subjected to minimal judicial scrutiny. But it is likewise the case that legislative efforts to regulate the press have traditionally been viewed with great suspicion under the First Amendment. This Court has reasonably accommodated both of these principles by holding, on the one hand, that it will engage in deferential review when "generally applicable economic regulations" are applied to the press but, on the other hand, that it will undertake strict scrutiny when legislatures "single out" the press for targeted, industry-specific legislation. *Compare Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) *with Cohen v. Cowles Media Co.*, 111 S. Ct. 2513 (1991). In saying that "the proper framework for evaluating the First Amendment issues in this case is found in *Associated Press v. United States*, 326 U.S. 1 (1945)"—a case involving application of the general antitrust laws to members of the press—the United States has set off on the wrong track. Motion at 10.

The distinction between general and specific laws in this connection has not been drawn out of thin air: it reflects the very different degrees to which the two types of laws threaten freedom of speech and of the press. Because a truly general law applies broadly to entities other than the press, the law will typically prove too unwieldy a mechanism for compelling, prohibiting, or otherwise interfering with the content of speech. *See Minneapolis Star*, 460 U.S. at 585.[2] Moreover, even with respect to

[2] This Court has frequently rejected efforts to characterize laws singling out the press as nothing more than general economic regulation. *See, e.g., Minneapolis Star*, 460 U.S. at 581; *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 112 S. Ct. 501, 509 (1991); *Riley v. National Fed'n of the*

general prohibitory laws—which, like the antitrust laws, are subject to case-by-case enforcement—the necessary application of the statute to other businesses provides a benchmark by which to identify, and assess, any arbitrary application to the press. *See City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 761 (1988) ("the general application of the statute to areas unrelated to expression will provide the courts a yardstick with which to measure the [officials'] occasional speech-related decision"); *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2464 (1991) (Scalia, J., concurring in judgment). These safeguards are entirely absent when the legislative branch marks out the press for special regulation in ways that directly or indirectly control what the press may say, and strict judicial scrutiny of such laws is required.

b. Although this Court has upheld broad regulation of the broadcasting industry, the United States admits that potential operators of cable systems do not confront the sort of physical scarcity faced by potential users of the electromagnetic spectrum. To tie cable television and broadcasting together, therefore, the United States makes the bold declaration that the "critical factor" justifying the broad regulation of broadcast television "has not been the physical phenomenon of spectrum scarcity as such, but the resulting inability of the broadcasting market to function successfully." Motion at 21. But this revisionist history is flatly contrary to statements by this Court to the effect that "spectrum scarcity" is "[t]he prevailing rationale for broadcast regulation." *FCC v. League of Women Voters*, 468 U.S. 364, 376 n.11 (1984); *see also Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997, 3010 (1990)

Blind of North Carolina, Inc., 487 U.S. 781, 789 n.5 (1988). In *Riley*, the Court declined to treat a law regulating the fees of professional fundraisers as "merely economic," observing that "[f]ar from the completely incidental impact of, for example, a minimum wage law, a statute regulating how a speaker may speak directly affects that speech." *Id.*

(restraints permitted "[b]ecause of the scarcity of [electromagnetic] frequencies"). Furthermore, if the asserted existence of a misfunctioning market alone were enough to justify broad restraints on speech, then the statute at issue in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974)—which, like the must-carry law, was justified as an effort to expand diversity of speech in the face of local monopolies—would seem to have been an entirely proper exercise of government power. This Court made clear in *Tornillo*, however, that a lack of competition among members of the press, unlike physical scarcity, does not justify making government the arbiter of what may and may not be said. *See also Turner Broadcasting Sys., Inc. v. FCC*, 113 S. Ct. 1806, 1807-08 (1993) (Rehnquist, C.J., in chambers) ("Under *Tornillo*, Congress plainly could not impose the must-carry provisions on privately owned newspapers.").

Taking a related tack, the United States argues that the federal government, having aided the growth of cable television, may now assume exceptional powers to determine the types of programming it delivers. The sole citation offered to support this proposition, however, is the decision in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), which turns on the unique circumstances of broadcast licensees. If the United States means to suggest that cable operators have received from the federal government (or even local governments) a benefit comparable to the right to use the scarce electromagnetic spectrum, the suggestion is totally off the mark: the record in this matter stands uncontroverted that there are no physical limitations on the ability to construct cable systems equivalent to the physical scarcity of the broadcast spectrum. *See* Time Warner Statement of Material Facts ¶ 23; Collins 2/11/93 Aff. ¶ 21; Defs.' Response to Time Warner Statement of Material Facts ¶ 23. If the United States instead means to argue that organs of the press accepting government benefits thereby surrender the right to control the content of their speech, the argument is

without any coherent foundation. There is no general principle that the receipt of a government benefit, *e.g.*, lower postal rates or exemptions from sales taxes (as in *Leathers v. Medlock*, 111 S. Ct. 1438 (1991)), fundamentally alters the relationship between the government and the press, permitting the government to engage in otherwise impermissible regulation. To whatever extent government may have assisted in the growth of cable television, it remains a *private* medium of communication and, absent a showing of compelling need, properly free to choose the programming for its viewers without government interference.

2. This Court has also required strict scrutiny of laws that are "content-based." *See Riley*, 487 U.S. at 795. Although the United States concedes that "the must-carry provisions . . . alter the content of programming," it nevertheless manages to claim that they are "not content-related for First Amendment purposes." Motion at 23. Relying on *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), the United States argues that the Court must first look to the purpose of the regulation: "whether the government has adopted a regulation of speech because of disagreement with the message it conveys." Motion at 23. Appellee NAB makes a similar point, contending that under *Ward* the proper inquiry is whether the law is "*justified* without reference to the content of the regulated speech." Motion at 9 (citation omitted).

These arguments are based on obvious misreadings of this Court's decisions. The reason why this Court at times has initially inquired into the purpose of, or justification for, statutes is to determine whether laws aimed at conduct (*e.g.*, the burning of a draft card [3] or sleeping in a public park [4]) or laws purporting to regulate the time, place, and manner of speech (*e.g.*, the noise level at rock

[3] *See United States v. O'Brien*, 391 U.S. 367 (1968).

[4] *See Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984).

concerts [5]) are entitled for those reasons to more lenient scrutiny or whether—because, though seemingly neutral on their face, they are actually intended to control the content of speech—they must be reviewed according to the traditional, more exacting standard. Put another way, the test serves to identify laws that, while not overtly interfering with the content of speech, are nonetheless enacted for that purpose. But where, as here, a law on its face directly and explicitly alters the content of speech, the nature of the regulation itself is enough to establish that strict scrutiny is necessary, regardless of the non-speech justifications the government may advance. In *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1507 (1993), for example, the Court agreed that regulation of newsracks by the city was " 'justified' by its interest in safety and esthetics," but nevertheless imposed strict scrutiny because the law enacted an explicit preference for certain kinds of publications at the expense of others.[6]

Because the must-carry law necessarily alters the content of speech carried by cable operators, appellees seek to convince the Court that a preference for certain speakers should be treated differently from a preference for certain speech. But this argument fails on several counts. As a legal matter, it is doubtful that a government, without compelling reasons, could require members of the press to devote part of their limited capacity to the speech of organizations selected by the government, even if the government somehow could demonstrate that it was oblivious or indifferent to what the speakers might say. At the

[5] *See Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

[6] The decision in *Riley* points to the same conclusion. There, in assessing a law requiring professional fundraisers to disclose the percentage of collected funds actually remitted to charity, the Court looked to the nature of the regulation (mandated speech) and stated: "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech. We therefore consider the Act as a content-based regulation of speech." 487 U.S. at 795; *see id.* at 798 ("North Carolina's content-based regulation is subject to exacting First Amendment scrutiny").

very least, that sort of directive would put government squarely in the middle of what would otherwise be private choices about selection of speech, a role typically barred to government under the First Amendment. *See Tornillo*, 418 U.S. at 258. Furthermore, as a practical matter, it is always highly unlikely that a governmental preference for one speaker over another will have nothing to do with the content of their speech. That is especially so here: Congress is favoring only those speakers subject to federal oversight by virtue of their receipt of broadcast licenses, an oversight that justifies a unique level of federal involvement with programming. And Congress gave explicit approval to the general nature of broadcast speech in explaining its mandatory preferences. *See* J.S. 20-21.[7]

3. The United States flatly asserts that the must-carry law is neither an impermissible interference with the editorial discretion of cable operators nor an improper discrimination against cable programmers. It argues only the first point, however, and its arguments are basically unsound.

The gist of these arguments is that the editorial discretion of cable operators is of a lesser order than the editorial discretion of other members of the press, more akin to the decision-making of the shopping-center owner in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), than the newspaper editors in *Tornillo*. In fact, however, as this Court has already recognized, cable operators do precisely what members of the press traditionally do: they create and select a package of "news, information, and entertainment" for sale to the public. *See Leathers v. Medlock*, 111 S. Ct. at 1442. Furthermore, in drawing analogies to shopping centers and newsstands, the United States seems to be missing the basic fact that

[7] Appellee NAB states that appellants "do[] not argue that Section 4 fails scrutiny under the *O'Brien/Ward* test." Motion at 12. In fact, appellants have contended and continue to contend that this statute fails scrutiny "even under the less demanding *O'Brien* test." J.S. 24.

the must-carry law, by its very terms, will diminish the amount of speech that cable operators may choose for their subscribers. For every channel that cable operators are forced by law to favor, they must disfavor the speech of a different programmer that they would prefer to carry. The must-carry law thus is very different from a law requiring shopping centers to permit pamphleting or a law controlling the placement of papers in newsracks or on newsstands: in neither of those cases does the law directly threaten the right of those engaged in speech to choose what they wish to say to the public. Here, however, the programming selected by Congress will routinely displace other programming selected by the cable operator.

The failure of the United States to come to grips with this basic fact may explain why it largely ignores the cable programmers' claims. Appellee NAB attempts to fill that breach, arguing that "[s]o long as Congress does not 'aim at the suppression of dangerous ideas,' it is free to treat different classes of speakers differently, even though that may have the effect of enhancing the speech of some classes over the speech of others." Motion at 22. But this argument was flatly rejected by this Court in each of the last two Terms. *Simon & Schuster*, 112 S. Ct. at 509; *City of Cincinnati*, 113 S. Ct. at 1516. As the Court stated in *City of Cincinnati*, "we [have] expressly rejected the argument that 'discriminatory . . . treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas.'" 113 S. Ct. at 1516 (quoting *Simon & Schuster*, 112 S. Ct. at 509).

This is as it should be. Discrimination among speakers runs afoul of a core premise of the First Amendment: that it is not generally the business of government to decide who shall and who shall not be allowed to speak. *See Leathers v. Medlock*, 111 S. Ct. at 1444. Although there are instances when government *must* discriminate among speakers, those instances are properly confined to situations in which government is selecting among competing applicants in its administration of government property or its appropriation of government funds. Here, the

circumstances are very different: Congress is not making an unavoidable choice in its role as overseer of public funds or property; it is reaching out to alter the choices made by *private* entities in the *private* marketplace for speech. That kind of discrimination is what this Court has rightly condemned as intolerable under the First Amendment. *See Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

4. Although the United States argues that this Court must accept the facts found by Congress in deciding whether the must-carry law is consistent with the First Amendment, we believe that the Court had it right in *Sable Communications* when it stated that the Court must exercise "independent judgment of the facts bearing on an issue of constitutional law." *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 129 (1989). In any event, even the facts as found by Congress do not justify the must-carry law. The facts reveal that, in the absence of a must-carry obligation, the overwhelming majority (95%) of broadcast stations are being carried voluntarily by cable systems, and it is undisputed that broadcast stations are growing in number. Moreover, were there any real uncertainty about the continued availability of broadcast television to a wide audience, it is inconceivable that Congress would, as it did, suddenly provide stations with the right—embodied in the "retransmission consent" provision—to *refuse* carriage on cable systems. Given the tradition of disfavoring prophylactic regulation that limits First Amendment rights, Congress simply cannot justify so sweeping a law on the basis of conjecture that what has demonstrably *not* happened in the past (widespread refusal to carry broadcast stations) might, perhaps, happen someday in the future. *See Century Communications Corp. v. FCC*, 835 F.2d 292, 303 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988).

CONCLUSION

The Court should note probable jurisdiction.

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RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
10/5/92	Complaint filed in 92-2247
10/13/92	Complaint filed in 92-2292
11/5/92	Complaints filed in 92-2494 & 92-2495
11/5/92	Motion for summary judgment filed by Plaintiff Daniels Cablevision
11/13/92	Complaint filed in 92-2558
11/23/92	ORDER by Judge Thomas P. Jackson: consolidating cases
11/24/92	Response by FCC to Daniels Cablevision motion for Summary Judgment
2/12/93	Motions, Cross-Motions and Oppositions for Summary Judgment filed by all parties, along with Statements of Material Facts
2/19/93	Replys in Support or Opposition to Motions, Cross-Motions and Oppositions to Summary Judgment filed by all parties
2/25/93	Responses to Statements of Material Facts filed by all parties
3/4/93	Motion Hearing before Judges Thomas P. Jackson, Stephen Williams and Stanley Sporkin, Plaintiffs motions for summary judgment, Defendants motions to dismiss, Intervenor-Plaintiff NICC motion for Preliminary Injunction, and Cross Claim by Intervenor-defendant CBA heard and taken under advisement.
3/11/93	Responses by movant Public Broadcasting and by Defendant FCC to (revised) motion for Summary Judgment by The Learning Channel, Discovery Communications
3/31/93	Notice of Filing by Defendant FCC of the Regulations implementing the Must-Carry provisions of the 1992 Act

DATE	PROCEEDINGS
3/31/93	Response (Oppositions) by Defendant FCC to submission of supplemental authority bearing upon the Must-Carry requirements of the 1992 Cable Act
4/8/93	MEMORANDUM and ORDER by Circuit Judge Stephen F. Williams, Judge Thomas P. Jackson, Judge Stanley Sporkin, Concurring Opinion of Judge Stanley Sporkin, Dissenting Opinion of Circuit Judge Stephen F. Williams, denying plaintiffs motions for Summary Judgment on must-carry claims, granting federal defendants motion to dismiss the must-carry claims, denying motion of intervenor-defendant Local Community Broadcasters for Summary Judgment on cross claim, dismissing with prejudice complaints of plaintiffs and intervenor-plaintiffs as they challenge as unconstitutional sections 4, 5, of Cable Act, dismissing with prejudice complaints challenging section 6 of the Cable Act, dismissing with prejudice cross claim of intervenor defendant Local Community Broadcasters, and denying and dismissing as moot all other pending motions relating to constitutionality of sections 4, 5 of Cable Act
5/3/93	Notices of Appeal filed by all parties
10/4/93	Letter from Supreme Court noting Probable Jurisdiction

Public Law 102-385 [S. 12]; October 5, 1992

CABLE TELEVISION CONSUMER PROTECTION AND COMPETITION ACT OF 1992

An Act to amend the Communications Act of 1934 to provide increased consumer protection and to promote increased competition in the cable television and related markets, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * *

Sec. 2. Findings; Policy; Definitions.

(a) FINDINGS.—The Congress finds and declares the following:

(1) Pursuant to the Cable Communications Policy Act of 1984, rates for cable television services have been deregulated in approximately 97 percent of all franchises since December 29, 1986. Since rate deregulation, monthly rates for the lowest priced basic cable service have increased by 40 percent or more for 28 percent of cable television subscribers. Although the average number of basic channels has increased from about 24 to 30, average monthly rates have increased by 29 percent during the same period. The average monthly cable rate has increased almost 3 times as much as the Consumer Price Index since rate deregulation.

(2) For a variety of reasons, including local franchising requirements and the extraordinary expense of constructing more than one cable television system to serve a particular geographic area, most cable television subscribers have no opportunity to select between competing cable systems. Without the presence of another multichannel video programming distribu-

tor, a cable system faces no local competition. The result is undue market power for the cable operator as compared to that of consumers and video programmers.

(3) There has been a substantial increase in the penetration of cable television systems over the past decade. Nearly 56,000,000 households, over 60 percent of the households with televisions, subscribe to cable television, and this percentage is almost certain to increase. As a result of this growth, the cable television industry has become a dominant nationwide video medium.

(4) The cable industry has become highly concentrated. The potential effects of such concentration are barriers to entry for new programmers and a reduction in the number of media voices available to consumers.

(5) The cable industry has become vertically integrated; cable operators and cable programmers often have common ownership. As a result, cable operators have the incentive and ability to favor their affiliated programmers. This could make it more difficult for noncable-affiliated programmers to secure carriage on cable systems. Vertically integrated program suppliers also have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies.

(6) There is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media.

(7) There is a substantial governmental and First Amendment interest in ensuring that cable subscribers have access to local noncommercial educational stations which Congress has authorized, as expressed

in section 396(a)(5) of the Communications Act of 1934. The distribution of unique noncommercial, educational programming services advances that interest.

(8) The Federal Government has a substantial interest in making all nonduplicative local public television services available on cable systems because—

(A) public television provides educational and informational programming to the Nation's citizens, thereby advancing the Government's compelling interest in educating its citizens;

(B) public television is a local community institution, supported through local tax dollars and voluntary citizen contributions in excess of $10,800,000,000 since 1972, that provides public service programming that is responsive to the needs and interests of the local community;

(C) the Federal Government, in recognition of public television's integral role in serving the educational and informational needs of local communities, has invested more than $3,000,000,000 in public broadcasting since 1969; and

(D) absent carriage requirements there is a substantial likelihood that citizens, who have supported local public television services, will be deprived of those services.

(9) The Federal Government has a substantial interest in having cable systems carry the signals of local commercial television stations because the carriage of such signals is necessary to serve the goals contained in section 307(b) of the Communications Act of 1934 of providing a fair, efficient, and equitable distribution of broadcast services.

(10) A primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming. There is a substantial governmental interest in ensuring its continuation.

(11) Broadcast television stations continue to be an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate.

(12) Broadcast television programming is supported by revenues generated from advertising broadcast over stations. Such programming is otherwise free to those who own television sets and do not require cable transmission to receive broadcast signals. There is a substantial governmental interest in promoting the continued availability of such free television programming, especially for viewers who are unable to afford other means of receiving programming.

(13) As a result of the growth of cable television, there has been a marked shift in market share from broadcast television to cable television services.

(14) Cable television systems and broadcast television stations increasingly compete for television advertising revenues. As the proportion of households subscribing to cable television increases, proportionately more advertising revenues will be reallocated from broadcast to cable television systems.

(15) A cable television system which carries the signal of a local television broadcaster is assisting the broadcaster to increase its viewership, and thereby attract additional advertising revenues that otherwise might be earned by the cable system operator. As a result, there is an economic incentive for cable systems to terminate the retransmission of the broadcast

signal, refuse to carry new signals, or reposition a broadcast signal to a disadvantageous channel position. There is a substantial likelihood that absent the reimposition of such a requirement, additional local broadcast signals will be deleted, repositioned, or not carried.

(16) As a result of the economic incentive that cable systems have to delete, reposition, or not carry local broadcast signals, coupled with the absence of a requirement that such systems carry local broadcast signals, the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized.

(17) Consumers who subscribe to cable television often do so to obtain local broadcast signals which they otherwise would not be able to receive, or to obtain improved signals. Most subscribers to cable television systems do not or cannot maintain antennas to receive broadcast television services, do not have input selector switches to convert from a cable to antenna reception system, or cannot othewise receive broadcast television services. The regulatory system created by the Cable Communications Policy Act of 1984 was premised upon the continued existence of mandatory carriage obligations for cable systems, ensuring that local stations would be protected from anticompetitive conduct by cable systems.

(18) Cable television systems often are the single most efficient distribution system for television programming. A Government mandate for a substantial societal investment in alternative distribution systems for cable subscribers, such as the "A/B" input selector antenna system, is not an enduring or feasible method of distribution and is not in the public interest.

(19) At the same time, broadcast programming that is carried remains the most popular programming on cable systems, and a substantial portion of the benefits for which consumers pay cable systems is derived from carriage of the signals of network affiliates, independent television stations, and public television stations. Also cable programming placed on channels adjacent to popular off-the-air signals obtains a larger audience than on other channel positions. Cable systems, therefore, obtain great benefits from local broadcast signals which, until now, they have been able to obtain without the consent of the broadcaster or any copyright liability. This has resulted in an effective subsidy of the development of cable systems by local broadcasters. While at one time, when cable systems did not attempt to compete with local broadcasters for programming, audience, and advertising, this subsidy may have been appropriate, it is so no longer and results in a competitive imbalance between the 2 industries.

(20) The Cable Communications Policy Act of 1984, in its amendments to the Communications Act of 1934, limited the regulatory authority of franchising authorities over cable operators. Franchising authorities are finding it difficult under the current regulatory scheme to deny renewals to cable systems that are not adequately serving cable subscribers.

(21) Cable systems should be encouraged to carry low-power television stations licensed to the communities served by those systems where the low-power station creates and broadcasts, as a substantial part of it programming day, local programming.

(b) STATEMENT OF POLICY.—It is the policy of the Congress in this Act to—

(1) promote the availability to the public of a diversity of views and information through cable

television and other video distribution media;

(2) rely on the marketplace, to the maximum extent feasible, to achieve that availability;

(3) ensure that cable operators continue to expand, where economically justified, their capacity and the programs offered over their cable systems;

(4) where cable television systems are not subject to effective competition, ensure that consumer interests are protected in receipt of cable service; and

(5) ensure that cable television operators do not have undue market powers vis-a-vis video programmers and consumers.

(c) DEFINITIONS.—Section 602 of the Communications Act of 1934 (47 U.S.C. 531) is amended—

(1) by redesignating paragraph (16) as paragraph (19);

(2) by striking "and" at the end of paragraph (15);

(3) by redesignating paragraphs (11) through (15) as paragraphs (13) through (17), respectively;

(4) by redesignating paragraphs 1 through (10) as paragraphs (2) through (11), respectively;

(5) by inserting before paragraph (2) (as so redesignated) the following new paragraph:

"(1) the term 'activated channels' means those channels engineered at the headend of a cable system for the provision of services generally available to residential subscribers of the cable system, regardless of whether such services actually are provided, including any channel designated for public, educational, or governmental use;";

(6) by inserting after paragraph (11) (as so redesignated) the following new paragraph:

"(12) the term 'multichannel video programming distributor' means a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming;"; and

(7) by inserting after paragraph (17) (as so redesignated) the following new paragraph:

"(18) the term 'usable activated channels' means activated channels of a cable system, except those channels whose use for the distribution of broadcast signals would conflict with technical and safety regulations as determined by the Commission; and".

* * * * *

Sec. 4. Carriage of Local Commercial Television Signals.

Part II of title VI of the Communications Act of 1934 is amended by inserting after section 613 (47 U.S.C. 533) the following new section:

"Sec. 614. Carriage of Local Commercial Television Signals.

"(a) CARRIAGE OBLIGATIONS.—Each cable operator shall carry, on the cable system of that operator, the signals of local commercial television stations and qualified low power stations as provided by this section. Carriage of additional broadcast television signals on such system shall be at the discretion of such operator, subject to section 325(b).

"(b) SIGNALS REQUIRED.—

"(1) IN GENERAL.—(A) A cable operator of a cable system with 12 or fewer usable activated channels shall carry the signals of at least three local commercial television stations, except that if such a system has 300 or fewer subscribers, it shall not be subject to any requirements under this section so long as such system does not delete from carriage by that system any signal of a broadcast television station.

"(B) A cable operator of a cable system with more than 12 usable activated channels shall carry the signals of local commercial television stations, up to one-third of the aggregate number of usable activated channels of such system.

"(2) SELECTION OF SIGNALS.—Whenever the number of local commercial television stations exceeds the maximum number of signals a cable system is required to carry under paragraph (1), the cable operator shall have discretion in selecting which such stations shall be carried on its cable system, except that—

"(A) under no circumstances shall a cable operator carry a qualified low power station in lieu of a local commercial television station; and

"(B) if the cable operator elects to carry an affiliate of a broadcast network (as such term is defined by the Commission by regulation), such cable operator shall carry the affiliate of such broadcast network whose city of license reference point, as defined in section 76.53 of title 47, Code of Federal Regulations (in effect on January 1, 1991), or any successor regulation thereto, is closest to the principal headend of the cable system.

"(3) CONTENT TO BE CARRIED.—(A) A cable operator shall carry in its entirety, on the cable system of that operator, the primary video, accompany-

ing audio, and line 21 closed caption transmission of each of the local commercial television stations carried on the cable system and, to the extent technically feasible, program-related material carried in the vertical blanking interval or on subcarriers. Retransmission of other material in the vertical blanking internal or other nonprogram-related material (including teletext and other subscription and advertiser-supported information services) shall be at the discretion of the cable operator. Where appropriate and feasible, operators may delete signal enhancements, such as ghost-canceling, from the broadcast signal and employ such enhancements at the system headend or headends.

"(B) The cable operator shall carry the entirety of the program schedule of any television station carried on the cable system unless carriage of specific programming is prohibited, and other programming authorized to be substituted, under section 76.67 or subpart F of part 76 of title 47, Code of Federal Regulations (as in effect on January 1, 1991), or any successor regulations thereto.

"(4) SIGNAL QUALITY.—

"(A) NONDEGRADATION; TECHNICAL SPECIFICATIONS.—The signals of local commercial television stations that a cable operator carries shall be carried without material degradation. The Commission shall adopt carriage standards to ensure that, to the extent technically feasible, the quality of signal processing and carriage provided by a cable system for the carriage of local commercial television stations will be no less than that provided by the system for carriage of any other type of signal.

"(B) ADVANCED TELEVISION.—At such time as the Commission prescribes modifications of

the standards for television broadcast signals, the Commission shall initiate a proceeding to establish any changes in the signal carriage requirements of cable television systems necessary to ensure cable carriage of such broadcast signals of local commercial television stations which have been changed to conform with such modified standards.

"(5) DUPLICATION NOT REQUIRED.—Notwithstanding paragraph (1), a cable operator shall not be required to carry the signal of any local commercial television station that substantially duplicates the signal of another local commercial television station which is carried on its cable system, or to carry the signals of more than one local commercial television station affiliated with a particular broadcast network (as such term is defined by regulation). If a cable operator elects to carry on its cable system a signal which substantially duplicates the signal of another local commercial television station carried on the cable system, or to carry on its system the signals of more than one local commercial television station affiliated with a particular broadcast network, all such signals shall be counted toward the number of signals the operator is required to carry under paragraph (1).

"(6) CHANNEL POSITIONING.—Each signal carried in fulfillment of the carriage obligations of a cable operator under this section shall be carried on the cable system channel number on which the local commercial television station is broadcast over the air, or on the channel on which it was carried on July 19, 1985, or on the channel on which it was carried on January 1, 1992, at the election of the station, or on such other channel number as is mutually agreed upon by the station and the cable operator. Any dispute regarding the positioning of a

local commercial television station shall be resolved by the Commission.

"(7) SIGNAL AVAILABILITY.—Signals carried in fulfillment of the requirements of this section shall be provided to every subscriber of a cable system. Such signals shall be viewable via cable on all television receivers of a subscriber which are connected to a cable system by a cable operator or for which a cable operator provides a connection. If a cable operator authorizes subscribers to install additional receiver connections, but does not provide the subscriber with such connections, or with the equipment and materials for such connections, the operator shall notify such subscribers of all broadcast stations carried on the cable system which cannot be viewed via cable without a converter box and shall offer to sell or lease such a converter box to such subscribers at rates in accordance with section 623(b)(3).

"(8) IDENTIFICATION OF SIGNALS CARRIED.—A cable operator shall identify, upon request by any person, the signals carried on its system in fulfillment of the requirements of this section.

"(9) NOTIFICATION.—A cable operator shall provide written notice to a local commercial television station at least 30 days prior to either deleting from carriage or repositioning that station. No deletion or repositioning of a local commercial television station shall occur during a period in which major television ratings services measure the size of audiences of local television stations. The notification provisions of this paragraph shall not be used to undermine or evade the channel positioning or carriage requirements imposed upon cable operators under this section.

"(10) COMPENSATION FOR CARRIAGE.—A cable operator shall not accept or request monetary payment or other valuable consideration in exchange

either for carriage of local commercial television stations in fulfillment of the requirements of this section or for the channel positioning rights provided to such stations under this section, except that—

"(A) any such station may be required to bear the costs associated with delivering a good quality signal or a baseband video signal to the principal headend of the cable system;

"(B) a cable operator may accept payments from stations which would be considered distant signals under section 111 of title 17, United States Code, as indemnification for any increased copyright liability resulting from carriage of such signal; and

"(C) a cable operator may continue to accept monetary payment or other valuable consideration in exchange for carriage or channel positioning of the signal of any local commercial television station carried in fulfillment of the requirements of this section, through, but not beyond, the date of expiration of an agreement thereon between a cable operator and a local commercial television station entered into prior to June 26, 1990.

"(c) LOW POWER STATION CARRIAGE OBLIGATION.—

"(1) REQUIREMENT.—If there are not sufficient signals of full power local commercial television stations to fill the channels set aside under subsection (b)—

"(A) a cable operator of a cable system with a capacity of 35 or fewer usable activated channels shall be required to carry one qualified low power station; and

"(B) a cable operator of a cable system with a capacity of more than 35 usable activated

channels shall be required to carry two qualified low power stations.

"(2) USE OF PUBLIC, EDUCATIONAL, OR GOVERNMENTAL CHANNELS.—A cable operator required to carry more than one signal of a qualified low power station under this subsection may do so, subject to approval by the franchising authority pursuant to section 611, by placing such additional station on public, educational, or governmental channels not in use for their designated purposes.

"(d) REMEDIES.—

"(1) COMPLAINTS BY BROADCAST STATIONS.—Whenever a local commercial television station believes that a cable operator has failed to meet its obligations under this section, such station shall notify the operator, in writing, of the alleged failure and identify its reasons for believing that the cable operator is obligated to carry the signal of such station or has otherwise failed to comply with the channel positioning or repositioning or other requirements of this section. The cable operator shall, within 30 days of such written notification, respond in writing to such notification and either commence to carry the signal of such station in accordance with the terms requested or state its reasons for believing that it is not obligated to carry such signal or is in compliance with the channel positioning and repositioning and other requirements of this section. A local commercial television station that is denied carriage or channel positioning or repositioning in accordance with this section by a cable operator may obtain review of such denial by filing a complaint with the Commission. Such complaint shall allege the manner in which such cable operator has failed to meet its obligations and the basis for such allegations.

"(2) OPPORTUNITY TO RESPOND.—The Commission shall afford such cable operator an opportunity

to present data and arguments to establish that there has been no failure to meet its obligations under this section.

"(3) REMEDIAL ACTIONS; DISMISSAL.—Within 120 days after the date a complaint is filed, the Commission shall determine whether the cable operator has met its obligations under this section. If the Commission determines that the cable operator has failed to meet such obligations, the Commission shall order the cable operator to reposition the complaining station or, in the case of an obligation to carry a station, to commence carriage of the station and to continue such carriage for at least 12 months. If the Commission determines that the cable operator has fully met the requirements of this section, it shall dismiss the complaint.

"(e) INPUT SELECTOR SWITCH RULES ABOLISHED.—No cable operator shall be required—

"(1) to provide or make available any input selector switch as defined in section 76.5(mm) of title 47, Code of Federal Regulations, or any comparable device; or

"(2) to provide information to subscribers about input selector switches or comparable devices.

"(f) REGULATIONS BY COMMISSION.—Within 180 days after the date of enactment of this section, the Commission shall, following a rulemaking proceeding, issue regulations implementing the requirements imposed by this section. Such implementing regulations shall include necessary revisions to update section 76.51 of title 47 of the Code of Federal Regulations.

"(g) SALES PRESENTATIONS AND PROGRAM LENGTH COMMERCIALS.—

"(1) CARRIAGE PENDING PROCEEDING.—Pending the outcome of the proceeding under paragraph (2),

nothing in this Act shall require a cable operator to carry on any tier, or prohibit a cable operator from carrying on any tier, the signal of any commercial television station or video programming service that is predominantly utilized for the transmission of sales presentations or program length commercials.

"(2) PROCEEDING CONCERNING CERTAIN STATIONS. Within 270 days after the date of enactment of this section, the Commission, notwithstanding prior proceedings to determine whether broadcast television stations that are predominantly utilized for the transmission of sales presentations or program length commercials are serving the public interest, convenience, and necessity, shall complete a proceeding in accordance with this paragraph to determine whether broadcast television stations that are predominantly utilized for the transmission of sales presentations or program length commercials are serving the public interest, convenience, and necessity. In conducting such proceeding, the Commission shall provide appropriate notice and opportunity for public comment. The Commission shall consider the viewing of such stations, the level of competing demands for the spectrum allocated to such stations, and the role of such stations in providing competition to nonbroadcast services offering similar programming. In the event that the Commission concludes that one or more of such stations are serving the public interest, convenience, and necessity, the Commission shall qualify such stations as local commercial television stations for purposes of subsection (a). In the event that the Commission concludes that one or more of such stations are not serving the public interest, convenience, and necessity, the Commission shall allow the licensees of such stations a reasonable period within which to provide different programming, and shall not deny such stations a renewal expectancy solely because

their programming consisted predominantly of sales presentations or program length commercials.

"(h) DEFINITIONS.—

"(1) LOCAL COMMERCIAL TELEVISION STATION.—

"(A) IN GENERAL.—For purposes of this section, the term 'local commercial television station' means any full power television broadcast station, other than a qualified noncommercial educational television station within the meaning of section 615(l)(1), licensed and operating on a channel regularly assigned to its community by the Commission that, with respect to a particular cable system, is within the same television market as the cable system.

"(B) EXCLUSIONS.—The term 'local commercial television station' shall not include—

"(i) low power television stations, television translator stations, and passive repeaters which operate pursuant to part 74 of title 47, Code of Federal Regulations, or any successor regulations thereto;

"(ii) a television broadcast station that would be considered a distant signal under section 111 of title 17, United States Code, if such station does not agree to indemnify the cable operator for any increased copyright liability resulting from carriage on the cable system; or

"(iii) a television broadcast station that does not deliver to the principal headend of a cable system either a signal level of —45dBm for UHF signals or—49dBm for VHF signals at the input terminals of the signal processing equipment, if such station

does not agree to be responsible for the costs of delivering to the cable system a signal of good quality or a baseband video signal.

"(C) MARKET DETERMINATIONS.—(i) For purposes of this section, a broadcasting station's market shall be determined in the manner provided in section 73.3555(d)(3)(i) of title 47, Code of Federal Regulations, as in effect on May 1, 1991, except that, following a written request, the Commission may with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section. In considering such requests, the Commission may determine that particular communities are part of more than one television market.

"(ii) In considering requests filed pursuant to clause (i) the Commission shall afford particular attention to the value of localism by taking into account such factors as—

"(I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;

"(II) whether the television station provides coverage or other local service to such community;

"(III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or

coverage of sporting and other events of interest to the community; and

"(IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.

"(iii) A cable operator shall not delete from carriage the signal of a commercial television station during the pendency of any proceeding pursuant to this subparagraph.

"(iv) In the rulemaking proceeding required by subsection (f), the Commission shall provide for expedited consideration of requests filed under this subparagraph.

"(2) QUALIFIED LOW POWER STATION.—The term 'qualified low power station' means any television broadcast station conforming to the rules established for Low Power Television Stations contained in part 74 of title 47, Code of Federal Regulations, only if—

"(A) such station broadcasts for at least the minimum number of hours of operation required by the Commission for television broadcast stations under part 73 of title 47, Code of Federal Regulations;

"(B) such station meets all obligations and requirements applicable to television broadcast stations under part 73 of title 47, Code of Federal Regulations, with respect to the broadcast of nonentertainment programming; programming and rates involving political candidates, election issues, controversial issues of public importance, editorials, and personal attacks; programming for children; and equal employment opportunity; and the Commission determines that the provision of such programming by such station would address local news

and informational needs which are not being adequately served by full power television broadcast stations because of the geographic distance of such full power stations from the low power station's community of license;

"(C) such station complies with interference regulations consistent with its secondary status pursuant to part 74 of title 47, Code of Federal Regulations;

"(D) such station is located no more than 35 miles from the cable system's headend, and delivers to the principal headend of the cable system an over-the-air signal of good quality, as determined by the Commission;

"(E) the community of license of such station and the franchise area of the cable system are both located outside of the largest 160 Metropolitan Statistical Areas, ranked by population, as determined by the Office of Management and Budget on June 30, 1990, and the population of such community of license on such date did not exceed 35,000; and

"(F) there is no full power television broadcast station licensed to any community within the county or other political subdivision (of a State) served by the cable system.

Nothing in this paragraph shall be construed to change the secondary status of any low power station as provided in part 74 of title 47, Code of Federal Regulations, as in effect on the date of enactment of this section.".

Sec. 5. Carriage of Noncommercial Stations.

Part II of title VI of the Communications Act of 1934 (47 U.S.C. 531 et seq.) is further amended by inserting after section 614 (as added by section 4 of this Act) the following new section:

"Sec. 615. Carriage of Noncommercial Educational Television.

"(a) CARRIAGE OBLIGATIONS.—In addition to the carriage requirements set forth in section 614, each cable operator of a cable system shall carry the signals of qualified noncommercial educational television stations in accordance with the provisions of this section.

"(b) REQUIREMENTS TO CARRY QUALIFIED STATIONS.—

"(1) GENERAL REQUIREMENT TO CARRY EACH QUALIFIED STATION.—Subject to paragraphs (2) and (3) and subsection (e), each cable operator shall carry, on the cable system of that cable operator, any qualified local noncommercial educational television station requesting carriage.

"(2)(A) SYSTEMS WITH 12 OR FEWER CHANNELS.—Notwithstanding paragraph (1), a cable operator of a cable system with 12 or fewer usable activated channels shall be required to carry the signal of one qualified local noncommercial educational television station; except that a cable operator of such a system shall comply with subsection (c) and may, in its discretion, carry the signals of other qualified noncommercial educational television stations.

"(B) In the case of a cable system described in subparagraph (A) which operates beyond the presence of any qualified local noncommercial educational television station—

"(i) the cable operator shall import and carry on that system the signal of one qualified noncommercial educational television station;

"(ii) the selection for carriage of such a signal shall be at the election of the cable operator; and

"(iii) in order to satisfy the requirements for carriage specified in this subsection, the cable operator of the system shall not be required to remove any other programming service actually provided to subscribers on March 29, 1990; except that such cable operator shall use the first channel available to satisfy the requirements of this subparagraph.

"(3) SYSTEMS WITH 13 TO 36 CHANNELS.—(A) Subject to subsection (c), a cable operator of a cable system with 13 to 36 usable activated channels—

"(i) shall carry the signal of at least one qualified local noncommercial educational television station but shall not be required to carry the signals of more than three such stations, and

"(ii) may, in its discretion, carry additional such stations.

"(B) In the case of a cable system described in this paragraph which operates beyond the presence of any qualified local noncommercial educational television station, the cable operator shall import and carry on that system the signal of at least one qualified noncommercial educational television station to comply with subparagraph (A)(i).

"(C) The cable operator of a cable system described in this paragraph which carriers the signal of a qualified local noncommercial educational station affiliated with a State public television network shall not be required to carry the signal of any additional qualified local noncommercial educational television stations affiliated with the same network if the programming of such additional stations is substantially duplicated by the programming of the qualified local noncommercial educational television station receiving carriage.

"(D) A cable operator of a system described in this paragraph which increases the usable activated channel capacity of the system to more than 36 channels on or after March 29, 1990, shall, in accordance with the other provisions of this section, carry the signal of each qualified local noncommercial educational television station requesting carriage, subject to subsection (e).

"(c) CONTINUED CARRIAGE OF EXISTING STATIONS.—Notwithstanding any other provision of this section, all cable operators shall continue to provide carriage to all qualified local noncommercial educational television stations whose signals were carried on their systems as of March 29, 1990. The requirements of this subsection may be waived with respect to a particular cable operator and a particular such station, upon the written consent of the cable operator and the station.

"(d) PLACEMENT OF ADDITIONAL SIGNALS.—A cable operator required to add the signals of qualified local noncommercial educational television stations to a cable system under this section may do so, subject to approval by the franchising authority pursuant to section 611, by placing such additional stations on public, educational, or governmental channels not in use for their designated purposes.

"(e) SYSTEMS WITH MORE THAN 36 CHANNELS.—A cable operator of a cable system with a capacity of more than 36 usable activated channels which is required to carry the signals of three qualified local noncommercial educational television stations shall not be required to carry the signals of additional such stations the programming of which substantially duplicates the programming broadcast by another qualified local noncommercial educational television station requesting carriage. Substantial duplication shall be defined by the Commission in a manner that promotes access to distinctive noncommercial educational television services.

"(f) WAIVER OF NONDUPLICATION RIGHTS.—A qualified local noncommercial educational television station whose signal is carried by a cable operator shall not assert any network nonduplication rights it may have pursuant to section 76.92 of title 47, Code of Federal Regulations, to require the deletion of programs aired on other qualified local noncommercial educational television stations whose signals are carried by that cable operator.

"(g) CONDITIONS OF CARRIAGE.—

"(1) CONTENT TO BE CARRIED.—A cable operator shall retransmit in its entirety the primary video, accompanying audio, and line 21 closed caption transmission of each qualified local noncommercial educational television station whose signal is carried on the cable system, and, to the extent technically feasible, program-related material carried in the vertical blanking interval, or on subcarriers, that may be necessary for receipt of programming by handicapped persons or for educational or language purposes. Retransmission of other material in the vertical blanking interval or on subcarriers shall be within the discretion of the cable operator.

"(2) BANDWIDTH AND TECHNICAL QUALITY.—A cable operator shall provide each qualified local noncommercial educational television station whose signal is carried in accordance with this section with bandwidth and technical capacity equivalent to that provided to commercial television broadcast stations carried on the cable system and shall carry the signal of each qualified local noncommercial educational television station without material degradation.

"(3) CHANGES IN CARRIAGE.—The signal of a qualified local noncommercial educational television station shall not be repositioned by a cable operator unless the cable operator, at least 30 days in advance of such repositioning, has provided written notice to

the station and all subscribers of the cable system. For purposes of this paragraph, repositioning includes (A) assignment of a qualified local noncommercial educational television station to a cable system channel number different from the cable system channel number to which the station was assigned as of March 29, 1990, and (B) deletion of the station from the cable system. The notification provisions of this paragraph shall not be used to undermine or evade the channel positioning or carriage requirements imposed upon cable operators under this section.

"(4) GOOD QUALITY SIGNAL REQUIRED.—Notwithstanding the other provisions of this section, a cable operator shall not be required to carry the signal of any qualified local noncommercial educational television station which does not deliver to the cable system's principal headend a signal of good quality or a baseband video signal, as may be defined by the Commission.

"(5) CHANNEL POSITIONING.—Each signal carried in fulfillment of the carriage obligations of a cable operator under this section shall be carried on the cable system channel number on which the qualified local noncommercial educational television station is broadcast over the air, or on the channel on which it was carried on July 19, 1985, at the election of the station, or on such other channel number as is mutually agreed upon by the station and the cable operator. Any dispute regarding the positioning of a qualified local noncommercial educational television station shall be resolved by the Commission.

"(h) AVAILABILITY OF SIGNALS.—Signals carried in fulfillment of the carriage obligations of a cable operator under this section shall be available to every subscriber as part of the cable system's lowest priced service tier

that includes the retransmission of local commercial television broadcast signals.

"(i) PAYMENT FOR CARRIAGE PROHIBITED.—

"(1) IN GENERAL.—A cable operator shall not accept monetary payment or other valuable consideration in exchange for carriage of the signal of any qualified local noncommercial educational television station carried in fulfillment of the requirements of this section, except that such a station may be required to bear the cost associated with delivering a good quality signal or a baseband video signal to the principal headend of the cable system.

"(2) DISTANT SIGNAL EXCEPTION.—Notwithstanding the provisions of this section, a cable operator shall not be required to add the signal of a qualified local noncommercial educational television station not already carried under the provision of subsection (c), where such signal would be considered a distant signal for copyright purposes unless such station indemnifies the cable operator for any increased copyright costs resulting from carriage of such signal.

"(j) REMEDIES.—

"(1) COMPLAINT.—Whenever a qualified local noncommercial educational television station believes that a cable operator of a cable system has failed to comply with the signal carriage requirements of this section, the station may file a complaint with the Commission. Such complaint shall allege the manner in which such cable operator has failed to comply with such requirements and state the basis for such allegations.

"(2) OPPORTUNITY TO RESPOND.—The Commission shall afford such cable operator an opportunity to present data, views, and arguments to establish

that the cable operator has complied with the signal carriage requirements of this section.

"(3) REMEDIAL ACTIONS; DISMISSAL.—Within 120 days after the date a complaint is filed under this subsection, the Commission shall determine whether the cable operator has complied with the requirements of this section. If the Commission determines that the cable operator has failed to comply with such requirements, the Commission shall state with particularity the basis for such findings and order the cable operator to take such remedial action as is necessary to meet such requirements. If the Commission determines that the cable operator has fully complied with such requirements, the Commission shall dismiss the complaint.

"(k) IDENTIFICATION OF SIGNALS.—A cable operator shall identify, upon request by any person, those signals carried in fulfillment of the requirements of this section.

"(l) DEFINITIONS.—For purposes of this section—

"(1) QUALIFIED NONCOMMERCIAL EDUCATIONAL TELEVISION STATION.—The term 'qualified noncommercial educational television station' means any television broadcast station which—

"(A)(i) under the rules and regulations of the Commission in effect on March 29, 1990, is licensed by the Commission as a noncommercial educational television broadcast station and which is owned and operated by a public agency, nonprofit foundation, corporation, or association; and

"(ii) has as its licensee an entity which is eligible to receive a community service grant, or any successor grant thereto, from the Corporation for Public Broadcasting, or any successor organization thereto, on the basis of the formula set forth in section 396(k)(6)(B); or

"(B) is owned and operated by a municipality and transmits predominantly noncommercial programs for educational purposes.

Such term includes (I) the translator of any noncommercial educational television station with five watts or higher power serving the franchise area, (II) a full-service station or translator if such station or translator is licensed to a channel reserved for noncommercial educational use pursuant to section 73.606 of title 47, Code of Federal Regulations, or any successor regulations thereto, and (III) such stations and translators operating on channels not so reserved as the Commission determines are qualified as noncommercial educational stations.

"(2) QUALIFIED LOCAL NONCOMMERCIAL EDUCATIONAL TELEVISION STATION.—The term 'qualified local noncommercial educational television station' means a qualified noncommercial educational television station—

"(A) which is licensed to a principal community whose reference point, as defined in section 76.53 of title 47, Code of Federal Regulations (as in effect on March 29, 1990), or any successor regulations thereto, is within 50 miles of the principal headend of the cable system; or

"(B) whose Grade B service contour, as defined in section 73.683(a) of such title (as in effect on March 29, 1990), or any successor regulations thereto, encompasses the principal headend of the cable system.".

Sec. 6. Retransmission Consent for Cable Systems.

Section 325 of the Communications Act of 1934 (47 U.S.C. 325) is amended—

(1) by redesignating subsections (b) and (c) as subsections (c) and (d), respectively; and

(2) by inserting immediately after subsection (a) the following new subsection:

"(b)(1) Following the date that is one year after the date of enactment of the Cable Television Consumer Protection and Competition Act of 1992, no cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station, or any part thereof, except—

"(A) with the express authority of the originating station; or

"(B) pursuant to section 614, in the case of a station electing, in accordance with this subsection, to assert the right to carriage under such section.

"(2) The provisions of this subsection shall not apply to—

"(A) retransmission of the signal of a noncommercial broadcasting station;

"(B) retransmission directly to a home satellite antenna of the signal of a broadcasting station that is not owned or operated by, or affiliated with, a broadcasting network, if such signal was retransmitted by a satellite carrier on May 1, 1991;

"(C) retransmission of the signal of a broadcasting station that is owned or operated by, or affiliated with, a broadcasting network directly to a home satellite antenna, if the household receiving the signal is an unserved household; or

"(D) retransmission by a cable operator or other multichannel video programming distributor of the signal of a superstation if such signal was obtained from a satellite carrier and the originating station was a superstation on May 1, 1991.

For purposes of this paragraph, the terms 'satellite carrier', 'superstation', and 'unserved household' have the

meanings given those terms, respectively, in section 119 (d) of title 17, United States Code, as in effect on the date of enactment of the Cable Television Consumer Protection and Competition Act of 1992.

"(3)(A) Within 45 days after the date of enactment of the Cable Television Consumer Protection and Competition Act of 1992, the Commission shall commence a rulemaking proceeding to establish regulations to govern the exercise by television broadcast stations of the right to grant retransmission consent under this subsection and of the right to signal carriage under section 614, and such other regulations as are necessary to administer the limitations contained in paragraph (2). The Commission shall consider in such proceeding the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier and shall ensure that the regulations prescribed under this subsection do not conflict with the Commission's obligation under section 623(b)(1) to ensure that the rates for the basic service tier are reasonable. Such rulemaking proceeding shall be completed within 180 days after the date of enactment of the Cable Television Consumer Protection and Competition Act of 1992.

"(B) The regulations required by subparagraph (A) shall require that television stations, within one year after the date of enactment of the Cable Television Consumer Protection and Competition Act of 1992 and every three years thereafter, make an election between the right to grant retransmission consent under this subsection and the right to signal carriage under section 614. If there is more than one cable system which services the same geographic area, a station's election shall apply to all such cable systems.

"(4) If an originating television station elects under paragraph (3)(B) to exercise its right to grant retransmission consent under this subsection with respect to a cable system, the provisions of section 614 shall not

apply to the carriage of the signal of such station by such cable system.

"(5) The exercise by a television broadcast station of the right to grant retransmission consent under this subsection shall not interfere with or supersede the rights under section 614 or 615 of any station electing to assert the right to signal carriage under that section.

"(6) Nothing in this section shall be construed as modifying the compulsory copyright license established in section 111 of title 17, United States Code, or as affecting existing or future video programming licensing agreements between broadcasting stations and video programmers.".

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 92-2247
(Three-Judge Court)

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Plaintiffs

v.

FEDERAL COMMUNICATIONS COMMISSION,

and

UNITED STATES OF AMERICA,
Defendants

AFFIDAVIT OF THOMAS F. BURCHILL

STATE OF NEW YORK)
) ss:
COUNTY OF QUEENS)

Thomas F., Burchill, being duly sworn, deposes and says:

1. I am the President and Chief Executive Officer of Hearst/ABC-Viacom Entertainment Services ("HAVES"). I make this affidavit in support of the plaintiff's application for a preliminary injunction.

2. HAVES is a joint venture operating as a partnership under the laws of the State of New York. Among HAVES' owners are The Hearst Corporation, Capital Cities/ABC Inc. and Viacom International, Inc.

3. HAVES offers television programming for exhibition to viewers primarily over the facilities of cable system operators on its television program service called

The Lifetime Television Network ("Lifetime"). Lifetime is a 24-hour per day service offering original and previously produced television programs of particular interest to women six days per week (Monday through Saturday). On the seventh day (Sunday), Lifetime offers Lifetime Medical Television ("LMT"), the world's foremost provider of television programs produced for medical professionals.

4. Lifetime began operation in February of 1984 as a result of the combination of two earlier unsuccessful programming services, Daytime and The Cable Health Network. At its inception, Lifetime was available to approximately 17 million subscribers and as of September 30, 1992, is available to over 58 million subscribers.

5. Lifetime is made available to viewers primarily through cable television operators. The cable operators receive or originate television signals from different sources and retransmit such signals to subscribers over coaxial and fiber optic cables. Operators select the programming to offer to their subscribers from sources including local television broadcast stations, distant television broadcast stations, locally originated cable programming, and cable network programming, such as Lifetime.

6. Lifetime is part of the diversity in program offerings that has been made available to American viewers in recent years as a result of the growth of the cable industry infrastructure and the development of far-reaching satellite-based distribution system. This diversity in program offerings, especially niche services such as Lifetime, could not be achieved through mass media oriented over-the-air broadcast stations.

7. One characteristic of Lifetime's programming which distinguishes it from its competitors is its relatively high percentage of original programming, i.e., pro-

grams either first available on Lifetime or available on no other program service in the United States. This favorable mix of original to acquired product is of great value to Lifetime in its efforts to expand its circulation by reaching agreements for carriage with currently non-affiliated cable operators. At its inception, Lifetime offered only 33% original programming, while it currently projects that it will offer 50% original programming in 1993.

8. Through the end of 1992, Lifetime's total programming investment has grown almost tenfold since its commencement. Its investment in original programming has grown by a comparable amount in the same period. This spectacular growth has been possible in part due to the growth in Lifetime's subscriber base and the willingness of its affiliates to stand behind Lifetime's programming efforts.

9. Since the enactment into law of the Cable Television Consumer Protection Act of 1992 (the "Act"), Lifetime's ongoing effort of retaining and expanding its universe of subscribers has met with resistance from cable operators which are concerned about the application of the Act to their operations. For instance, Lifetime has been advised that operators are more inclined to invest in non-programming related areas of their business rather than in new programming, because there are no regulatory impediments in those areas and no uncertainty in the law. The consequence of this investment decision is that Lifetime may not be able to amass enough capital to continue to increase the amount of original programming it offers.

10. The must carry requirements embodied in Sections 4 and 5 of the Act will most likely visit harm to Lifetime in other respects. The ability of Lifetime to market its service to potential advertisers will be impaired because of the right of broadcast stations,

including low power stations and non-commercial educational stations, to require carriage on cable systems and, in some instances, to demand favorable channel placement. Moreover, cable channel capacity is a scarce commodity. Accordingly, Lifetime may be required to forfeit existing channel positions completely or to be moved to a higher numbered channel which will reduce the likelihood of viewership. The loss of viewers which would occur in these circumstances would make Lifetime a far less attractive advertising vehicle that it currently is.

11. Channel positions are important to broadcast and cable networks. For example, all telecasters seek to develop viewer association through their channel position and for new networks, being placed near well-established or popular channels will tend to lead to sampling by viewers or exposure to program offerings that can lead to viewer acceptance. Also, technological characteristics of some television receivers make certain channel positions more desirable. So to grant over-the-air telecasters the right to oust previously placed cable programmers, without regard to viewer preference or the broadcasters' prior history of carriage in the community served by them is a manifest injustice to any affected cable programmer.

12. The right of over-the-air telecasters to require their consent to the retransmission of their signals will further jeopardize the ability of Lifetime to produce additional original programming. To the extent that consideration will be paid to over-the-air programmers, that consideration will most likely come from amounts available to cable services such as Lifetime, reducing the viewing public's access to additional product. Especially vulnerable would be highly targeted programs and other socially redeeming programming which often are not able to attract sufficient advertiser support to warrant production.

13. Under the must carry and retransmission consent provisions of the Act (i.e., sections 4, 5 and 6), broadcast stations are granted a clear preference over their cable competitors. Regardless of the public interest or lack thereof in their program content, over-the-air broadcasters are given the power to oust comparable cable programmers from the offerings of cable operators for no reason other than the legislative advantage embodied in the Act. The legislative history of the Act strongly suggests that Congressional intent is to enhance the diversity of program offerings available to the viewer. This worthy goal will be frustrated if in the implementation of the must carry requirements the number of programming choices is decreased due to the loss of viewer access to alternative cable services.

This 4th day of November, 1992

/s/ Thomas F. Burchill
THOMAS F. BURCHILL

[Notarization Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF NATIONAL CABLE SATELLITE CORPORATION, d/b/a C-SPAN IN SUPPORT OF COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

BRUCE D. COLLINS, makes this affidavit and states:

1. I am Bruce D. Collins, an attorney authorized to make this Affidavit on behalf of National Cable Satellite Corporation, d/b/a C-SPAN ("NCSC").

Background of NCSC

2. NCSC is a non-profit corporation organized in 1978 under the laws of the District of Columbia, and located at Suite 650, 400 North Capitol Street, Washington, D.C. 20001, and has been recognized by the Internal Revenue Service as exempt from the payment of federal income tax pursuant to I.R.C. Sec. 501(c)(3).

3. NCSC was created and continues to be funded exclusively by cable television operators as an independent journalistic organization. As such, NCSC receives no taxpayer funds of any kind, and has no legal connection to, or any legal relationship with any agency of government at any level, including the United States Congress.

4. NCSC is the producer and the exclusive distributor of the two information and public affairs television networks known as C-SPAN and C-SPAN 2. The two programming services are available on a 24-hour per day basis via cable television and are devoted entirely to in-

formation and public affairs programming, including the live gavel-to-gavel coverage of the proceedings of both the U.S. House of Representatives (on C-SPAN) and the U.S. Senate (on C-SPAN 2), and a variety of other events at public forums around the country and the world (see Exhibit A). Each program on C-SPAN and C-SPAN 2 is provided to the viewer in its entirety, and without editorial comment or analysis.

5. The C-SPAN network is available to 58 million cable television subscribers, representing 62% of all television households in the U.S. The C-SPAN 2 network is available to 29 million cable television subscribers, representing 31% of all television households in the U.S.

6. Since 1989 NCSC has also distributed via cable television the C-SPAN Audio Networks containing international radio broadcasts and historical programming drawn from the National Archives. The two networks, C-SPAN Audio 1 and C-SPAN Audio 2 are available to 5.7 million television households in the U.S.

NCSC's Status as a First Amendment Speaker

7. NCSC bylaws provide that the powers of its cable television operator board of directors are limited to the business affairs of the corporation. Full authority for NCSC editorial policies is reserved exclusively to the staff.

8. NCSC's full-length carriage of the proceedings of the U.S. House of Representatives and of the U.S. Senate is voluntary, and is motivated solely by the public service mission of the corporation. NCSC has no agreement with either the House or the Senate with respect to such carriage, nor was the commencement of such carriage prompted or otherwise motivated by any government regulation.

9. By exercising a significant amount of editorial discretion regarding the types of programming offered by C-SPAN, C-SPAN 2, and the C-SPAN Audio Networks,

the NCSC staff is engaged in conduct protected by the First Amendment.

The Must Carry Rules Brand C-SPAN as "Less Worthy"

10. Sections 4 and 5 (the must carry provisions) of the Cable Television Consumer Competition and Protection Act of 1992 ("the Act") grant an unwarranted and unsupported preference to all broadcasters over all cable programming services in the allocation of a limited number of available channels on a cable system. Such impermissible governmental action effectively brands C-SPAN's public affairs programming as less worthy of access to the public through cable systems than any other programming that any broadcast licensee might care to put on the electromagnetic spectrum.

11. The wisdom of the First Amendment's declaration that "The Congress shall make no law. . . ." regarding the freedom of speech is apparent, given the harmful consequences of the proposed must carry rules on C-SPAN's public service programming, especially with respect to the Act's own stated policy goal of promoting the "availability to the public of a diversity of views and information through cable television and other video distribution media."

12. Through the must carry provisions of the Act, the government is telling the local cable operator in many instances that C-SPAN and C-SPAN 2 must take a back seat for a channel position on the cable system to *any* broadcast licensee, regardless of its programming or even the extent to which it is viewed locally. The effect will be that a cable operator could, and likely would, be forced to substitute a shopping channel or a barely-viewed low-power broadcast station for C-SPAN or C-SPAN 2. NCSC submits that, given the realities of today's video marketplace, not only would NCSC's First Amendment rights be compromised by that result, the Act's stated goal of 'diversity of information' would not be served.

13. The First Amendment prohibits restricting speech based on the government's judgement of the worthiness or value of that speech. In establishing preferential access to cable subscribers for broadcast licensees over cable programmers, the must carry provisions of the Act restrict NCSC's First Amendment rights.

Must Carry Could Mean "Less Carry" for C-SPAN

14. The enforcement of Sections 4 and 5 of the Act could mean that C-SPAN and C-SPAN 2 will be available to fewer American television households. Like any other video programmer (broadcast or cable), NCSC competes for channel space on the finite number of channels available in each cable system. The enforcement of the must carry rules will mean that NCSC will have to compete for fewer available channels. In some small- to medium-sized cable systems that now carry C-SPAN or C-SPAN 2, the operator will be forced, due to the must carry rule, to drop some cable programming services. C-SPAN and C-SPAN 2 will be at an economic disadvantage when that choice is made, because unlike many cable programming services that generate revenue for the cable operator, the NCSC services are a direct cost.

15. Given the growth in the number of video services, and the creation of new services that will take up channel capacity in the future, C-SPAN and C-SPAN 2 will face increasing competition for channel capacity, and such competition will likely extend beyond the smaller markets into the mid-sized and larger markets. While NCSC is willing to face such competition in a free market, it is unwilling to accept unfair competition in the form of the government siding with any and all broadcast licensees in the competition for limited channel capacity to NCSC's detriment.

16. C-SPAN 2, which is the only distributor of the daily proceedings of the U.S. Senate, has experienced a healthy growth in carriage by cable systems in recent

years. The artificial shortage of cable channels available to cable programmers created by the must carry rule will have the effect of retarding the growth of C-SPAN 2's audience reach, if not actually reducing it. C-SPAN 2 is particularly vulnerable because, unlike C-SPAN, it is carried on a part-time basis in many systems. In general, part-time programming services are perceived by cable operators as having less value to audiences than full-time services. Due to the artificial shortage of channels available to cable programmers created by the must-carry rules, C-SPAN 2 will be worse off in the competition for cable system access.

17. In some cable systems, the reduced number of channels available to cable programmers would place pressure on NCSC to accept part-time carriage of C-SPAN in response to cable operator desires to avoid dropping C-SPAN's public affairs programming altogether. Given NCSC's standing as a First Amendment speaker, and its commitment to the gavel-to-gavel coverage of public affairs events (particularly the daily proceedings of the U.S. House of Representatives) it is loath to accept such a crude and editorially blunt restraint on its speech. However, the reality of the marketplace is such that the artificial shortage of cable channels available to C-SPAN as a cable programming service, could force NCSC to restrain its speech in such a fashion in order to maintain its business viability.

I declare under the penalty of perjury that the foregoing is true and correct. Executed this 3rd day of November, 1992.

/s/ Bruce D. Collins, Esq.
BRUCE D. COLLINS, ESQ.
Vice President and General Counsel
National Cable Satellite Corporation
Suite 650
400 North Capitol Street, N.W.
Washington, D.C. 20001

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF NICKOLAS DAVATZES

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

Nickolas Davatzes, being duly sworn, deposes and says:

1. I am the President and Chief Executive Officer of Hearst/ABC/NBC, a joint venture operating as a partnership under the name of Arts & Entertainment Network ("A&E"), a position I have held since 1983. I submit this Affidavit in support of plaintiff's Motion for a Preliminary Injunction.

2. A&E is a joint venture operating as a partnership, composed of (1) The Hearst Corporation, a Delaware Enterprises, Inc., a Delaware corporation, located and doing business at 77 West 66th Street, New York, New York 10023, (3) RCA Cable Inc., a Delaware corporation, located and doing business at 30 Rockefeller Plaza, New York, New York 10112, and (4) Radio City Music Hall Productions, Inc., a Delaware corporation, located and doing business at 1230 Avenue of the Americas, New York, New York 10020. A&E is duly organized under the laws of the State of New York and is located and doing business at 235 East 45th Street, New York, New York 10017.

3. A&E is a 24-hour per day television entertainment program service launched on February 1, 1984. A&E is

distributed principally to subscribing cable television systems in the United States and Canada. A&E's programming is acquired from, produced by or coproduced with a variety of American and international sources, and consists of entertainment programming in four areas—comedy, drama, documentaries and performing arts.

4. Since 1985, when the FCC's must carry rules were first struck down in *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986), and A&E reached only around 14,000,000 subscribers, A&E's subscribers have increased by approximately 400% to 55,600,000 as measured by A.C. Nielsen Company. The growth of A&E's subscriber base and the diversity and economic viability of new cable networks such as A&E, Black Entertainment Television, Nickelodeon, Lifetime and The Discovery Channel, among others, are due in large part to the absence until now of must carry rules and other legislative and regulatory restrictions upon cable operators' editorial discretion.

5. During those same years and for the same reasons, A&E's investment in programming increased by over 450%. A&E's ability to increase its programming expenditures has made possible the excellence of the programming for which A&E is recognized. However, the network's ability to continue, let alone increase its investment in programming hinges directly on its continued carriage by cable operators in channel positions which television viewers have come to expect through viewing for a period of years. The current cable legislation operates to favor broadcasters to the detriment of cable programming networks by granting broadcast stations preferential treatment with respect to cable carriage, channel positioning, and guaranteed access to viewers.

6. Cable operators, to comply with the new statutory requirements with respect to preferential carriage and channel position designed solely to benefit broadcasters, may be forced to (i) drop A&E entirely from cable sys-

tems, (ii) move A&E from its current, well-established channel position, or (iii) move A&E from a basic to a higher, less-viewed tier. Not only do the statutory requirements overtly favor broadcaster speech, they also compel a cable operator to disfavor cable program networks.

7. Cable systems do not have unlimited channel capacity and most cable systems operate at full or nearly full available capacity, carrying a mix of broadcast and non-broadcast services based upon viewer demand and other marketplace considerations. Under the statute, broadcasters can demand cable carriage without regard to viewer preference or program diversity. This leaves fewer cable channels available for the carriage of cable program services. Accordingly, the statute requires cable systems operating at full capacity to delete cable program services to accommodate the must carry demands of broadcasters. As a basic cable network, A&E receives revenue not only from advertising sales, the rates for which are based on the number of A&E viewers, but also from monthly license fee payments from cable operators, based upon the number of A&E subscribers. The number of A&E viewers and subscribers will necessarily decline, as will A&E's revenues, if cable operators are forced to drop A&E from their systems.

8. Under the statute, broadcasters electing must carry are also given the right to choose among a number of channel position options. Thus, even where cable programmers are not dropped to accommodate must carry broadcast stations, they may be displaced to inferior channel position and suffer loss of audience. By requiring that broadcasters decide where they are to be carried on cable systems, the channel positioning requirements of the 1992 Cable Act not only interfere with the cable operators' editorial discretion but also with the relationships established between cable operators, cable program networks and viewers. In general, lower channels are more watched than higher channels and channels located close

to other popular channels have higher viewership or greater sampling by viewers, thus having competitive consequences within the television industry as a whole. In many cable systems A&E occupies a desirable channel position, in which A&E has invested significant time and resources to obtain and maintain, and with which A&E has become strongly identified among its viewers over many years. However, under the must carry provisions of the Act, A&E can be displaced without regard to viewer preference, at the whim of a broadcaster who can appropriate the channel position that it had occupied over seven years ago in July 1985. There can be no justification for granting artificial advantages such as these to broadcasters, at the expense of the cable networks, particularly since viewer demands and other marketplace factors are not taken into consideration for the must carry process.

9. The statute requires cable operators to place all broadcast stations carried pursuant to must carry or retransmission consent on the initial or basic tier of service available to all cable system subscribers. The statute requires this initial level of service to be made available on all television sets connected to cable service and also requires all cable customers to purchase all broadcast stations carried pursuant to must carry and retransmission consent in order to obtain any other services carried on a cable system. Cable services presently carried on the basic tier may be displaced to higher tiers in order to accommodate additional broadcast stations on the basic tier. Specialized networks such as A&E have higher penetration levels when offered on a basic tier, since some cable subscribers do not choose or cannot afford to pay extra monthly fees to receive a higher tier that includes A&E. A drop in the number of A&E subscribers will cause a decline in advertising revenue as well, since a network relies on the widest possible penetration to support its rating base. Curtailed revenues in turn will dimin-

ish the funds A&E can utilize to develop new programming, to the obvious detriment of the network and the viewing public.

10. The must carry, channel position and retransmission consent provisions of the 1992 Cable Act clearly favor broadcaster speech and disfavor cable programmer speech, and drastically impair the ability of cable operators to respond to viewer preferences through the exercise of their editorial discretion. As such, the 1992 Cable Act infringes on the First Amendment rights of cable networks such as A&E, cable system operators and the American public.

/s/ Nicholas Davatzes
NICKOLAS DAVATZES

[Notarization Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF DOUGLAS V. HOLLOWAY

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

Douglas V. Holloway, being first duly sworn, deposes and says:

1. I am Senior Vice President—Affiliate Relations of plaintiff USA Networks ("USA"). I first joined USA in 1983 as Director of National Accounts. In 1986, I was promoted to Vice President of National Accounts and in 1988, I was promoted to my current position. I submit this Affidavit in support of Plaintiff's Motion for a Preliminary Injunction.

2. USA is a New York Partnership, owned in equal shares by MCA Cable Services, Inc., a Delaware Corporation and Eighth Century Corp., a Delaware Corporation. USA operates two satellite-delivered program services—USA Network and The Sci-Fi Channel.

3. USA owns and operates USA Network, a 24-hour per day satellite-delivered general entertainment program service. USA Network's programming is distributed primarily by cable system operators throughout all 50 states, Puerto Rico, and the United States Virgin Islands and Guam. USA Network's programming includes original movies, original television series, previously-viewed theatrical movies and television series, cartoons, game shows

and other material. USA Network commenced operations on October 5, 1981. According to information provided by A. C. Nielsen & Co., as of September 1, 1992, USA Network, was available in 60,224,000 households.

4. USA owns and operates The Sci-Fi Channel, a 24-hour per day satellite-delivered program service. The Sci-Fi Channel's programming is distributed primarily by cable system operators. The Sci-Fi Channel's programming consists of original series, previously-viewed theatrical movies and television series and cartoons in the science fiction genre, including fantasy and horror. The Sci-Fi Channel commenced operations on September 24, 1992.

5. USA Network, as one of the first satellite-delivered program services had limited distribution during its early years. As more cable systems were built, USA Network's programming was distributed to an increasing number of homes. USA Network, like many other networks, was able to invest in more original programming and better-quality theatrical movies and off-network television series. The improvement in programming made cable a more attractive consumer product and cable system operators were able to increase their number of subscribers. This symbiotic growth allowed cable system operators upgrade to their systems and expand their channel capacity. It also allowed existing networks to invest in more and better programming and encouraged the development of new and diverse program networks.

6. There has been a tremendous increase in the diversity of programming available to the American public. Cable subscribers now are free to choose among a panoply of diverse offerings including sports, news, music videos, cartoons, game shows, first-run movies, classic movies, etc. —all without turning to the over-the-air stations that were its only choice just 15 years earlier.

7. In 1985 and again in 1987, must carry regulations were struck down as unconstitutional. The absence of must carry rules during the last seven years have been a significant factor in the growth of cable program networks. Cable operators have been free to select the programming that their subscribers want. This leveling of the playing field encouraged the development of more networks like The Comedy Channel, Ha!, "E", CNBC, TNT, The Cartoon Network and The Sci-Fi Channel. It also helped to induce existing networks to improve their programming, including a dramatic increase original production, creating more jobs in related industries. In 1985, USA Network's total programming expenditure, including production, was $29.0 million. In 1992, USA Network's figure is projected to be approximately $193.0 million.

8. The vast majority of cable systems made substantial investments in plant and equipment to increase the number of channels which they provided to their subscribers. Nevertheless, as more networks have launched, and existing networks have expanded their offerings, channel availability has become tight. There has been intense competition among many networks for very limited channel availability.

9. USA launched The Sci-Fi Channel on September 24, 1992 with an impressive array of classic science fiction television series and movies, as well as original programming and high-tech interstitial material. Many cable systems informed USA that they wanted to include The Sci-Fi Channel on their systems, but were unable to do so because they had no available channels. Listed below are just a few specific examples:

(a) Comcast—Flint, MI
54 channels with one open channel on hold due to re-regulation must-carry concerns

(b) Post Newsweek—Fargo, ND
41 channels with no open channels.

(c) Multimedia—Wichita, KS
36 channels with no open channels.

(d) Storer—Louisville, KY
42 channels with no open channels.

(e) Times-Mirror—Lafayette, IN
54 channels with three open channels on hold due to re-regulation must-carry concerns.

(f) Cox—Parma, OH
30 channels with no open channels.

(g) Continental Cablevision—Pompano Beach, FL
54 channels with no open channels.

(h) Sammons Cable TV—Dover, NJ
37 channels with no open channels.

(i) TKR Cable—Parlin, NJ
41 channels with no open channels.

(j) Comcast—Indianapolis, In
39 channels with no open channels.

(k) Viacom Cable, Tacoma, WA
34 channels with no open channels.

(l) Cox Cable—Santa Barbara, CA
36 channels with no open channels.

(m) KBLCOM—Paragon Cable of Garden Grove, CA
54 channels with no open channels.

(n) Prime Cable—Las Vegas, NV
52 channels with no open channels.

10. While many cable system operators may prefer The Sci-Fi Channel to an existing broadcast station, the must carry statute prohibits them from exercising their first-amendment rights as speakers.

11. The new statute also mandates that broadcast stations receive preferential treatment in the specific channels to which they occupy on cable systems. USA has emphasized channel positions in its negotiations with cable operators for at least the last seven years. USA has made a number of studies of the effect of channel positioning on viewership. Each such study has reached the same conclusion: the lower the channel position, the greater the viewership. Under the new law, USA Networks is likely to be taken off its present channel in a number of cable systems. The result is damaging to USA Networks and to the viewing public which expects to find certain programming on certain channels. The only beneficiary is the broadcast station. We can find no justification for so favoring such a speaker.

Conclusion

12. The must carry statute divides speakers into two groups—the favored broadcast stations and the unfavored cable networks. The fact is that both groups compete for distribution and viewership. We can find no rationale for government to dramatically tip the balance in this highly competitive environment that has produced so much benefit to the American public. Diversity and choice are positive goals of our national communications policy, which should be fostered.

The 4th day of November, 1992.

/s/ Douglas V. Holloway
DOUGLAS V. HOLLOWAY

[Notarization Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF LEE MASTERS
PRESIDENT AND CEO, E! ENTERTAINMENT TELEVISION, INC.

STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

Lee Masters, being first duly sworn, deposes and says:

1. I am the President and Chief Executive Officer of E! Entertainment Television, Inc., a position I have held since January, 1990. Prior to that time I served as the Executive Vice President and General Manager of MTV, Music Television, a basic cable television network owned by MTV Networks, Inc. My tenure at MTV Networks included responsibility for the operation of MTV and VH-1, another basic cable television network. Since April, 1986, I have been a senior executive in the cable television programming business.

2. E! Entertainment Television ("E!") is a 24-hour, advertiser-supported basic cable network originating in Los Angeles and presenting news, programs and features about the world of entertainment to nearly twenty million cable television households. A relative newcomer to the ranks of cable networks, E! continues to experience the most difficult obstacle faced by creators of new programming: the lack of available channels on local cable systems.

3. Formerly named "Movietime," the network was launched to two million homes in July, 1987. In June, 1990, the network's format was completely changed and the channel was re-launched as E! Entertainment Television. Initially, the channel offered rotating short segments of entertaiment news and information. However, in January of this year, E! changed its programming format to long form (hour and half hour) programs. This commitment to a new format required substantial additional investment in the network. From its new state-of-the-art production facility in Los Angeles' mid-Wilshire district, E!'s staff of 396 employees currently produces almost all of E!'s programming.

4. E! represents a completely unique programming service, providing its cable audience—particularly female viewers—continuous coverage of the entertainment industry, and information on entertainment choices, not available elsewhere on the television spectrum. However, in order to continue offering and up-grading its programming, E! must have access to channel space on cable systems.

5. At no time during my more than six years involvement as a senior executive in cable television programming has the unavailability of channel capacity on local cable television systems been as widespread as it is today. We have heard from numerous cable system operators that while they would like to have E! on their systems, and that their viewers would value E!'s service, they currently have no available channel capacity.

6. Furthermore, for many cable television operators, the provisions of the Cable Television Consumer Protection and Competition Act of 1992 (the "Act") have created a nearly complete barrier to new launches of E!. Cable operators, required under the Act to allocate channels to over-the-air television stations, have informed E! that they will not launch our service because they will need channel capacity to satisfy the must carry and other

obligations under the Act. Examples of cable operators so informing E! as follows:

Falcon Cable TV, Los Angeles, California. This multiple system operator has informed E! that many of their cable television systems have placed all futures launches of basic cable networks, including E!, on indefinite hold due to the uncertainties created by the Act.

MultiVision Cable TV Corp., Prince Georges County, Maryland (73,000 subscribers). This systsm is not currently carrying E!, is not carrying all must carry signals and will therefore not launch E! on an indefinite basis.

Adelphia Communications Corp., Coudersport, Pennsylvania. No new launches of E! by this multiple system operator will be undertaken in any system until the financial impact of the must carry retransmission provisions of the Act have been determined.

TKR Cable Company, Warren, New Jersey. New launches of satellite delivered channels such as E! have been indefinitely suspended in light of the possibility that channel capacity will be needed to satisfy must carry obligations.

7. Based on our experience since the passage of the Act, there can be no doubt that numerous cable operators previously considering launching E! will not do so as long as they must reserve channel capacity for must carry stations.

/s/ Lee Masters
LEE MASTERS

[Notarization Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF TERENCE F. McGUIRK

STATE OF GEORGIA)
) ss:
COUNTY OF FULTON)

Terence F. McGuirk, being first duly sworn, deposes and says:

1. I am Executive Vice President of plaintiff Turner Broadcasting System, Inc. ("TBS"), President of its Turner Sports Division, and a Director of the Company since 1987. I first joined the Company in 1972. In 1975, I became Director of Cable Relations. I became Director of Special Projects in 1978. I was promoted to Vice President of the Company in 1979. I submit this Affidavit in support of plaintiffs' Motion for a Preliminary Injunction.

Factual Background

2. TBS, a Georgia corporation organized in 1965, is a diversified company whose business segments include entertainment, news, syndication and licensing, sports, and real estate operations. Among its business segments relevant to the instant action are its five cable program networks.

3. The Cable News Network ("CNN") is a 24-hour per day news cable program network that utilizes a format consisting of up-to-the minute national and international news, sports news, financial news, science news, medical

news, weather, interviews, analysis and commentary. CNN maintains 27 news bureaus worldwide, nine in the United States and 18 located throughout the world. CNN has become world-wide news network of record and an indispensable source for news and information, from Desert Storm to full coverage of the political process. As of September 1991, CNN was available in the United States on 11,392 cable systems reaching 53,098,655 subscribers.

4. Headline News, a second 24-hour per day news cable program network, was inaugurated in December 1981. Headline News uses a concise, fast-paced format which provides a consistent, updated half-hour newscast. As of September 1992, Headline News was available in 5,638 cable systems reaching 45,129,865 subscribers. Headline News allows its cable affiliates to insert a 5-minute local newscast at the end of each half-hour; over 7 million cable households currently receive Headline News in that format.

5. TBS owns and operates TBS Superstation, a 24-hour per day independent UHF television station licensed by defendant Federal Communications Commission ("FCC") to Atlanta, Georgia. TBS Superstation is telecast over the air to the Atlanta market and is also retransmitted by a common carrier via satellite to cable systems all over the United States, Puerto Rico and the Virgin Islands. Consistent with the copyright laws, TBS Superstation relies principally on advertising revenues and receives no direct compensation for its signals to cable systems, or from the common carrier which delivers the TBS signal to the cable systems. TBS Superstation provides programming 24 hours a day. The Company acquires original programming from film companies, previously viewed programming from syndicators and sports programming. As of September 1, 1992, TBS was available in 11,351 cable systems and distribution outlets and had 51,384,100 subscribers.

6. TBS's second entertainment cable program network, TNT, began operations on October 3, 1988 and is distributed principally to subscribing cable television systems. TNT's programming is derived from the film library owned by TBS's subsidiary, Turner Entertainment Company, original programming, sports events, and syndicated programming. As of September 1, 1992, TNT was available through 8,624 cable systems and had 51,324,881 subscribers.

7. TBS's newest cable program network, The Cartoon Network, launched on October 1, 1992. The Cartoon Network is a 24-hour per day programming service, and consists of entirely animated programming distributed to cable television systems. At its launch, it was available in 233 cable systems, representing 1,923,254 subscribers.

8. Cable operators receive or originate signals from different sources, then amplify and retransmit those signals over coaxial and fiber optic cables to subscribers. Cable operators choose what programming to present to their subscribers from sources including local broadcast station signals, signals of distant broadcast television stations such as TBS Superstation, locally-originated cable programming, and cable network programming such as CNN.

9. Broadcast television stations possess multiple means of transmitting their signals to their audiences. Pursuant to the Communications Act, broadcast television stations are licensed by the FCC for free to utilize specified portions of the radio-magnetic spectrum to transmit their signals over-the-air to antennas connected to television sets. Broadcast stations are also able to transmit their programming over-the-air to cable systems for subsequent retransmission to cable system subscribers. Absent carriage on a cable system, a broadcast television station can transmit its signal over-the-air to virtually every home within its licensed community.

10. Cable program networks receive no access to the government-controlled radio-magnetic spectrum and can only reach their viewing audience by obtaining access to a channel on a cable system or similar distribution system. Cable networks therefore reach only the approximately 60 percent of television homes that subscribe to cable. Cable systems operate under franchises granted by local governments and pay those governments up to five percent of revenues as franchise fees.

11. The Turner cable program networks are part of a tremendous diversity in program offerings that such networks have provided to the American public during the last 15 years. This diversity was made possible by entrepreneurial instincts of the networks' founders, the growth of the cable industry and the development of a satellite-based distribution system. Today, cable program networks include approximately 80 national and regional programming services that provide general entertainment and sports programming in addition to discrete services that specialize in such areas as news (CNN), financial and other informational services (CNBC. Discovery Channel), coverage of Congressional deliberations (C-Span) and children's (Nickelodeon), music (Nashville Network, MTV), sports (ESPN), religious and minority-oriented (Black Entertainment Television) programming. This rich diversity in program offerings could not be achieved in mass audience oriented and scarcely allocated over-the-air broadcast stations.

12. To be sure, since the development of cable program networks, the viewership in cable homes of broadcast stations have declined from the levels that existed where broadcast stations represented the only choices available. The changes in viewing patterns represents the exercise of the viewing public's right to choose freely among diverse program offerings what the viewer wants to watch. (The decline in broadcast station audiences is also partially attributable to other alternatives now available to television viewers, for example, prerecorded tapes and video games.)

History of the Must Carry Rules

13. Until, as discussed below, struck down by the courts as unconstitutional, must carry regulations adopted by the FCC were major impediments to the development of the diversity provided by cable program networks and made it difficult, if not impossible, for cable program networks to reach their intended audiences.

14. The must carry rules were originally adopted by the FCC in 1965 and were applied to all cable systems in 1966. There were no cable program networks in existence when the must carry rules were enacted.

15. TBS's objections to must carry regulations are of longstanding. Faced with the regulatory impediment to its ability to speak over cable through its programming services represented by the must carry rules, TBS filed a petition with the FCC to delete the must carry rules in 1980, the same year it introduced it first cable program network, CNN. The FCC took no action on TBS's position.

16. In October 1983, TBS asked the United States Court of Appeals for the District of Columbia to compel FCC action unreasonably delayed. Thereafter, the Commission agreed to act; the FCC reaffirmed its must carry regulations in April 1984. In July 1985, the United States Court of Appeals struck down the must carry rules as violations of First Amendment rights of cable programmers and cable operators. The FCC adopted a second, more limited set of must carry regulations in 1986. They too were struck down as unconstitutional in 1987.

17. The absence of must carry rules during the last seven years has contributed significantly to the further development and diversity represented by the cable program networks, including TBS' networks, in two very

important respects. *First*, it has permitted cable operators to exercise their editorial discretion in choosing program offerings that their subscribers want and has led to the introduction of new programming networks and expansion of already existing cable program networks.

18. *Second*, this expansion and growth has permitted cable program networks to increase substantially their ability to create and offer original programming, whether entertainment, informational, or news. This expansion has certainly been the case with respect to TBS' services. CNN's ability to provide worldwide, indepth news coverage has been funded by its growth in the past seven years. In 1984, CNN's and Headline News' news programming budget was $65 million. In 1993, it will be $181 million.

19. TBS has been able to initiate two new entertainment program services, TNT and The Cartoon Network, in the last seven years. Furthermore, TBS has been able to increase markedly the original programming it offers on its services. In 1984, it invested $45 million in all entertainment programming. In 1993, that number will be $433.6 million, including $82.6 million in original programming.

The New Must Carry Requirements Affect TBS's Ability to Reach Audiences and Thus to Speak

20. The new must carry statute institutes requirements far more onerous on cable operators and therefore far more harmful to cable program networks than those found unconstitutional in 1987. The must carry statute requires cable systems to allocate up to one-third of their channel capacity for the mandatory carriage of television station signals; the 1986 FCC regulations invalidated as unconstitutional required only a maximum of one-fourth of a cable system's capacity be reserved for must carry stations. The geographic area in which broadcast stations can claim mandatory carriage status is broader in the must carry statute than in either version of the FCC's must carry regulations.

21. The must carry regulations invalidated in 1987 attempted to incorporate viewer preferences by requiring a minimum viewership standard to be met by broadcast stations to qualify for mandatory carriage. The must carry statute contains none—viewer preference is made absolutely irrelevant.

22. The must carry statute adds a category of broadcast station to those eligible for carriage—low power television stations. Low power stations were not eligible under either set of FCC must carry regulations.

23. The must carry statute goes farther than the FCC regulations set aside in 1987 in providing carriage rights for non-commercial stations. Moreover, the must carry statute retroactively freezes into law the exercise of editorial discretion by cable operators. Any non-commercial educational television station carried by a cable system as of March 29, 1990 must continue to be carried.

24. The growth of cable program networks, to some extent, has now caught up with the channel capacity of many cable operators. Thus, compared with 1988, when TNT was launched with 17 million subscribers, The Cartoon Network began operations last month with only 2 million subscribers, less than 3% of the cable viewing universe.

25. Many cable systems have informed TBS that they were interested in including The Cartoon Network in their offerings and thought that The Cartoon Network contained programs that their viewers would be interested in receiving. However, each of these cable networks had no available capacity. Some specific examples of cable systems who have so informed TBS include:

(a) Storer Cable Communications—Louisville, KY
43 channels with no open channels.

(b) Storer Cable—Bowling Green, KY
35 channels with no open channels.

(c) Viacom Cablevision—Nashville, TN
36 channels with no open channels.

(d) Cox Cable Middle Georgia—Macon, GA
52 channels with no open channels.

(e) Cablevision—Memphis, TN
36 channels with no open channels.

(f) Ventura County Cablevision—Westlake Village, CA
39 channels with no open channels.

26. Even if we were to convince any of these cable operators or its audiences that The Cartoon Network is a preferred alternative to an existing broadcast station, the must carry statute would permit these broadcast stations to ensure continued carriage on these cable systems.

27. The reduction of available outlets through which cable program networks can speak will be made even worse by the must carry statute. Broadcast stations not currently carried by systems can invoke must carry to displace cable program networks that are currently being offered by these cable operators. Specific examples where we have been unable to obtain an outlet for The Cartoon Network, or other TBS services are currently being carried, where the must carry statute would appear to provide additional broadcast station carriage rights that would displace existing speakers include:

(a) Georgia Cable TV and Communications—Atlanta, GA
52 channels with no open channels.

There is a UHF station in nearby Rome, Georgia which is not carried by the system and is requesting carriage. Since the system currently carries nine broadcast stations, and the must carry limit is 17, a cable program network would have to be dropped.

(b) TCI Cablevision—Contra Costa County, CA
42 channels with no open channels and at least five broadcasters requesting carriage. Five cable program networks would have to be dropped.

(c) TCI Cablevision—Eugene, OR
36 channels with no open channels and one broadcaster requesting carriage. A cable program network would have to be dropped.

(d) Columbia Cable—Columbia, OR
63 channels with no open channels and one broadcaster requesting carriage. A cable program network would have to be dropped.

28. The potential displacement of existing cable program networks and foreclosure of potential opportunities for new cable networks to speak caused by the new must carry statute is strikingly illustrated by the Viacom systems in Northern California. For example,

(a) The 55-channel Viacom system in San Francisco already carries 11 commercial broadcast stations and 3 noncommercial broadcast stations. Although the system currently has 2 blank channels, the must carry statute would require Viacom to add 4 more commercial broadcasters and 2 more noncommercial broadcasters, co-opting the 2 open channels and requiring the displacement of 4 present speakers.

(b) The 38-channel Viacom system in Marin already carries 14 broadcast stations (10 commercial, 4 noncommercial), equal to the number of basic cable networks being carried. Yet the must carry statute would require up to 3 additional commercial and 1 additional noncommercial station to be carried, displacing 4 cable networks currently reaching audiences in Marin.

(c) A similar situation exists in the 38-channel Viacom system in East Bay. It has no open channels. It already carries 12 broadcast stations (9 commercial, 3 noncommercial). While it has no room for new cable networks, the must carry statute will require East Bay to add up to 6 additional broadcast stations (4 commercial, 2 noncommercial), and potentially therefore require the system to drop over half of the 13 basic cable networks East Bay current carries.

(d) The 37-channel Viacom system in Pinole carries 13 broadcasters (9 commercial, 4 noncommercial). Pinole currently has 1 open channel. Instead of Pinole exercising its editorial discretion as to how to program its open channel, instead of the Pinole subscribers having any role in deciding what speaker they wish to hear, instead of cable program networks like TBS having an opportunity to convince Pinole to let it speak, the must carry statute, by government fiat, grabs that open channel for a broadcaster. Not only that, the must carry statute will require Pinole to add up to 4 additional commercial broadcasters and thus also to displace 3 cable program networks that currently speak to Pinole.

(e) A similar situation exists in the 37-channel Viacom system in Petaluma, where there is currently one open channel. Although 14 broadcasters are currently being carried (10 commercial, 4 noncommercial), the must carry statute will require Petaluma to carry up to 3 more commercial broadcasters, both preempting the open channel and silencing 2 current speakers on the Petaluma system.

29. The situation is not confined to northern California. For example, Viacom is also facing the necessity of displacing cable networks in other areas of the country:

(a) In Viacom's three Puget Sound, Washington systems, Viacom currently has no open channels. Although the 34-channel Puget Sound South system currently carries 9 broadcast stations (7 commercial and 2 noncommercial), it will have to add 2 commercial stations and an additional noncommercial station, displacing 3 current cable network speakers. In Puget Sound Central, 8 broadcasters are currently carried, but 2 additional commercial and 1 additional noncommercial station will have to be added to the 37-channel system, again displacing 3 cable networks. Two additional commercial stations would be added to the 7 already carried on the 37-channel Puget Sound North system, again displacing two cable networks.

(b) In Dayton, Ohio, Viacom operates a 38-channel system with no open channels. It would have to add 1 additional commercial station, and may have to add 3 Cincinnati noncommercial stations, all within 50 miles of Dayton, which would bump up to 4 cable networks.

(c) The 37-channel Viacom system in Salem, Oregon again has no open channel, but would have to add 2 additional commercial broadcasters to the 6 it now carries, and 1 additional noncommercial station to the 1 it now carries, displacing 3 current cable speakers in Salem.

(d) In Nashville, Tennessee, the 38-channel Viacom system has 1 open channel. But like the Pinole and Petaluma systems, that channel would be grabbed by government fiat for an additional broadcast station. Nashville currently carries 5

commercial broadcast stations and 1 noncommercial station. It would have to add 3 additional commercial stations and may have to add 2 additional noncommercial stations licensed to Bowling Green, Kentucky. Hence, 4 cable speakers could be displaced.

The Channel Positioning Requirements Harm Cable Program Networks

30. With the absence of government regulation, cable operators have exercised their editorial discretion in creating various packages of program services to offer their subscribers and in arranging and grouping program offerings among its channels. As a newspaper editor or bookstore owner decides the best way to display or arrange stories or books, cable operators have utilized their judgment to do the same.

31. Channel positions are important to broadcast and cable networks. For example, for new networks, being placed near well-established or popular channels will lead to sampling by viewers or exposure to programming that can lead to success, and growth. Certain technological characteristics of some television receivers make certain channel positions more desirable.

32. The must carry statute interferes with cable operators' editorial discretion and the opportunity for cable program networks to convince operators to provide them certain outlets by governmentally providing certain unilateral rights to broadcasters to decide where they are to be carried on cable systems.

33. The inescapable conclusion is that these provisions give broadcasters the unilateral rights to cream-skim choice positions from which to speak to the viewing audience. Particularly pernicious is the option given each broadcaster to obtain the carriage position it had on July

19, 1985, when the FCC's original must carry regulations were declared unconstitutional. Many cable program networks, like TNT and The Cartoon Network, did not exist in 1985. Other cable program networks were only able to obtain access to cable systems once the must carry regulations that mandated the carriage of every broadcast station, even duplicative signals, were found unconstitutional. Furthermore, since 1985, hundreds of cable systems have expanded their capacity. For example, a 36-channel cable system would not have been able to carry Channel 45 or Channel 50 on its Channel 45 or 50 because it did not exist. It now may be doing so, yet those broadcasters are given the unilateral right to push a cable network off a lower number and be returned to their 1985 position. There is no justification for this government fiat.

34. For example, CNN is currently carried in the Howard County, Maryland cable system on Channel 12. In 1985, however, WDCA was carried on Channel 12. WDCA, Channel 20 in Washington, is carried on Channel 20 on the system. Under the channel positioning provisions of the Act, WDCA has the governmental-granted right to reclaim Channel 12 if it desires to displace CNN. There is no governmental interest that can justify the encroachment on the cable operator's editorial discretion or justify the elevation of WDCA's speech rights over CNN.

33. Similarly, in the Mt. Carmel, Pennsylvania cable system, within the Philadelphia ADI, TNT is carried on Channel 7, while WPHL-TV, licensed to Channel 17, is carried on Channel 17 by the cable system. Yet in 1985, before TNT even existed, WPHL was on Cable Channel 7. Under the must carry statute, WPHL is given by the government the right to oust TNT.

Conclusion

34. The must carry statute divides speakers into two groups. The first group, broadcast stations, who have been given free by the government an over-the-air route into the home, are given a government preference that guarantees them a second duplicative route into homes via cable, no matter whether the subscribing public wants to receive the broadcast stations. The statute then creates a second, inferior group—cable program networks—who must vie for the carriage slots left over, even though these cable systems represent their only practical means of reaching their intended audience. Cable program networks, like the TBS networks, have been competing with over-the-air broadcasters, and we will continue to do so. There is no justification, in my view, for the governmental thumb to be placed on the broadcasters' side of the scale. The inevitable effect of the must carry statute will be to limit cable program networks' available resources to put into original programming and to develop new programming services, leading to a net reduction in diversity available to the public and a net reduction in speech.

This 1 day of November, 1992.

/s/ Terence F. McGuirk
TERENCE F. MCGUIRK

[Notarization Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF TIMOTHY B. ROBERTSON

Timothy B. Robertson, being first duly sworn, deposes and says:

1. I am the President and Chief Executive Officer of plaintiff International Family Entertainment, Inc. ("IFE"). I submit this Affidavit in support of plaintiffs' Motion for a Preliminary Injunction.

2. IFE is a Delaware corporation whose principal place of business is 1000 Centerville Turnpike, Virginia Beach, Virginia 23483. IFE owns and operates The Family Channel, a 24-hour per day cable television network that is primarily distributed through cable television systems; throughout the United States. The Family Channel was originally launched in April 1977 as CBN Satellite Network. The Family Channel provides family-oriented entertainment, including original made-for-television movies, dramatic and comedy series, classic westerns, specials, inspirational programs, and children's programming.

3. IFE has also publicly announced plans to launch a new cable program network, The Game Channel. The Game Channel is contemplated to be a 24-hour per day cable program network distributed primarily through cable television systems. As proposed, The Game Channel programming will consist of previously produced game shows that include an interactive element allowing viewers to participate.

4. Since the original must carry rules were struck down in *Quincy Cable TV, Inc. v. FCC*, 768 F.2D 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986), The Family Channel's total audience has increased dramatically. As of July, 1985, when the original must carry rules were invalidated, The Family Channel (then known as CBN Cable Network) was distributed to approximately 5,700 cable systems and received by approximately 29 million subscribers. Today, The Family Channel is distributed to more than 10,000 cable systems and received by more than 55.7 million cable television subscribers. Moreover, according to A. C. Nielsen figures, ratings for The Family Channel's 7:00 p.m. to 10:00 p.m., Monday to Friday time period increased 14 percent, from 0.7 to 0.8, during the period September 1991 to September 1992. As these figures demonstrate, the American public has expressed a preference for the type of family-oriented programming offered by The Family Channel.

5. Cable systems channel capacity has become increasingly scarce since the must carry requirements were invalidated in *Century Communications Corp. v. FCC*, 835 F.2D 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988). With the development of new programming services, competition for channel system capacity has become particularly fierce. The enactment of the must carry provisions of the Cable Television Consumer Protection and Competition Act of 1992 has made it even more difficult for cable systems to continue carrying The Family Channel because cable systems are now required to carry a significant number of commercial television stations, noncommercial educational television stations, and low power television stations.

6. Channel positioning is extremely important to the success of The Family Channel. For that reason, IFE offers a 15 percent rebate of license fees to cable systems that carry The Family Channel on channels 2 through 20. Despite the rebate, cable systems are already shifting The Family Channel from its established positions on channels

2 through 20 to new channel positions above channel 20. Comparing cable systems that carried The Family Channel during the third quarter of 1992 and during the first quarter of 1992, approximately 155,000 fewer cable subscribers now receive The Family Channel on channels 2-20.

7. Due to the increasing scarcity of cable system channel capacity, it has been difficult for IFE to obtain carriage for The Game Channel. The success or failure of The Game Channel depends of IFE's ability to obtain carriage for the program service on cable systems. The enactment of the must carry provisions of the Cable Television Consumer Protection and Competition Act of 1992, has made it even more difficult for IFE to obtain carriage for The Game Channel because cable systems are now required to carry a significant number of broadcast television stations. In fact, a number of cable systems, including several of the largest multiple system operators, have informed IFE that they are unlikely to carry a new service like The Game Channel for the foreseeable future due to limited channel capacity and the enactment of the new must carry requirements.

8. The must carry provisions, including the channel positioning requirement, and the retransmission consent provisions provide the broadcast industry with a substantial competitive advantage over cable networks, like The Family Channel. There is no legitimate justification for enhancing the economic interests of broadcast stations over cable networks, especially when the means involved completely disregard the viewing preferences of the public.

Pursuant to 28 U.S.C. § 1746, I declare under the penalty of perjury that the foregoing is true and correct.

Executed this fifth day of November, 1992.

/s/ Timothy B. Robertson
TIMOTHY B. ROBERTSON

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

**AFFIDAVIT OF JOSEPH M. SEGEL
CHAIRMAN OF QVC NETWORK, INC.
IN SUPPORT OF PLAINTIFFS' MOTION
FOR PRELIMINARY INJUNCTION**

1. I, Joseph M. Segel, am the Chairman and Chief Executive Officer of Plaintiff QVC Network, Inc. ("QVC"). I am over 18 years of age and am competent to provide this affidavit.

2. QVC is a Delaware corporation. Its principal place of business is at 1365 Enterprise Drive, West Chester, Pennsylvania 19380.

3. QVC's principal business is a televised home-shopping service (the "QVC Service") that is dependent upon cable television systems for transmission to the American public in all 50 states, the District of Columbia, Puerto Rico and the Virgin Islands.

4. QVC was incorporated in June 1986 and commenced business in November 1986. The QVC Service can currently be received by approximately 43,000,000 homes through cable television systems.

5. QVC has agreements ("Carriage Agreements") with cable system operators to carry the QVC Service on more than 4,000 local cable systems as part of the basic cable television service. QVC makes no charge to either cable system operators or cable subscribers to receive the QVC Service. Each cable system operator receives five percent

(5%) of the net sales of merchandise sold to customers located in the cable system operator's service area.

6. As the principal consideration for cable system operators to enter into Carriage Agreements, over the past six years QVC has issued to cable system operators more than 60% of QVC's total equity for substantially less than the market value of that equity. Such consideration has been necessary because most cable systems do not have enough channels available to carry the more than 70 cable networks vying for carriage on cable systems as well as all local broadcast stations. The equity issued to cable system operators in consideration for carriage of the QVC Service has a present value in excess of $400,000,000. The number of shares of stock which each cable system operator was permitted to acquire was based on the number of subscribers, the channel position and the number of years during which the cable system operator committed in its Carirage Agreement to transmit QVC Service.

7. To the extent that any such cable system is not carrying all of the local VHF, UHF and low-power broadcast stations it would be required to carry under Section 4 of the Cable Television Consumer Protection Act of 1992 (the "Act"), the cable system would have to replace existing cable networks with broadcast stations.

8. Today there are two major competitors in the televised home-shopping business of approximately equal size: Home Shopping Network ("HSN") and QVC. Like QVC, HSN transmits its televised home-shopping presentations by means of cable systems. However, unlike QVC, HSN additionally retransmits its nationally-transmitted sales presentations on a 24-hour-a-day basis by means of more than 20 UHF broadcast stations. Unlike normal local broadcast stations, these UHF stations spend approximately 90% of their broadcast time retransmitting the nationally-transmitted HSN sales presentations rather than diversified or local television programming.

9. Under the provisions of Section 4 of the Act, cable system operators would be forced to carry HSN's virtually continuous sales presentations on the basic tier of many cable systems, even if operators have previously chosen not to carry HSN for economic and/or qualitative reasons. Additionally, those cable systems that already carry HSN's cable "feed" may also be forced to carry an HSN broadcast station with duplicative programming on another channel. In nearly all of those cases, it is likely that any competitive television home-shopping channel now being carried on the basic tier would either be squeezed off the cable system or be displaced to a higher channel.

10. To provide cable subscribers with maximum diversity of programs in a scarce channel environment, several cable system operators have allocated only one of their limited number of channels to televised home-shopping programming. If they are required under Section 4 of the Act to carry a broadcast station that is utilized predominantly to retransmit HSN sales presentations, then an established competitive cable network such as QVC would be in jeopardy of being expelled or excluded from the cable system.

11. Higher channels are less watched than lower channels and, therefore, are less valuable. QVC sales from carriage on channels 14 to 24 are only 92% of the average sales from channels 2 to 13. Channels 25 to 36 are only 84% as productive as channels 2 to 13; channels 37 and higher are only 62% as productive as channels 2 to 13. This situation will be exacerbated if broadcast stations are placed exclusively on the lower channels as part of basic cable television service and cable networks are displaced to higher channel positions.

12. If QVC is deleted from cable systems, many of the more than 4,000,000 cable television subscribers who have made purchases from QVC in the past two years will be deprived of access to their preferred shopping channel.

13. QVC will suffer substantial, immediate and irreparable injury if the provisions of Section 4 of the Act are enforced.

Pursuant to the provisions of 28 U.S.C. Section 1746, I declare under the penalty of perjury that the foregoing is true and correct.

/s/ Joseph M. Segel
JOSEPH M. SEGEL

Executed: November 3, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF E. ROGER WILLIAMS

STATE OF GEORGIA)
) ss:
COUNTY OF COBB)

E. Roger Williams, being first duly sworn, deposes and says:

1. I am President and Chief Operating Officer of The Travel Channel, Inc. I have held this position since March 24, 1992. Prior to March 24, 1992, I was Senior Vice President, Affiliate Sales and Consumer Marketing for ESPN, Inc. I was employed by ESPN, Inc. since February 1, 1980. I submit this affidavit in support of plaintiffs' Motion for a Preliminary Injunction.

2. The Travel Channel, Inc. is a Virginia corporation with its principal place of business in Atlanta, Georgia engaged in the business of providing a network television programming service to cable television systems.

3. The Travel Channel, Inc. is a 24 hour per day program service distributed principally to subscribing cable television systems. The Travel Channel, Inc.'s programming consists of programs dedicated to the subject of travel and programs featuring travel related subjects.

4. The Travel Channel began providing its service to cable systems on February 1, 1987. The Travel Channel was created by Trans World Airlines (TWA) as a promotional service and direct marketing vehicle for TWA. The

Travel Channel was purchased by Landmark Communications, Inc. on March 20, 1992. Landmark has since changed the focus of The Travel Channel from an airline promotion service to a service which provides viewers with programs consisting of travel entertainment, information, news and special events. The Travel Channel currently is seen in approximately 17 million cable households.

5. When The Travel Channel launched in 1987, the average number of channels per system was less than 32. (Today that number is 38.6). Despite this limited channel capacity environment, The Travel Channel was able to obtain carriage on 606 cable systems serving over 17 million subscribers. During this same period (1987-1992), 168 new television stations began operation. It is highly unlikely that The Travel Channel would have been able to enjoy the success it did in obtaining new systems if those same cable operators were forced to automatically grant carriage to these new (as well as other existing stations) broadcast stations. The absence of must carry allowed cable operators the ability to select the program offerings for their communities based on which service was of greater value to the community rather than artificially mandating carriage to broadcast stations (many of whom are duplicate network affiliates or independent stations carrying much of the same syndicated programming already being offered in the marketplace).

6. The new must carry rules will have a definite negative effect on the ability of The Travel Channel to increase the number of cable systems that carry our service. With channel capacity on cable systems being almost filled, cable operators will be unlikely to add any new cable services if they must first accommodate the necessary quota of existing and new broadcast stations. Further, there are now 192 outstanding construction permits for additional broadcast stations. Even if cable operators had capacity left after the imposition of must carry it is unlikely they would add new cable services while the threat remained that

these C.P.'s may become operational, gain must carry status, and thus force the operator to remove any recently launched cable services in order to accommodate the new broadcast station. This type of action would be extremely disruptive to the viewers.

7. The Travel Channel is also harmed by must carry within the existing system base. Approximately 50% of The Travel Channel subscriber base is part time. That is, we share a channel with other cable services. For a cable network to be successful, it must have full time carriage within each system. One of the immediate goals for The Travel Channel is to convert this part time system group to full time carriage. With the imposition of must carry, our ability to accomplish this goal will be negatively impacted.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on the fourth day of November, 1992.

/s/ E. Roger Williams
E. ROGER WILLIAMS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

STATEMENT OF MATERIAL FACTS OF INTERVENOR-DEFENDANT NATIONAL ASSOCIATION OF BROADCASTERS IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT IN TURNER AND IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT IN DANIELS

Defendant-Intervenor National Association of Broadcasters ("NAB") submits this Statement of Material Facts in support of its motion for summary judgment in No. 92-2247 and in support of its cross-motion for summary judgment in No. 92-2292.

1. For a variety of reasons, including local franchising requirements and the extraordinary expense of constructing more than one cable television system to serve a particular geographic area, most cable television subscribers have no opportunity to select between competing cable systems. Without the presence of another multi-channel video programming distributor, a cable system faces no local competition. The result is undue market power for the cable operator as compared to that of consumers and video programmers. Cable Consumer Protection and Competition Act of 1992 ("Act") § 2(a)(2); Affirmation of Jack N. Goodman ("Goodman Affirmation"), November 24, 1992, ¶¶ 9, 14-19.

2. There has been a substantial increase in the penetration of cable television systems over the past decade. Nearly 56,000,000 households, over 60 percent of the households with televisions, subscribe to cable television, and this percentage is almost certain to increase. As a

result of this growth, the cable television industry has become a dominant nationwide video medium. Act § 2(a)(3); Goodman Affirmation, ¶¶ 9, 14-18.

3. The cable industry has become highly concentrated. The potential effects of such concentration are barriers to entry for new programmers and a reduction in the number of media voices available to consumers. Act § 2(a)(4); Goodman Affirmation, ¶¶ 8-11.

4. The cable industry has become vertically integrated; cable operators and cable programmers often have common ownership. As a result, cable operators have the incentive and ability to favor their affiliated programmers. This could make it more difficult for noncable-affiliated programmers to secure carriage on cable systems. Vertically integrated program suppliers also have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies. Act § 2(a)(5); Goodman Affirmation, ¶ 20.

5. There is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media. Act § 2(a)(6).

6. The Federal Government has a substantial interest in having cable systems carry the signals of local commercial television stations because the carriage of such signals is necessary to serve the goals contained in Section 307(b) of the Communications Act of 1934 of providing a fair, efficient, and equitable distribution of broadcast services. Act § 2(a)(9); Goodman Affirmation, ¶¶ 21-26.

7. A primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming. There is a substantial governmental interest in ensuring its continuation. Act § 2(a)(10).

8. Broadcast television stations continue to be an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate. Act § 2(a)(11).

9. Broadcast television programming is supported by revenues generated from advertising broadcast over stations. Such programming is otherwise free to those who own television sets and do not require cable transmission to receive broadcast signals. There is a substantial governmental interest in promoting the continued availability of such free television programming, especially for viewers who are unable to afford other means of receiving programming. Act § 2(a)(12); Affirmation of Mark R. Fratrik (Fratrik Affirmation), November 23, 1992, ¶ 6.

10. As a result of the growth of cable television, there has been a marked shift in market share from broadcast television to cable television services. Act § 2(a)(13); Fratrik Affirmation, ¶¶ 2-6.

11. Cable television systems and broadcast television stations increasingly compete for television advertising revenues. As the proportion of households subscribing to cable television increases, proportionately more advertising revenues will be reallocated from broadcast to cable television systems. Act § 2(a)(14); Goodman Affirmation, § 20; Fratrik Affirmation ¶¶ 5-6.

12. A cable television system which carries the signal of a local television broadcaster is assisting the broadcaster to increase its viewership, and thereby attract additional advertising revenues that otherwise might be earned by the cable system operator. As a result, there is an economic incentive for cable systems to terminate the retransmission of the broadcast signal, refuse to carry new signals, or reposition a broadcast signal to a disadvantageous channel position. There is a substantial likelihood that absent the reimposition of such a requirement, additional local broadcast signals will be deleted, repositioned, or not carried. Act § 2(a)(15); Goodman Affirmation, §§ 20-26.

13. As a result of the economic incentive that cable systems have to delete, reposition, or not carry local broadcast signals, coupled with the absence of a requirement that such systems carry local broadcast signals, the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized. Act § 2(a)(16); Goodman Affirmation, ¶¶ 20-26; Fratrik Affirmation ¶¶ 5-6.

14. Consumers who subscribe to cable television often do so to obtain local broadcast signals which they otherwise would not be able to receive, or to obtain improved signals. Most subscribers to cable television systems do not or cannot maintain antennas to receive broadcast television services, do not have input selector switches to convert from a cable to an antenna reception system, or cannot otherwise receive broadcast television services. The regulatory system created by the Cable Communications Policy Act of 1984 was premised upon the continued existence of mandatory carriage obligations for cable systems, ensuring that local stations would be protected from anticompetitive conduct by cable systems. Act § 2(a)(17); Goodman Affirmation, ¶¶ 15-19.

15. Cable television systems often are the single most efficient distribution system for television programming. A Government mandate for a substantial societal investment in alternative distribution systems for cable subscribers, such as the "A/B" input selector antenna system, is not an enduring or feasible method of distribution and is not in the public interest. Act § 2(a)(18); Goodman Affirmation, ¶¶ 15-19.

16. At the same time, broadcast programming that is carried remains the most popular programming on cable systems, and a substantial portion of the benefits for which consumers pay cable systems is derived from carriage of the signals of network affiliates, independent television stations, and public television stations. Also cable programming placed on channels adjacent to popular off-the-air

signals obtains a larger audience than on other channel positions. Cable systems, therefore, obtain great benefits from local broadcast signals which, until now, they have been able to obtain without the consent of the broadcaster or any copyright liability. This has resulted in an effective subsidy of the development of cable systems by local broadcasters. While at one time, when cable systems did not attempt to compete with local broadcasters for programming, audience, and advertising, this subsidy may have been appropriate, it is so no longer and results in a competitive imbalance between the two industries. Act § 2(a)(19); Sherman Affirmation ¶ 8.

17. The Act's must carry requirements will have little effect on whether a particular cable program service is carried on a cable system. Whatever difficulties cable programmers have had gaining access is unrelated to must-carry rules, which have not been in existence since 1985. Affirmation of Charles E. Sherman ("Sherman Affirmation"), November 23, 1992, ¶¶ 4-5.

18. Overall popularity growth for cable programming is flat, and ratings for many prominent cable networks is declining. Sherman Affirmation, ¶ 7.

19. The least viewed broadcast station typically has a larger audience than the most-viewed cable network. Sherman Affirmation, ¶ 8.

20. Lack of capacity to accommodate additional cable programming is not a problem on many cable systems. Cable operators are increasingly engaging in the practice of "multiplexing," which means that a single cable network such as HBO is shown simultaneously (on different time schedules) on more than one cable channel. Cable capacity thus is presently used for purposes, such as multiplexing, that do not increase the diversity of programming. Sherman Affirmation ¶ 11.

21. Technical improvements, such as compression technology and fiber optic cable networks, are presently available, or will soon be available, and will substantially

increase the channel capacity of cable systems. Affirmation of Michael C. Rau, November 23, 1992.

22. There is no significant risk that viewers of programming provided by a cable system will believe that broadcast programming carried over that system pursuant to must carry requirements is conveying ideas, messages or points of view endorsed by the cable operator. Federal Communications Commission regulations require broadcasters to identify themselves when signing on and off each day, and at least once every hour during the day. 47 C.F.R. § 73.1201. Cable has a long history of serving as a conduit for broadcast channels, and consumers know that broadcast programming on a cable system is not the expression of the cable operator. Furthermore, cable operators have ample opportunity to use disclaimers should they feel any need to dissociate themselves from particular broadcast stations or messages. Goodman Affirmation, ¶ 27.

Respectfully submitted,

NATIONAL ASSOCIATION OF BROADCASTERS

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIRMATION OF DR. MARK R. FRATRIK

District of Columbia: ss

I, Dr. Mark R. Fratrik, affirm pursuant to 28 U.S.C. § 1746, as follows:

1. I am the Vice President Economist of the National Association of Broadcasters. I submit this affidavit in support of the Opposition to Plaintiffs' Motion for Preliminary Injunction and the Opposition to Plaintiff's Motion for Summary Judgment filed by the National Association of Broadcasters in these cases.

2. The National Association of Broadcasters and Price Waterhouse collect financial information on commercial television stations every year. A comprehensive questionnaire is mailed to every commercial television station, and nearly three-quarters of all of these stations respond. Given the high response rate, an accurate picture of the financial state of the television industry can be drawn. The annual *NAB Television Financial Reports* are considered to be the most complete information available about the economics of commercial television. I have been in charge of this project every year since 1985.

3. The most current report of these data, *1992 NAB Television Financial Report*, shows the perilous financial condition in which many television stations find themselves. Over one-quarter of all stations affiliated with the three major television networks (ABC, CBS and NBC)

lost more than $477,959 in 1991. One half of all independents, including those stations affiliated with the FOX network, lost more than $314,795 in 1991, with one quarter losing more than $1.6 million.

4. Interestingly, the average value for independents' pre-tax profits were positive. Taken together, these results indicate that there are a few independent stations who are doing quite well (considerably raising the average), while the vast majority of independent stations (shown by the median and quartile values) face very difficult financial times.

5. While some of this poor performance can be attributed to the poor overall U.S. economy, it is also consistent with recent trends of previous years' performances. For example, over one-quarter of all stations affiliated with the three major television networks lost more than $197,000 in 1990, prior to the economy entering into the recesson. In like fashion, one half of all independents lost more than $410,585 in 1990, with one quarter losing more than $1.6 million.

6. Even if many television stations are not headed for extinction as the Turner Plaintiffs suggest (Memorandum at 31), that is not the proper focus to determine the impact of anti-competitive behavior by cable systems. If stations' revenues are reduced, they will be forced to reduce expenses, and will be less able to acquire the most desirable programming or to devote as much effort and resources to local news and public affairs programming. Thus, the *quality* of service the public receives will be affected, even if stations are able to survive.

/s/ Mark R. Fratrik
MARK R. FRATRIK

[Notarization Ommitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIRMATION OF JACK N. GOODMAN

District of Columbia: ss

Jack N. Goodman submits this affirmation pursuant to 28 U.S.C. § 1746 in opposition to the motion for a preliminary injunction filed by the Turner plaintiffs in No. 92-2247, in opposition to the motion for summary judgment filed by Daniels Cablevision in No. 92-2292, and in support of NAB's cross-motions for summary judgment in both cases. This affirmation is based on personal knowledge.

1. I am Special Counsel in the Legal Department of the National Association of Broadcasters ("NAB"). I have practiced in the area of communications law since 1976, and have dealt with the issue of signal carriage obligations of cable television systems for at least ten years.

I. *Support for Must Carry By Cable Interests*

2. The current opposition to the must carry provision expressed by plaintiffs in these cases is in marked contrast with the *support* for must carry regulations expressed by cable industry leaders during hearings leading to the adoption of the Act.

3. On January 17, 1990, Mr. James P. Mooney, the President and Chief Executive Officer of the National Cable Television Association, wrote a letter to Senator Daniel K. Inouye, the Chairman of the Senate Subcommittee on Communications. Mr. Mooney stated: "NCTA

supports Congressional enactment of a must carry statute to assure continued carriage on cable systems of qualified local broadcast stations." Letter from Mr. James P. Mooney to the Hon. Daniel K. Inouye, January 17, 1992, *reprinted in, Oversight of Cable TV: Hearings on the Oversight of the 1984 Cable Telecommunications Act Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 101st Cong., 1st Sess. 548 (1990).

4. Dr. John Malone, the President and Chief Executive Officer of Tele-Communications, Inc., the Nation's largest cable operator, also stated: "Another source of recent complaints [about the cable industry] has been the 'must carry' issue, but TCI's position is clear. We have long supported an industry-wide compromise on this issue and fully endorse the standard proposed by Senator Inouye." *Id.* at 139. TCI, of course, is a major stockholder in Turner Broadcasting System, Inc. and other cable programming services which are plaintiffs in this litigation.

5. In later testimony, the cable industry's support for a "must carry" statute was reiterated. In testimony submitted in 1990, Mr. Mooney declared:

> "As we have stated before this Committee on several occasions, *NCTA supports Congressional enactment of a must carry statute to assure continued carriage of qualified local broadcast stations on cable systems.* And as a matter of public policy, NCTA agrees with on-channel carriage unless otherwise negotiated by the broadcaster and cable operator. Where it is not technologically possible to carry a broadcaster on his FCC assigned channel, or in cases of dispute, we support Chairman Inouye's proposal that the FCC develop rules for channel positioning. NCTA's main concern is that a must carry statute survive constitutional challenge in the courts, which previous FCC rules have not."

Cable TV Consumer Protection Act of 1989: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, 101st Cong., 2d Sess. 62 (1990) (emphasis in original).

6. Amos Hostetter, the Chairman and Chief Executive Officer of Continental Cablevision, Inc., the Nation's third largest cable operator, and another principal stockholder in Turner Broadcasting System, also stated:

> "I think a better way of dealing with this problem is to go forward with a sort of must carry program that the chairman and Senator Danforth have each incorporated in their respective bills.
>
> "I mean, I think must carry is an important dimension of our national communication system. It reinforces the localism, which is the underpinning of that system and is an appropriate relationship with cable companies." *Id.* at 153.

7. During hearings in the 102nd Congress, Mr. Mooney again expressed the cable industry's support for must carry legislation. He said:

> "I would urge you to look at the second 'must-carry' case where the court of appeals said it is possible that within the bounds of the Constitution you might do something to protect broadcasting, but the something has got to be objectively premised, applied in a non-discriminatory manner as between broadcasters, and which is crafted so as to minimally intrude into the legitimate rights of cable operators and cable programmers to do their own kind of TV. *We were for that than [sic]. We are for it today.*"

Cable Television Regulation: Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce, 102d Cong., 1st Sess. 1034 (1992) (emphasis added).

II. *Economic Integration in the Cable Industry*

8. The cable industry is dominated by large multiple system owners, referred to as MSOs. These companies control thousands of individual cable systems and make the decisions as to which signals will be carried on those cable systems and available to subscribers of those systems. It is important to remember that, unlike television stations, cable systems rarely face any competition and, even in the few locations where there are competing providers of video programming, one household almost universally is served by only one of those providers. By contrast, in virtually every television market, there are several independently owned television stations providing different "voices" to every television household that can receive the stations' signals.

9. Attached to this affidavit as Exhibit A is a chart showing the number of subscribers served by the 20 largest MSOs. The largest cable operator is Tele-Communications, Inc., or TCI. TCI and its affiliates control cable systems serving 12,334,000 households. That represents 22.5 percent of all households served by cable systems and 13.4 percent of all American television households. The five largest MSOs together control the television viewing in 46.7 percent of all cable households, and 27.8 percent of American television households. The twenty largest cable companies serve 74.3 percent of cable homes, representing almost half of all television households. Thus, cable television now is the provider of video services to almost two thirds of American households and more than two thirds of all cable subscribers are served by the top 15 cable operators.

10. Cable sysem ownership frequently is also concentrated regionally. In many television markets, one or two MSOs own or control virtually all of the cable systems serving the market. In those situations, the decision of a single cable operator to carry or drop a signal will govern the information and viewpoints the vast majorty of households in a region will receive.

11. In some cases, this results in one individual having the ability to dictate which information reaches millions of Americans. For example, TCI and its programming decisions are dominated by one individual, John Malone. The programming decisions of the third and fourth largest MSOs, Continental and Cablevision Systems, also appear to be controlled by one individual at each company, Amos Hostetter and Charles Dolan, respectively. Comcast and Jones Spacelink, the fifth and seventh largest operators, also appear to be directly and centrally controlled by the individuals who founded the companies or their families. Should any of these individuals determine that they objected to information or a point of view expressed on a broadcast channel, they would be able to prevent viewers of their cable systems from being exposed to that information or viewpoint.

III. *Legislative Record Supporting Congressional Findings*

12. I am familiar with the congressional findings set forth in Section 2 of the Cable Consumer Protection and Competition Act of 1992. I am also generally familiar with the legislative record on which those findings were premised. That record was the product of at least 13 hearings and well over a hundred witnesses.[1] Representa-

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[1] *E.g., H.R. 1303 (Consumer Protection and Competition) and H.R. 2546 (Communications Competitiveness and Infrastructure Modernization): Hearings before the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce, U.S. House of Representatives,* 102d Cong., 2d Sess. March 20, June 18, June 27, 1991; *S. 12: Hearing before the Subcommittee on Communications, Committee on Commerce, Science and Transportation, U.S. Senate,* 102d Cong., 1st Sess. (March 14, 1991); *S. 1880: Hearing before the Committee on Commerce, Science and Transportation, U.S. Senate, on S. 1880 (April 1990); Hearing before the Committee on Commerce, Science and Transportation, U.S. Senate,* 101st Cong., 2d Sess. (March 1990); *The Federal Communications Syndicated Exclusivity Rules: Hearing before the Subcommittee on Communications of the Committee on Commerce, Science, and Transportation,* 101st Cong., 1st Sess. (101-689)

tives of the broadcast industry, the cable industry and other interested groups had an ample opportunity to testify at those hearings and submit evidence to Congress, and took full advantage of that opportunity. Additionally, Congressional committees took note of, and relied upon, the voluminous submissions made to the Federal Communications Commission ("FCC") in various proceedings involving issues of cable regulation. NAB participated in hearings before Congress and in relevant FCC proceedings, and has submitted a substantial volume of evidence relevant to the must carry issue.

13. One part of that evidentiary record consists of materials submitted to the FCC in various proceedings, including MM Docket 90-4, MM Docket 89-600, in MM Docket 88-138, and MM Docket 85-349. This information, which constitutes only a small part of the evidentiary record assembled by Congress, is all a matter of public record, and is available from the FCC.[2] Those Comments reflect evidence filed by NAB and other parties,

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(March 21, 1990); *Oversight of the 1984 Cable Telecommunications Act: Hearing before the Subcommittee on Communications of the Committee on Commerce, Science and Transportation, U.S. Senate,* 101st Cong., 1st Sess. (101-464) (November 16-17, 1989); *"Must-Carry": Hearing before the Subcommittee on Communications of the Committee on Commerce, Science and Transportation, U.S. Senate,* 101st Cong., 1st Sess. (101-427) (October 25, 1989); *Commercial Time on Children's Cable T.V.: Hearing before the Committee on Commerce, Science and Transportation, U.S. Senate,* 101st Cong., 1st Sess. (October 1989); *Media Ownership: Diversity and Concentration: Hearing before the Subcommittee on Communications of the Committee on Commerce, Science and Transportation, U.S. Senate,* 101st Cong., 1st Sess. (June 14, 21 and 22, 1989).

[2] Attached as Exhibit to this Affirmation are excerpts from NAB's Comments and Reply Comments in FCC MM Docket 90-4, which contain factual information relevant to the need for must carry requirements. These Comments and Reply Comments, which were submitted to Congress, also reference numerous other submissions in other FCC dockets, many of which are cited in this Affirmation.

particularly the Association of Independent Television Stations ("INTV"), much of which contained additional material relevant to the must carry issue. The Comments were often independently submitted to Congress in the course of its consideration of must carry legislation. The cable industry participated in all of these proceedings before the FCC. Many of the Comments filed by broadcast interests addressed the arguments raised by the cable industry against must carry, both at the FCC and before Congress.

A. *Cable Monopoly Power*

14. The legislative record contains ample evidence supporting Congress's findings that cable operators have achieved "undue market power . . . as compared to that of consumers and video programmers," § 2(a)(2), and that "the cable television industry has become a dominant nationwide video medium," § 2(a)(3).

15. The record includes the following evidence documenting the lack of competition in the market for providing cable services:

a. Testimony of the Honorable Sharpe James on behalf of the National League of Cities and U.S. Conference of Mayors, "Oversight of Cable TV" Hearing, at 191;

b. Testimony of Edward Fritts, President of NAB, "Must Carry" Hearing, at 40;

c. Testimony of Gene Kimmelman on behalf of the Consumer Federation of America, "Cable TV Consumer Protection Act of 1991" Hearing, at 271 (quoting a tax court brief submitted by TCI, Inc., the largest owner of cable systems in the country);

d. Comments and Reply Comments of NAB in FCC MM Docket No. 89-600, containing *e.g.* Malarkey-Taylor Associates, Economic Analysis

of Cable Overbuilds (1987); Noam, Economies of Scale in Cable Television: A Multiproduct Analysis, in *Video Media Competition: Regulation, Economics and Technology* (Colum. U. Press 1985); Milton Maltz, Testimony before Subcommittee on Antitrust, Monopolies and Business Rights, Committee on the Judiciary, U.S. Senate (March 17, 1988);

e. Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service ("1990 Cable Report"), 5 FCC Rcd. 4962 (1990).

16. The legislative record also contains the following evidence documenting that cable has become an essential gateway for access to video programming consumers by broadcasters and others:

a. Testimony of Edward Fritts, "Must Carry" Hearing, at 38-39 and sources cited therein;

b. Testimony of Preston Padden, "Must Carry" Hearing, at 61-63 and sources cited therein;

c. Testimony of the Honorable Sharpe James on behalf of the National League of Cities and U.S. Conference of Mayors, "Oversight of Cable TV" Hearing, at 191;

d. Information filed by broadcasting and cable interests in FCC MM Docket 85-349;

e. ELRA Group, Inc. "Outdoor Antennas, Reception of Local Television Signals, and Cable Television" (January 28, 1986);

f. NAB Comments and Reply Comments in FCC MM Docket 88-138;

g. Views of Commissioner Quello in FCC Memorandum Opinion and Order, MM Docket 85-349 May 1, 1987).

17. In particular, the record before Congress contains extremely persuasive evidence supporting Congress's finding that "alternative distribution systems, such as 'A/B' input selector antenna system is not an enduring or feasible method of distribution and is not in the public interest." § 2(a)(18).

18. The broadcasting *and cable* industries submitted studies to the FCC demonstrating that A/B switches are not acceptable as a substitute fo. carriage of broadcast signals on cable systems.[3] These showed that among the reasons why A/B switches do not present an effective alternative to cable carriage are:

a. Many cable subscribers disassemble their outdoor antennas when they subscribe to cable; other subscribers are prevented from using outdoor antennas by zoning or planned unit development restrictions;

b. Where terrain or distance make off-the-air reception difficult or impossible even with an outdoor antenna, cable is the only way to receive broadcast signals;

c. A/B switches are complex to install, particularly when a VCR is also hooked up to the consumer's television;

d. Remote controlled A/B switches costing about 40 dollars have only recently become available, which means consumers have to go to the time and expense of purchasing and installing the extra remote control, or have to go to their television to change services, either of which is a substantial impediment to using the antenna;

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[3] *See, e.g.*, Comments of NAB, FCC MM Docket No. 88-138, at 23-30; Comments of NAB, FCC MM Docket No. 85-359, at 15-21 & Exh. 1; Comments of the Television Operators Caucus, FCC MM Docket No. 85-359, App. B; Joint Petition for Reconsideration filed by NAB, NCTA & CATA, FCC MM Docket No. 85-349.

e. On "cable-ready" televisions connected to a cable system, the UHF channel positions on the set's tuner are set to receive typical cable frequencies, not UHF frequencies, so a switch on the television would have to be adjusted in addition to the A/B switch.

19. NAB and INTV jointly commissioned a survey of cable subscribers to determine how many have an input selector switch and what proportion of cable subscribers have used it. The results are reported in a study submitted by NAB. *See* Fratrik, "A-B Switch Availability and Use," Sept. 23, 1991 (*see* Exhibit D). The results of that study were compared with the 1986 study of A/B switch usage conducted by the ELRA Group.[4] In that study, only 1.5% of all cable homes were found to have ever used an A/B switch to change between cable and off-the-air television service. In the 1991 study, only 6% of cable households in 1991 report ever having used an A/B switch, despite five years of FCC-mandated consumer education about A/B switches.

B. *Incentives for Anticompetitive Conduct by Cable*

20. The record before Congress strongly supports Congress's findings that "cable operators have the incentive and ability to favor their affiliated programmers," and that "there is an economic incentive for cable systems to terminate the retransmission of broadcast signals, refuse to carry new signals, or reposition a broadcast signal to a disadvantaged channel." §§ 2(a)(5) & (15). That evidence consists, in part, of the following:

a. Testimony James B. Hedlund, "Cable TV Consumer Protection Act of 1991" Hearing, at 214

[4] "Outdoor Antennas, Reception of Local Television Signals and Cable Television," ELRA Group, Inc., Jan. 28, 1986, submitted as Exh. 1 to the Comments of NAB, MM Dkt. No. 85-349 (filed Jan. 29, 1986).

(describing the decision of TCI, the largest owner of cable systems, to drop the Learning Channel in favor of a station in which TCI had an ownership interest);

b. NAB comments in MM Docket 88-138 (including, Michael O. Wirth, The Economic Impact of Cable on Broadcasting (1988), and Gary M. Fournier, An Economic Analysis of The Appropriateness of a New Must-Carry Rule for Broadcast Stations and Cable Operators (1986) ("When programs are highly substitutable the cable operator recognizes that the total effect on profits of carrying the local station includes the negative impact the local station has on profits earned from other offerings. The negative impact includes the reduction in both the subscriber's willingness to pay for other programming and in the local cable system's revenues from local advertising.")));

c. Testimony of FCC Commissioner Quello Hearing of Subcom. on Telecom and Finance, Committee on Energy and Commerce, U.S. House of Representatives, 100th Cong., 2d Sess. (May 11, 1988) ("There is an increasingly strong incentive for cable to drop local broadcast signals.");

d. NAB Reply Comments in MM Docket 88-138;

e. Testimony of Ass'n of National Advertisers, "Cable TV Consumer Protection Act of 1991" Hearing, at 351;

f. Testimony of Daniel Jaffe on behalf of the Ass'n of National Advertisers, "Must Carry" Hearing, at 144.

C. *Anticompetitive Conduct by Cable*

21. The legislative record strongly supports Congress's findings that "there is a substantial likelihood that absent

the reimposition of . . . [must carry] requirement, additional local broadcast signals will be deleted, repositioned or not carried." § 2(a)(15). That evidence consists, in part, of the following:

a. Cable system Broadcast Signal Carriage Survey" Staff Report by Policy and Rules Division, Mass Media Bureau, 9/1 88. (attached as Exhibit B hereto);

b. Testimony of Brian Holton, General Manager, KTSF(TV), San Francisco, "Must Carry" Hearing, at 161-74;

c. Testimony of Edward Fritts, "Must Carry" Hearing, at 41;

d. Comments and Reply Comments of NAB in FCC MM Docket No. 89-600, which refers to FCC MM Docket No. 88-138, Comments of NAB, July 8, 1988;

e. Testimony of James Hedlund, "S.12" Hearing, at 218-19;

f. Testimony of James Hedlund, "Must Carry" Hearing, at 222 (INTV's sampling of TCI repositioning showed that 65 of 70 repositioning replaced local broadcast stations with cable networks in which TCI had an equity interest);

h. Testimony of James Hedlund, "Must Carry" Hearing, at 214 (Cable systems favor networks in which they own an interest and exert influence against others, such as CNBC and the Learning Channel) and 225 (In almost every instance, the higher rated station was shifted);

i. INTV, Free Television Under Siege: Typical and Illustrative Case Histories of Anticompetitive Conduct by Cable Television Systems, May 1988 (copy attached hereto as Exhibit C);

j. Comments and Reply Comments of NAB, INTV, Chris-Craft, and The 97 Stations in FCC MM Docket 89-600;

k. NAB Comments in FCC Docket 88-138.

22. Comments filed by NAB, INTV, KTFH-TV, Trinity Broadcasting Network, APTS, WCOM-TV, Chris-Craft Industries, KWBI and Leon A. Crosby, in FCC MM Docket No. 89-600 document a continuing pattern of cable operators manipulating the carriage and channel positioning of local stations for anticompetitive purposes.[5] For example, after $3 million was spent to put WCOM-TV, Mansfield, Ohio on the air, it went dark in 16 months, having been "bled to death" as a result of being able to obtain carriage on only a fraction of the cable systems in the area."[6] KTFH reported that it

> "has not been able to come out of its bankruptcy since it was filed over two and one half years ago despite the fact that KTFH-TV's experienced management team has been able to operate the station on an extremely low overhead cost of $107,000 per month. The lack of cable carriage has prevented the station from generating enough income to service its debt of $3,000,000."[7]

Having been denied cable carriage on all Denver area cable systems, KWBI stated that: since commencing oper-

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[5] *See* Comments of NAB at 25-31; Comments of INTV at 48-52 and Exhibits B and C; Comments of Lesea at 3-17; Comments of KTFH-TV at 2-8; Comments of Trinity Broadcast Network (reporting that its stations have been removed from 22 cable systems serving 5.5 million viewers and have been denied access to another 900,000 subscribers since the demise of must carry) at 4-5; Comments of APTS at 14-16; Comments of WCOM-TV at 1-2; Comments of Chris-Craft Industries at 10-14; Comments of KWBI at 3-5; Comments of Leon A. Crosby at 2-5.

[6] Comments of WCOM-TV at 1 & 2.

[7] Comments of KTFH-TV at 1, 2.

ations in 1988, it has continuously encountered deficits; that "there is no other factor more important to the viability of this station than cable carriage"; and that it is in a "survival mode" and would probably go dark if local carriage is not obtained in the next two years.[8]

23. Other comments in FCC MM Docket 89-600 contain similar evidence. TCI systems in the San Francisco area repositioned the signal of Station KBHK-TV. KBHK has been repositioned almost annually on some of the San Francisco area cable systems.[9] At one time, it had arranged for its signal be carried on channel 12 on almost all local cable systems; indeed the station promoted itself as "Bay Area Cable 12." All local TCI systems subsequently repositioned KBHK to varying channel positions. In May 1989, KBHK was moved on the San Carlos system from channel 19 to channel 23. On the Sunnyvale system, the station was shifted from channel 22 to channel 24. The Fremont system moved it from channel 22 to channel 23. These changes were made without any prior notice to the station. Again, there can be no explanation for such minor and repeated shifts except an effort to reduce the audience of a local station to the benefit of the cable operator.

24. Comments in FCC MM Docket 88-138 confirm the pattern of anticompetitive conduct. NAB Comments filed in July 1988 documented the demise of WCVX-TV and WVUW-TV in Massachusetts because of their inability to obtain local carriage, and reported that WFAT (later WPTJ-TV), Johnstown, Pennsylvania, had been driven into Chapter 11 bankruptcy because "drops and cable channel shifts have progressively weakened our economic viability." [10] Leon Crosby, former licensee of WPTJ

[8] Comments of KWBI at 2, 7, 8.

[9] Comments of Chris-Craft Industries, MM Dkt. No. 89-600 (filed March 1, 1990).

[10] NAB Comments in MM Dkt. No. 88-138 at 35 and 36.

and a broadcast veteran of 40 years, reported that "WPTJ went dark in mid-1990 after being on the air continuously for over thirty years," having been "literally forced off the air by the harsh treatment it received from the cable systems located in the Johnstown-Altoona area." [11]

25. Comments filed in FCC MM Docket 90-4 further confirm the pattern of anticompetitive conduct by cable operators. These comments include the following examples:

a. KVVT-TV, Victorville, California, is the only local television station operating in the High Desert area of Southern California, an area which includes the communities of Palmdale and Lancaster. KVVT provides coverage of those communities as part of its service; no other television station carries local coverage. Because of terrain problems and restrictions on outdoor antennas, many homes in the Palmdale/Lancaster area cannot receive KVVT over the air. Since 1987 when the interim must carry rules were invalidated, Jones Intercable has either denied KVVT carriage on the Palmdale/Lancaster cable system or demanded concessions from KVVT in exchange for such carriage.[12]

b. Station KMTR(TV), Eugene, Oregon, recently constructed two full power satellite stations to extend its signal, and also sought to have the satellite stations carried on cable systems in their areas. In Coos Bay, where one of the satellites operates, cable penetration exceeds 82 percent, making cable carriage essential if the station is to have any audience at all. The Coos Bay cable system carried two NBC affiliates from adjacent

[11] Comments of Leon A. Crosby at 1, 5, 6, in MM Docket 90-4.

[12] *Sunbelt Television v. Jones Intercable, Inc.*, 795 F. Supp. 333 (C.D. Cal. 1992) (denying motion to dismiss).

markets which did not provide local programming. It refused originally to carry the new facility and only agreed to do so after the licensee agreed to numerous valuable concessions.[13] In effect, in order to get access to the audience it is licensed to serve, the station is required to subsidize the cable system which is its principal competitor.

c. WYST-TV, Syracuse, New York, is the Fox affiliate in the Syracuse area. Despite the attractiveness of its programming, the station was forced to give up valuable rights in order to be carried or to maintain its channel position on many cable systems within its coverage area.

d. The control of the cable system in Fergus Falls, Minnesota was assumed by TCI. As part of its introduction of the ENCORE service, a pay service owned by a TCI affiliate, the cable system dropped carriage of KXJB-TV, Fargo, North Dakota. The cable system explained that its viewers could receive CBS network programming over another affiliate carried by the cable system. That station, however, provides much less coverage of the Fergus Falls area than KXJB. In response to complaints about the lack of local weather information on the other CBS station, cable system officials suggested that viewers watch The Weather Channel, a national cable program service.[14]

e. In Iowa and Minnesota, other TCI-owned systems engaged in widespread dropping and replacement of network stations at the time ENCORE was introduced. The TCI system in Washington County, Iowa for many years carried the signals

[13] Comments of KMTR, Inc., MM Dkt No. 90-4 (filed Aug. 14, 1991).

[14] "Viewers Cite Ties to Fargo at TV Session," *Fergus Falls Daily Journal*, May 25, 1992.

of the three network affiliates in Cedar Rapids, and Washington County was included in the Cedar Rapids area. TCI dropped carriage of the Cedar Rapids ABC and NBC affiliates, substituting for them one signal from the Davenport-Rock Island market and one signal from Des Moines. Thus, the network affiliates carried on the Washington system come from three different television markets. Although the Quad cities station is not much further from Washington than Cedar Rapids, the Cedar Rapids stations cover the Washington area, while the substitute station does not. The Des Moines station is more than 150 miles from Washington County.

f. In the Mason City-Rochester-Austin area, TCI systems engaged in a pattern of dropping the signals of affiliates within the area and picking up stations from outside the area which do not provide local service to the cable community.

g. The Algona, Iowa system dropped the signals of stations KAAL-TV, Austin, and KTTC-TV, Rochester. Algona is in the Mason City-Rochester-Austin area. The cable kept the signals of WHO-TV, Des Moines, and WOI-TV, Ames, Iowa, both of which are in different areas. KAAL's president wrote: "We are the second rated station in the county. We carry the weather and Tornado alerts for Algona, we carry local news, local sports and other local event news. Des Moines ABC will never cover these things. And Des Moines weather doesn't relate in any way to Algona's weather." [15]

[15] Letter from Robert C. Dix, Jr., Dix Communications, to Robert Thomson, Vice President, TCI, May 9, 1991; *see* Letter from the Algona City Council to Senator Tom Harkin, June 12, 1991.

h. Station KDOC-TV, Anaheim, California, reported numerous instances of being dropped or repositioned by cable systems. In some cases, the repositioning involved a change of only one or two channel numbers. There can be little reason for a cable system to reorder its channel lineup so incrementally other than to make it more difficult for subscribers to find local channels, and thus to weaken local stations.

D. *Harm to Broadcasting*

26. The evidence before Congress strongly supports Congress's finding that "with the absence of a requirement that such systems carry local broadcast signals . . . the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized." § 2(a)(16). That evidence consists, in part, of the following:

a. Testimony of Preston Padden, "Must Carry," at 57 (describing how the growth of new stations has been brought to an "absolute halt");

b. Testimony of Preston Padden, "Must Carry" Hearing, at 79 ("Broadcast stations are the quintessential democratic medium, available equally to rich and poor");

c. Testimony of the City of New York, Bureau of Franchises, "Must Carry" hearing, at 176 (Without cable carriage, viewing declines, it becomes impossible to finance local programming and there is nothing left for the low-income brackets who do not have cable);

d. Testimony of James Hedlund, "Must Carry" Hearing at 206.

e. Testimony of NAB, "Must Carry" Hearing, at 33.

IV. *FCC Views on Severability of Retransmission Consent*

27. Attached to this Affirmation at Exhibit E is a true copy of a page of the November 6, 1992 *Communications Daily* newsletter which reflects that, at the meeting of the Federal Communications Commission on November 5, 1992, Commissioner Duggan asked whether the must carry and retransmission consent provisions of the 1992 Cable Act were severable, and that the Chief of the Mass Media Bureau indicated the Commission's conclusion that the two provisions are severable. Also attached at Exhibit E is a transcribed portion of the November 5, 1992 meeting of the Federal Communications Commission during which the exchange reported on in *Communications Daily* took place. I have compared the transcript with a tape of the meeting made by my office during the meeting. The transcript accurately reflects the discussion that took place.

28. On November 19, 1992, the Federal Communications Commission released the text of its *Notice of Proposed Rulemaking* in *Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Broadcast Signal Carriage Issues*, MM Docket No. 92-259. At page 2 of the *Notice*, the Commission describes the relationship between the must carry and retransmission consent provisions of the Act, stating as follows:

> "Although the provisions are related by virtue of that option [to elect between must carry and retransmission consent], they are otherwise substantively quite distinct, with each provision functioning in a separate fashion once a selection is made. Thus, the inclusion of both issues in a single proceeding is simply a matter of administrative convenience and not an indication that the matters are not severable."

IV. *Risk of Association of Views*

29. There is no significant risk that viewers of programming provided by a cable system will believe that broadcast programming carried over that system pursuant to must carry requirements is conveying ideas, messages or points of view endorsed by the cable operator. Federal Communications Commission regulations require broadcasters to identify themselves when signing on and off each day, and at least once every hour during the day. 47 C.F.R. § 73.1201. Cable has a long history of serving as a conduit for broadcast channels, and consumers know that broadcast programming on a cable system is not the expression of the cable operator. Furthermore, cable operators have ample opportunity to use disclaimers should they feel any need to dissociate themselves from particular broadcast stations or messages.

I affirm under penalty of perjury that the foregoing is true and correct:

/s/ Jack N. Goodman
JACK N. GOODMAN

November 24, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIRMATION OF MICHAEL C. RAU

DISTRICT OF COLUMBIA: ss

I, Michael C. Rau, affirm pursuant to 28 U.S.C. § 1746, as follows:

1. I am the Senior Vice President, Science & Technology, of the National Association of Broadcasters. I submit this affidavit in support of the Opposition to Plaintiffs' Motion for Preliminary Injunction and the Opposition to Plaintiff's Motion for Summary Judgment filed by the National Association of Broadcasters in these cases.

2. I am responsible for a broad range of NAB technical affairs and for providing technical advice and guidance to the membership and Board of Directors of the Association. As part of my duties, I review technological developments which may affect the television industry, either through changes in broadcast television systems or changes in other technologies used to distribute television signals, including in particular cable television. Prior to joining NAB in 1981, I was employed by Jules Cohen & Associates, an engineering consulting firm, and by Rau Radio Stations, Inc., a broadcasting company with cable television interests.

3. Plaintiffs have alleged that the must carry requirements of the 1992 Cable Act may cause displacement of certain cable program services because of a lack of capacity on cable systems. Briefly, technology improvements and increased customer expectations have resulted in a

strong and unmistakable trend toward expanding channel capacity on cable television systems, especially at franchise renewal time, developments which make displacement either unlikely or unnecessary. Even without exploiting new technologies such as fiber optics and signal compression, today's cable and electronics technology easily allows substantial improvements in channel capacity. Often even the most primitive systems, with only 12-22 channels, can be upgraded to provide 40 channels without overhauling the system. Most new builds and rebuilds are for high capacity systems which can provide at least 80 channels. Some systems are now appearing with capacity of 150 channels or more.

4. There are two new technologies which are being used to dramatically expand the channel capacity of cable television systems: fiber optics and video compression. Installation of fiber optic networks is already proceeding for many cable operators. The capacity on optical fibers is only limited by the electronics necessary to interface with the fiber. With today's electronics technology, a single fiber can carry up to 80 NTSC television signals. NTSC is the current technical standard for U.S. television signals.

5. Video compression provides the greatest promise for long term expansion of cable channel capacity. Cable Laboratories (CableLabs), a technical facility funded completely by the cable industry, is evaluating standards proposals to develop a system for delivering compressed television signals from the cable head-end to consumers. Compression technologies already exist which can fit 4 NTSC quality video signals in an existing 6 MHz television channel. CableLabs expects to have a system available for cable operators' use by 1994.

6. Therefore, industry trends are combining with new technologies to expand the capacity of cable television systems. Systems such as the one in Queens, New York, with 150 channels, are pointing the way to the future. If

technology developments continue as most experts expect, compression will allow channel capacity on a cable television system to be multiplied by a factor of four, with compression equipment availability expected by 1994. Cable operators, foreseeing the imminent arrival of excess capacity, are exploring how to use these channels to branch out into personal communications and other businesses. A more detailed description of these developments follows.

Background

7. Channel capacity for a cable television (CATV) system is limited by the bandwidth available in the system. Every television channel carried on a cable system requires 6 MHz of bandwidth. Total system bandwidth, in turn, is limited by the physical properties of the cable system equipment.

8. A cable system can be divided into 5 parts: (1) the headend, (2) the trunk, (3) the distribution system, (4) the drop cable, and (5) the customer premises equipment.[1] The trunk is the long backbone cable that runs through the system to within a mile or so of each subscriber. The distribution system distributes the signal from the trunk throughout the various neighborhoods served by the system. The drop cable is the line which connects an individual subscriber to the cable distribution system.

9. The bandwidth of a system is limited by the trunk and, to a lesser extent, the distribution system and the drop cable. Only 14% of all cable footage is in the trunk.[2] Thus, when cable systems are upgraded to expand their channel capacity, most of the existing cable is left

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[1] Ciciora, *An Overview of Cable Television*, National Association of Broadcasters Engineering Handbook, 731, 732 (8th ed. 1992).

[2] *Id.* at 746.

intact.[3] This has made it easy and commonplace for cable systems to increase their capacity as technology has improved.

Current CATV Capacity

10. Because the cable and electronic components used in CATV systems are fairly standardized, these systems tend to operate at a few bandwidth plateaus. On the lowest plateau are very old, small systems which operate at an upper frequency of 220 MHz, yielding up to 22 channels of capacity.[4] On the upper plateau are modern, urban systems operating at 1 GHz with over 150 channels of capacity.[5] In between are plateaus at 330 MHz, 450 MHz, 550 MHz, and 750 MHz with capacities of up to 40, 60, 80, and 110 channels respectively.[6]

11. No more than ten percent of cable plant today operates at the lowest capacity plateau of 22 or fewer channels.[7] Even these systems can be, and often are, upgraded to 330 MHz and 40 channels without a complete rebuild. Seventy-five percent of cable plant today consists of systems with 330 MHz bandwidth and up to 40 channels of capacity. However, few new systems are

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[3] *Id.*

[4] In figuring the channel capacity of a cable system, not all frequencies are used for distribution of video programs. The lower 54 MHz, as well as 20 MHz for the FM radio band, are not occupied with television signals. Another two 6 MHz channels, designated A1 and A2, are typically used for isolating system faults. Thus a system with a 220 MHz upper bandwidth limit has capacity for: (220-54-20-12)/6=134/6=22 channels.

[5] *See, e.g.*, Jesuale, *Video on Demand: Cable's Next Step?*, TV Technology, Sept. 1992 at 1, 48. The Time-Warner system in Queens, New York provides 150 channels of programming, went on-line in February 1992 and uses fiber optics in its trunk.

[6] *See* Ciciora, *supra* note 1, at 736.

[7] *Id.* at 736, 738.

built with the limited capacity of a 330 MHz system.[8] Most new systems are built with bandwidths of 550 MHz providing 80 channel capacity.[9] Already, 15% of existing cable plant is in the "high capacity" category.[10]

Trends

12. Bandwidth expansion in CATV has been routine since the early days of cable.[11] Clearly the trend is for new systems and rebuilds to expand bandwidth to 550 MHz or more with a capacity of at least 80 channels.[12] This trend is being driven by consumer demands,[13] and technology improvements.[14]

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[8] *See id.*

[9] *See* Moloney, Schilling, and Marz, *Expanded Bandwidth Requirements in CATV Applications*, 1992 NCTA Technical Papers 200, 201 [hereinafter *Expanded Bandwidth*] (noting the rapid expansion of cable system bandwidth "to the current standard level of 550 MHz").

[10] Ciciora, *supra* note 1, at 738.

[11] *Expanded Bandwidth*, *supra* note 9, at 201. The authors note that bandwidth, and hence capacity, has doubled every 12-15 years.

[12] *See, e.g., Expanded Bandwidth*, *supra* note 9, at 200; Brugliera, *Compression and its Impact on Cable*, Communications Technology, May 1992, at 18; Vaughan, *Upgrades with Fiber: Selecting Cost-Effective Architectures*, 1991 NCTA Technical Papers 273.

[13] *See, e.g.*, Brugliera, *supra* note 12, at 18 (noting the growth in available programming choices); Ciciora, *Scenarios for Compressed Video in Cable Practice*, 1991 NCTA Technical Papers 123. Ciciora maintains that "[w]hen given a choice, the American consumer has always chosen "more" over "better." He points out that most VCRs are used in the six hour "EP" format despite "the noticeably superior video and dramatically better audio" available in the two hour "SP" mode. *Id.*

[14] See Chiddix and Vaughn, *Upgrading Coaxial Distribution Networks with Amplified Taps*, 1991 NCTA Technical Papers 245 (discussing how low cost fiber technology is allowing 1 GHz systems to be built); Brugliera, *supra* note 12, and 18 (noting that steady advances in technology are extending cable plant bandwidth beyond 350 MHz and 450 HMz bandwidths).

13. This high-capacity trend is reported in a recent poll by Midwest CATV and *Cablevision*.[15] The poll of 200 general managers revealed that 43% of the managers would upgrade or rebuild their system in 1993.[16] An earlier poll showed that 36% planned to modernize in 1992.[17] Of the managers planning upgrades or rebuilds, 78% said that they would be expanding the capacity of their systems. And 15% of those surveyed will be expanding their systems to a 1 GHz bandwidth and its capacity for 150 channels.[18] 14. Thus, steady bandwidth and channel capacity expansion has been, and continues to be, the trend for all cable systems. Customer demands and technology improvements have fueled this expansion. However, two new technologies, *fiber optics* and *video compression*, promise to turn this slow, steady expansion into an imminent explosion in available capacity.

New Technologies for Expanding Channel Capacity

15. Fiber optics and video compression are two revolutionary new technologies which are being used to expand the channel capacity of cable television systems. Fiber optics expands the effective bandwidth of the cable system. Video compression makes more efficient use of whatever bandwidth is already available in the system. If a CATV system is analogized to a water distribution system, then adding fiber optics is like using a bigger pipe, and adding signal compression is like using a more powerful pump.

16. The combined impact of these technologies is an imminent explosion in channel capacity on CATV systems. Indeed, the impact of fiber optics alone on cable

[15] *Building Blocks*, Cablevision, September 21, 1992, at 44.

[16] *Id.*

[17] *Id.*

[18] *Id.*

television has been compared to the tremendous growth of cable television popularity following its marriage to satellite technology in the 1970's.[19] "Technology is making channel capacity ubiquitous and low cost." [20]

Fiber Optics

17. Installation of fiber optic networks in CATV systems is now commonplace.[21] Fiber optics is an extremely cost-effective approach to upgrading a cable trunk.[22] The capacity of an optical fiber is, in practice, only limited by the electronics necessary to interface with the fiber. With today's electronics technology, a single fiber can carry up to 80 NTSC television signals.[23] Many systems are built

[19] Mattson, *Fiber to Feeder Design Study*, 1991 NCTA Technical Papers 309, 319.

[20] Pollack, *Packing Cable with Programs*, New York Times, January 22, 1992, at D1 (quoting Mr. Craig Tanner, Vice President for Advanced Television Products at Cable Television Laboratories (CableLabs)).

[21] *See, e.g.*, Holobrow, Bohn, and Das, *Passive Optical Network (PON) Architectures and Applications*, 1992 NCTA Technical Papers 364 (noting that "fiber systems have supplanted coaxial trunking in most new and rebuild construction in the last two years."); Ciciora, *supra* note 1, at 738, 7[illegible] 746 (noting that optical fiber is now "frequently used" in cable systems as part of upgrades, rebuilds, and new builds).

[22] *See*, Ciciora, *supra* note 1, at 746 (noting that some studies have shown that the cost of upgrading a system's trunk to fiber is less than $25 per subscriber). *See also* McGrath, *The Evolution of Broadband Hybrid Networks*, 1992 NCTA Technical Papers 124, 126 (proclaiming that, "[f]iber trunking/coax distribution . . . with analog bandwidths of 600 MHz (to a demonstrated top of 1 GHz) is now the architecture of choice.").

[23] *See, e.g.*, Weinschenk, *Jerrold to Extend Starfire Family*, Cable World, April 20, 1992 at 62; Kearns, *An 80-Channel High-Performance Video Transport System Over Fiber Using FM-SCM Techniques for Super-Trunk Applications*, 1991 NCTA Technical Papers 71.

with several fibers bundled together for even greater capacity.

18. In fact, fiber use has been proposed to interconnect cable systems with one another.[24] In this vein, Adelphia Communications is currently building a 165 mile, 1 GHz fiber optic loop around the state of Vermont.[25] And New Jersey Bell recently announced a partnership with Sammons Communications to build a fiber-to-the-curb (FTTC) system to 11,700 customers in New Jersey.[26]

19. Once installed, fiber eliminates the capacity bottleneck on the cable trunk. In fact, many cable industry executives see the tremendous capacity made available by fiber as a tool to allow them to expand into the telephone and personal communications industries.[27] Tele-Communications, Inc. has been testing personal communications networks (PCNs) with McCaw Cellular in Oregon.[28] Meanwhile, CableLabs has formed a PCN Technical Advisory Subcommittee to explore provision of these services using the excess capacity on cable networks.[29]

20. In addition to PCN, cable executives appear to want to use their new-found excess capacity to provide more pay-per-view channels.[30] In fact, in one almost un-

[24] Stratton, *A Future Without Satellites*, Cable Television Business, July 1, 1990, at 20A.

[25] *See, Ring Around the State*, Cablevision, September 21, 1992, at 40.

[26] Communications Daily, November 17, 1992, at 6.

[27] Hart, *Cost Effective Cable Television Transport for PCN*, 1992 NCTA Technical Papers 148; Gitten, Albagli, and Walker, *Planning CATV-Based Personal Communications Networks*, 1992 NCTA Technical Papers 129.

[28] *Impact of Fiber Optics*, Communications Technology, May 1992, at 28, 40.

[29] Dukes, *CableLabs 1991 Advanced Network Development Work*, 1991 NCTA Technical Papers 232, 234.

[30] *See, e.g.*, Brugliera, *supra* note 12, at 18; *Multiple Channels Planned*, TV Digest, September 21, 1991, at 7.

believable trial, Comcast and Jerrold have teamed to design a system that would dedicate 25 channels to a single movie, with start times rotating at 5 minute delays.[31] Indeed the Time-Warner 150-channel cable system in Queens, New York includes 57 channels of pay-per-view.[32]

21. Fiber is available, cost effective, and is being used in most CATV trunk construction today. It is expanding cable system capacity beyond the number of conventional programming services available to cable systems today. The result is that plans are in the works to use the excess capacity for PCN, pay-per-view, and other subscription services.

Video Compression

22. If fiber optics is a crowbar to pry open previous bottlenecks in CATV systems, then video compression is a sledgehammer to smash the bottleneck to pieces. Fiber optics adds capacity to a cable system. Video compression literally multiplies that capacity by a factor of four or more. Video compression is the future of virtually every video transmission and storage system from CATV to High Definition Television (HDTV). And video compression has already moved from the laboratory to the marketplace.

23. Video compression eliminates redundancy and irrelevancy in video signals, thus reducing the bandwidth required for their transmission. An NTSC television signal requires 6 MHz of bandwidth, but it is possible to fit six compressed NTSC signals in that same 6 MHz bandwidth.[33] Thus, even a very limited capacity cable

[31] Jesuale, *supra* note 5, at 48.

[32] *Id.* at 48.

[33] *See, e.g.*, Weinschenk, *DigiCipher Gear Wins High Marks*, Cable World, September 21, 1992, at 46; *Westcott and NTU—Important End Users*, Satellite News, November 2, 1992, at 4; Communications Daily, September 16, 1992, at 5-6.

system operating at 220 MHz could be upgraded to provide over 100 video channels *without replacing the existing cable plant*.[34] And 1 GHz systems will be able to provide over 500 channels of television programming. Although decompression converters would need to be provided for every customer, Hal Krisbergh, President of Jerrold, has estimated that these boxes will only cost about 35% more than existing boxes.[35]

24. Video compression is already being installed in satellite transmission systems for cable programming distribution. National Technological University and Westcott Communications have recently converted to Compression Lab's SpectrumSaver system.[36] Meanwhile Rogers Cable has been using the General Instruments DigiCipher compression system since July 1992 to provide 4 video signals over a single transponder.[37] Cablevision Systems and Multivision of Mexico have also selected the DigiCipher system.[38]

25. The migration of compression from the satellite feed to the cable distribution system would appear to be imminent. All of the systems being considered by the Federal Communications Commission for a U.S. standard for terrestrial HDTV use video compression, thus ensuring that integrated circuits will be mass produced as an important component of the next generation of home receivers.

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[34] *See* Tanner, *Digital Compression and Transmission: A Primer for Non-Technical Readers, Specs*, October 1992, at 3.

[35] Weinschenk, *Digital Compression: No Sure Thing*, Cable World, April 27, 1992, at 30.

[36] *Westcott and NTU—Important End Users*, *supra* note 33, at 4.

[37] Weinschenk, *supra* note 33, at 46.

[38] Lambert, *Digital Compression Now Arriving on the Fast Track*, Broadcasting, July 27, 1992, at 40; *Multivision to Use Digicipher*, TV Digest, June 8, 1992, at 7.

26. Most experts are in agreement that video compression is coming soon to CATV systems and will be cost effective. CableLabs joined with Viacom, Tele-Communications, Inc. (TCI), and the Public Broadcasting System (PBS) to issue a request for proposals for satellite transponder compression systems in the fall of 1991.[39] The process ultimately led to purchase negotiations between Viacom, TCI, and PBS, and the three compression finalists: AT&T, General Instruments, and Scientific-Atlanta.[40]

27. CableLabs is now focusing on development of headend-to-the-home compression systems.[41] And the experts are predicting that these systems will become available by 1994.[42] John Malone, President of TCI, has opined that compression will have as much impact on the development of the cable industry as did the availability of communications satellites which made national distribution of programming possible.[43]

Conclusions

28. The history of CATV systems has been a steady expansion of channel capacity. Systems are now in place with 1 GHz of bandwidth and 150 channels of capacity.

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[39] Lambert, *supra* note 38, at 40.

[40] *Id.*

[41] *Id.* at 42. CableLabs President Dick Green has said, "In general, I have a lot of faith in the entrepreneurial process that costs are tractable." Weinschenk, *supra* note 35, at 30.

[42] Tony Weselberger, Vice President at Oak Communications, believes compression will hit the market beginning in 1994. Lambert, *supra* note 38, at 44. Mike Harris, Senior Vice President of Century Communications also sees 1994 as a target date for compression in the distribution system. *Building Blocks*, *supra* note 15, at 44. AT&T has also said that their system will be available to cable television operators by 1994. Farhi, *AT&T Announces System to Expand Cable Offerings; Technology Could Allow up to 500 Channels*, Washington Post, May 5, 1992, at C1.

[43] *MSO's Prime Compression*, TV Digest, April 22, 1991, at 2.

These systems are pointing the way to the future. Most new systems and upgrades to old systems are providing at least 80 channels of capacity. This expansion is and will continue to be built on the availability of low cost, wide bandwidth fiber optics.

29. Meanwhile, a tremendous explosion in available capacity is at hand with the introduction of video compression technology. This technology has already moved out of the lab and into the marketplace. As systems are upgraded with video compression, their capacity will be multiplied by a factor of four or more. The outlook is for a future where capacity exceeds available programming. Cable industry executives, foreseeing that result, are investigating new services such as PCN to exploit that excess capacity.

/s/ Michael C. Rau
MICHAEL C. RAU

[Notarization Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIRMATION OF DR. CHARLES E. SHERMAN

District of Columbia: ss

I, Dr. Charles E. Sherman, affirm pursuant to 28 U.S.C. § 1746, as follows:

1. I am the Senior Vice President, Television of the National Association of Broadcasters. I submit this affidavit in support of the Opposition to Plaintiffs' Motion for Preliminary Injunction and the Opposition to Plaintiff's Motion for Summary Judgment filed by the National Association of Broadcasters in these cases.

2. I have been involved in the television industry, either in an academic position, operating stations, or at the NAB for more than 25 years. I have a Ph.D. in Mass Communications from Wayne State University. From 1967 to 1979, I was a professor of Radio-Television-Film at the University of Wisconsin-Madison and Indiana University. At Indiana, I chaired the Department of Telecommunications. A *curriculum vitae* listing the articles and papers I have written in the field is attached to this affidavit. From 1979 until 1988, I was President and General Manager of Stations WTRF-TV, Wheeling, West Virginia, and WHOI-TV, Peoria, Illinois. I have held my present position since 1988. During this entire period, I have been involved in the issues surrounding cable system carriage of broadcast stations.

3. Cable systems include a variety of signals on their systems. Usually, cable systems carry a selection of local over-the-air television signals. They also may carry some "distant" broadcast television signals which they import from other markets. Cable systems also carry different types of cable programming. Pay cable networks refers to programs like Home Box Office or the Disney Channel. Subscribers usually pay a monthly fee to obtain these particular services. Basic cable networks, by contrast, are usually included as part of a cable system's basic service tier or on a separate tier together with other cable networks. No separate charge is made for each basic cable network.

4. The cable programmer plaintiffs contend that the must carry requirements contained in the 1992 Cable Act will harm their interests by leading cable systems to carry local television station signals instead of allegedly more popular basic cable networks. The affidavits of Terrence F. McGuirk and Lee Masters, attached to the Motion for Preliminary Injunction, demonstrate that must carry rules will have little effect on whether a particular cable program service is carried on a cable system. Both affidavits assert that a present shortage of capacity on some cable systems impedes carriage of their cable services. Must carry rules, however, have not been in effect since 1985. Whatever difficulties cable programmers now have in obtaining carriage has nothing to do with must carry requirements, past or future. Further, while the McGuirk affidavit asserts that the elimination of must carry rules in 1985 had a direct impact on the growth of new cable programming services, Turner's Memorandum in support of its Motion asserts (p. 33) that "[t]he vast majority of cable systems continue to carry a full complement of broadcast stations." If cable systems did not cease carrying broadcast stations after their carriage became optional, as the Plaintiffs claim, it is difficult to understand how the elimination of the rules had any impact on the development of cable program services.

5. The affidavits submitted by the Turner plaintiffs also establish how successful these cable program suppliers have been in obtaining carriage. CNN claims availability in 53,098,655 households (McGuirk aff. ¶ 4); TBS is available to 51,384,100 households (McGuirk aff. ¶ 5); TNT is available to 51,324,881 households (McGuirk aff. ¶ 6); Arts & Entertainment Network is available in 55,600,000 households (Davatzes aff. ¶ 4); Lifetime claims to be available in more than 58 million households (Burchill aff. ¶ 4); The Family Channel can be seen in more than 55.7 million households (Robertson aff. ¶ 4); C-SPAN claims that it can be seen in 58 million households (Collins aff. ¶ 5). Since as of July 1992, Nielsen estimates that there were 56,551,610 total cable households, it is clear that all of these services are provided on the overwhelming majority of all cable television systems. Even if a cable system were required to change its program selection as a result of must carry requirements, it is unlikely that any of these networks, which are among the most popular cable program services, would be affected. It is also worth noting that the Cartoon Channel which Turner seeks to have carried would be the *fifth* channel controlled by Turner on cable systems. Moreover, two of Turner's principal shareholders are Tele-Communications, Inc. and Time-Warner, the Nation's two largest cable operators, who each have ownership interests in many other cable program services. By contrast, with few exceptions, FCC regulations bar one entity from owning more than one television station in a market.

6. Trends in viewing in cable households indicate that, rather than use of channels for over-the-air broadcast signals, the major factor affecting carriage of cable programming networks will be the flat demand for cable networks by cable subscribers. Ratings data on viewing of over-the-air television signals and basic cable networks in cable households indicate that the viewing of basic

cable networks in cable households has declined. By contrast, the viewing of the major over-the-air signals on cable systems has increased in the last year. The February 1992 Nielsen data showed that viewing of basic cable networks in the evening "prime time" hours represented 10.2 percent of the total audiences, as compared with 12 percent the previous year. For the same period, viewing in cable homes of ABC, CBS, and NBC, the three established broadcast networks, increased from 38.5 percent of the audience to 41.9 percent. Thus, basic cable networks as a whole are not only less popular than over-the-air television stations, their relative popularity among cable subscribers is declining. A chart showing this trend is attached to this affidavit.

7. Not only is the viewing of basic cable networks in decline generally, ratings for the more prominent cable networks have either flattened out or, where they have grown, the growth has been at the expense of other cable programs. The Nielsen Cable Activity Report comparing prime time ratings in the second quarter of 1992 with similar data for previous years shows, for example, that while ratings for the TNT network increased from a 1.1 share of all cable households in 1991 to a 1.2 share rating in 1992, during the same period The Nashville Network's ratings declined from a .7 to a .6 share. Pay cable networks show similar results. Home Box Office's ratings climbed one tenth of a percent from 1991 to 1992, but the ratings for the competing Showtime service declined by the same amount. It is apparent that ratings for basic cable networks have generally stopped growing and that any growth in the audience for basic cable network services comes from "cannibalizing" the audience of other basic cable networks. Two charts showing trends in the ratings for various cable program services are attached to this affidavit.

8. Both the Turner Plaintiffs and Daniels assert that the must carry requirements may impel cable systems to

make programming choices which are contrary to viewer preference. Ratings data comparing the viewing of over-the-air stations and cable programming services show, to the contrary, that the least-watched broadcast station almost always is watched by more people than the most-watched cable network. The one exception is when NFL football is carried on the TNT or ESPN cable networks. For example, in the Washington, D.C. market in November, 1990, a comparison of Nielsen ratings data for the three independent commercial television stations and four leading cable networks shows:

	Sign-on/sign-off rating	Prime time rating
Independents		
WTTG	5	8
WDCA	3	3
WFTY	1	1
Cable networks		
ESPN	1	2
TBS Superstation	1	1
TNT	1	1
USA Network	1	1

It is apparent, therefore, that the decision by a cable operator to drop a local broadcast signal and replace it with a less-watched cable program service has nothing to do with viewer preference, but instead only with the economic advantage which the cable operator believes it can derive from promoting the cable service and/or disadvantaging the system's broadcast competitor.

9. Difficulties which new basic cable network services may have in gaining carriage on cable systems are not necessarily attributable to a shortage of channel capacity, but instead to a lack of demand for new services which will further splinter the audience which watches basic cable programming, and thus make it more difficult for cable system operators to sell advertising on those services.

CableVision, in a March 9, 1992 article about Turner's efforts to sell the Cartoon Network to cable systems, quotes the Executive Vice President of the Cartoon Network as follows: "Local avails [of advertising time] is one of the top five factors in adding a channel. . . The top is whether the programming is differentiated and enhances the value of basic programming. If they get past that hurdle, then we get into the economics, in which ad sales and revenues are an important part." It is noteworthy that in the affidavit of Joseph M. Segel, it is admitted that the QVC Network was forced to pay cable systems a percentage of the network's sales and offer cable system owners an ownership interest in the network in order to obtain carriage.

10. Cable operators are also beginning to drop basic cable network services in some instances because the prices charged by program suppliers are too high. The March 9, 1992 issue of *CableVision* magazine reported on a dispute between four Sammons Communications systems and MTV Networks which occurred after the Sammons systems dropped the MTV service when MTV refused to permit Sammons to place the MTV on an optional "tier" which might not be taken by all of the systems' subscribers. Sammons did not want to include the increased cost of the MTV service in its basic service tier.

11. Other evidence that channel capacity is not the factor most limiting the growth of basic cable networks is the choice of several enlarged cable systems to "multiplex" existing channels, rather than add new services. Under this approach, one service, like Home Box Office, is offered on four or more channels at staggered times. The Time Warner system in Queens, New York, has chosen to use much of its expanded channel capacity for multiplexed existing services. Similarly, large cable systems like the one in Queens or the Fairfax, Virginia system use their channels to offer pay-per-view movies and other features on a staggered basis over several channels, instead of providing other cable program services. The September 1992 issue of *TV Technology* reports that cable systems in Baltimore County, Maryland, Queens, New York, and Littleton, Colorado, are participating in experiments in which ten pay-per-view movies are offered on up to 75 cable channels, with staggered starting times. In the Baltimore test, 25 channels will be dedicated to showing one movie with starting times every five minutes. Again, this shows that cable operators have capacity, but that capacity is not being used for new basic cable program services.

12. With respect to the Daniels complaint, NAB has reviewed the current channel listing for the Daniels system in Carlsbad, California. The Daniels system is currently carrying on a voluntary basis the signals of every local commercial television station that would be entitled to must carry status on the system under the 1992 Cable Act. On information and belief, the Daniels system is also carrying the signals of every non-commercial station which would be interested in and entitled to carriage under Section 5 of the Cable Act.

/s/ Charles E. Sherman
CHARLES E. SHERMAN

[Notarization Omitted in Printing]

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BROADCAST EXPERIENCE

May, 1988 to Present
Senior Vice President, Television, National Association of Broadcasters, Washington, D.C.

September, 1984 to February, 1988
President/General Manager, WHOI-TV, Peoria, Illinois

August, 1979 to August, 1984
President/General Manager, WTRF-TV, Wheeling, West Virginia

ACADEMIC EXPERIENCE

September, 1975 to July, 1979
Professor/Chairman, Department of Telecommunications, Indiana University

September, 1967 to August, 1975
Professor/Associate Chairman, Department of Communications Arts, University of Wisconsin-Madison

EDUCATION

June, 1967
Ph.D., Mass Communications, Wayne State University

January, 1963
M.A., Speech, Temple University

June, 1960
B.S., with Honors, Television & Radio, Temple University

BROADCAST ACTIVITIES

Member of:

ABC-TV Affiliates Association Board of Governors, served as secretary

National Association of Broadcasters, Research Committee, served as Chairman

Broadcast Education Association, served as Chairman

CBS Affiliates Board

NATPE Educational Foundation

Accrediting Council on Education in Journalism and Mass Communications

PUBLICATIONS

"The Asian Broadcasting Union." *Journal of Broadcasting*, Fall 1969.

" 'Initialization' in International Broadcasting." *Journal of Broadcasting*, Spring 1970.

"The International Radio and Television Organization." In *International Broadcasting*, Association for Professional Broadcasting Education, February 1971.

"Turmoil and Transition in International Broadcasting: 1938-50." *Journal of Broadcasting*, Summer 1971.

"Resources for International Broadcasting Research." *Feedback*, November 1973 and December 1973.

"Public Service Announcement Survey of Wisconsin Broadcasting Stations." Report prepared for the Wisconsin Broadcasters Association, July 1973.

"International Broadcasting Unions." In *Broadcasting in Africa*. Edited by Sydney Head. (Philadelphia: Temple University Press, 1974.)

"The International Broadcasting Union: A Study in International Pragmatism." *EBU Review,* May 1974. (Reprinted in *Radio Times of India,* July-August 1975.)

"Copyright: Quo Vadis." In *Issues in Broadcast Regulation.* Edited by Don R. Le Duc. Broadcast Monograph No. 1, 1974, Broadcast Education Association.

"The Eurovision News Exchange." *Journalism Quarterly,* Autumn 1974. With John Ruby.

IN PRESS

"Cooperative Broadcasting Activities in Asia." In *Broadcasting in Asia.* Edited by John Lent. Temple University Press.

Issues in International Broadcasting. BEA Monograph No. 2, Washington, Broadcast Education Association.

IN PREPARATION

A book-length manuscript tentatively entitled *Broadcasting Through International Action.*

BOOK REVIEWS

The First Freedom. In *Journal of Broadcasting,* Fall 1970.

The International Film Industry. In *Journalism Quarterly,* January, 1970.

PAPERS PRESENTED

"As Eurovision Approaches Its 25th Anniversary: An Apraisal," Speech Communication Association Convention, December 1975.

"Graduate Education in Radio-Television-Film," Broadcast Education Association, March 1974.

"Resources for International Broadcasting Research," Association for Professional Broadcasting Education, March 1973.

"Copyright Prospects," Association for Professional Broadcasting Education, Legal Seminar, October 1972.

"Interrelationships Between the International Broadcasting Unions," Speech Comunication Association, December 29, 1970.

"Intervision: Eastern Europe's Television Network," Association for Professional Broadcasting Education, International Broadcasting Seminar, November 4, 1970.

"Broadcasting in the Developing Nations of Malaysia and Indonesia," Wisconsin Speech Association, May 1, 1970.

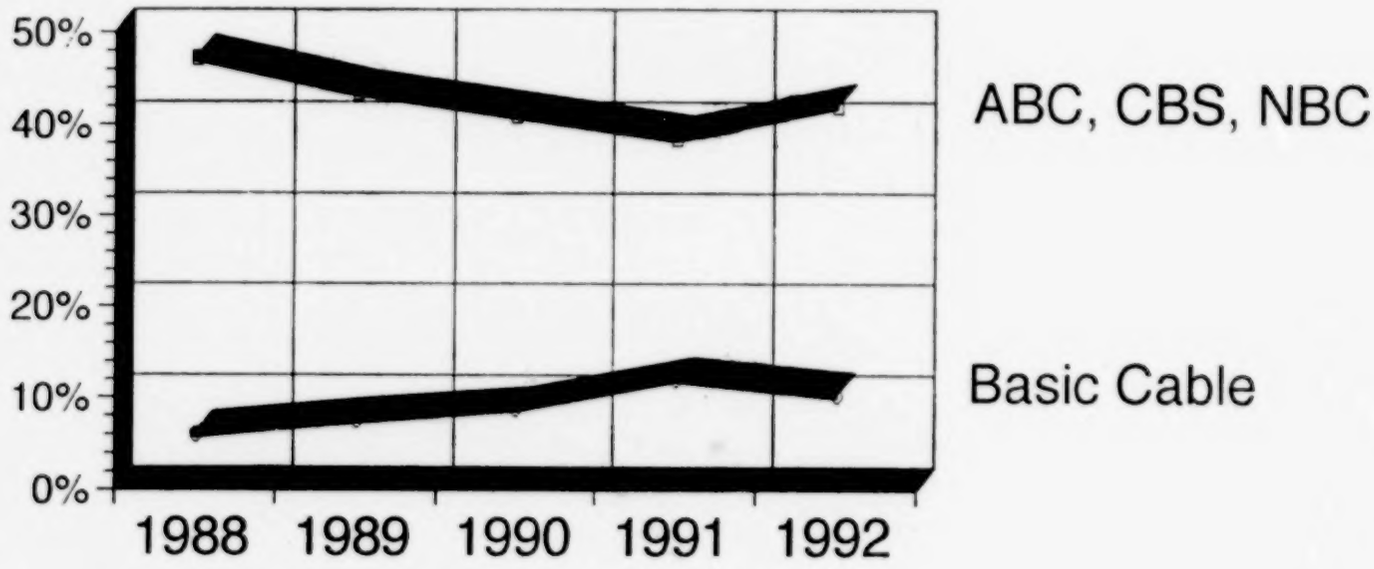
"Teaching the Basic Mass Media Course," Wisconsin Speech Association, May 2, 1969.

"The Areas of Needed Research in International Broadcasting," Speech Association of America, December 1967.

"The Activities of the European Broadcasting Union," Speech Association of America, December 1967.

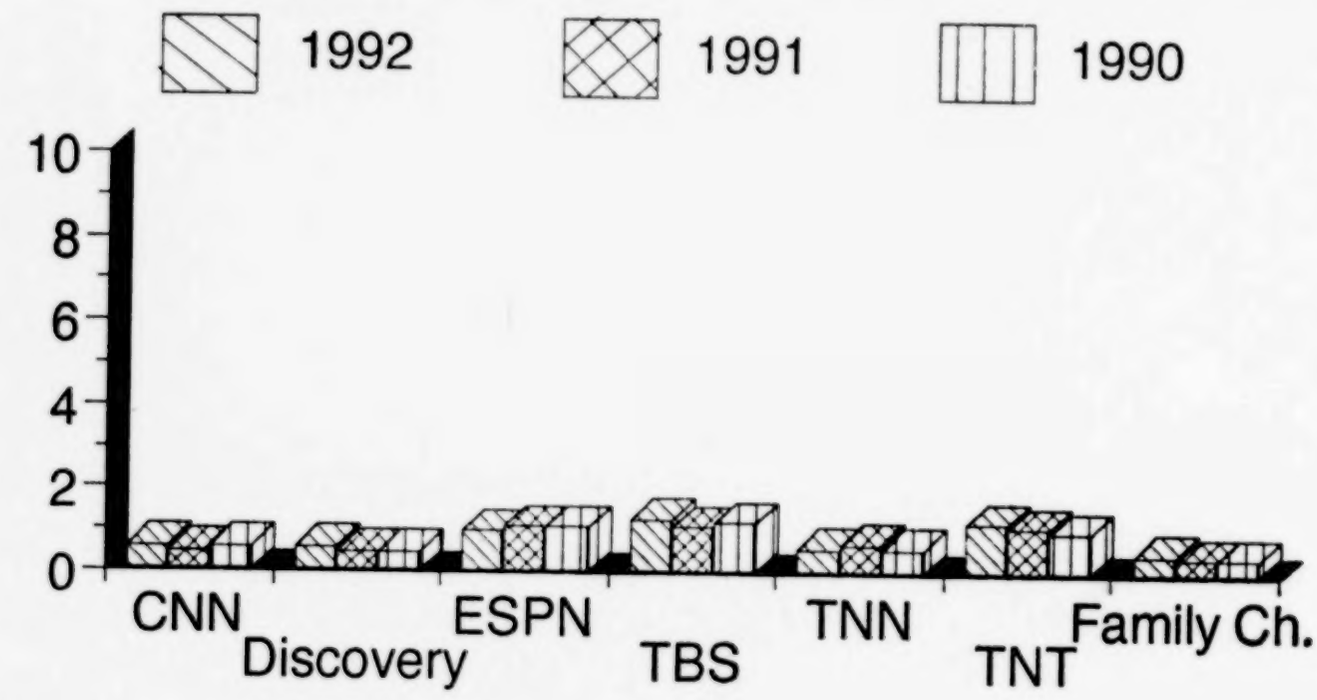
Prime – Time Ratings

Network vs. Cable

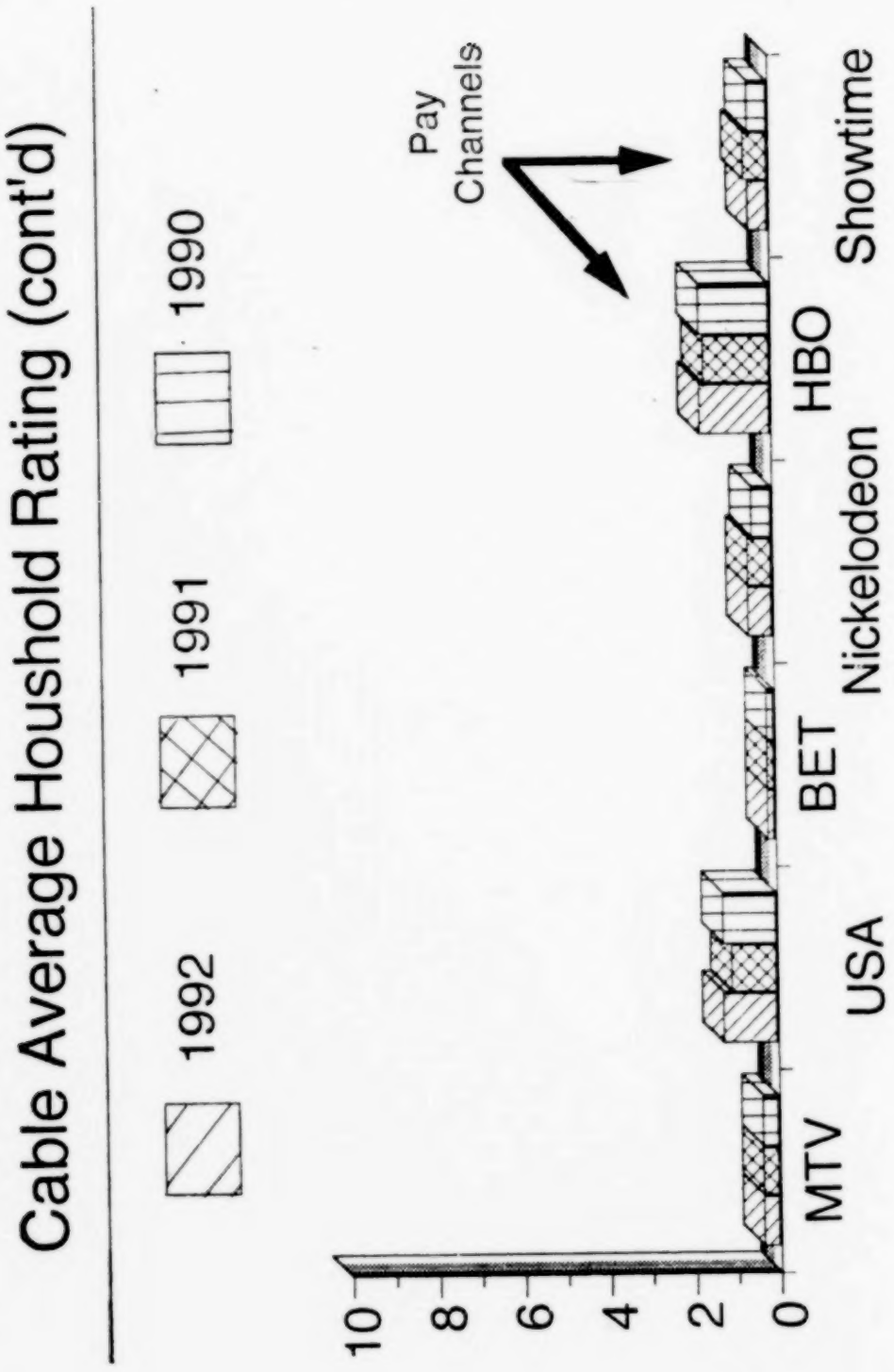


Source: A.C. Nielsen

Cable Average Household Rating



Source: Nielsen Market Research



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF JAMES A. FINCH

STATE OF KENTUCKY)
) ss:
COUNTY OF MASON)

James A. Finch, being duly sworn, deposes and says:

1. I am Vice President of Standard Tobacco Company, Inc. which owns and operates Limestone Cable Vision, Inc. (LCVI) located in Mason County, Kentucky. I am also President of LCVI, and as of November 30, 1992, this cable system had 4530 subscribers. LCVI has been in operation since 1958 with the same continuous ownership and currently has 33 active channels of it's 36 channel system. This system will probably never expand it's channel capacity above 36 channels.

The New Must Carry Requirements Will Affect LCVI's Channel Line-Up

2. The 1992 Cable Act, Section 615 establishes must-carry requirements for noncommercial educational television broadcast (NCE) stations. The manner the Act is currently written: Systems with 13 to 36 "usable activated channels" must carry up to 3 "qualified local" NCE signals as are requested that do not substantially duplicate (section 615(b)(3)(A)(i) and (C)).

3. LCVI is currently carrying one NCE, WKLE of Lexington, Kentucky. The only other NCE in this area

is WCET of Cincinnati, Ohio and all they have to do is demand that we add their channel to our system and we must comply with their demand. LCVI has "3" open channels, we do not desire to use the thirty sixth on the system, since it is the last usable channel and sometimes the picture on this channel has tendency to have a grany-type appearance. We are planning to add two channels in the near future: The Black Entertainment Network and The Trinity Network, since we have had many request from our subscribers for these two networks.

4. If the NCE channel of WCET were to be added to our cable vision system's channel line-up, only one of the two anticipated new channels could be added to our system. Therefore, Section 615 has quite a negative effect upon this cable system and community since only one of the two requested channels can be added to this system, BET or The Trinity Net—"a very difficult choice to make"!

Conclusion

5. Only "1" NCE signal should be required for Must Carry for cable systems of 36 channels or less, and these systems can have the option of adding 2 more NCE Signals if they so desire.

I declare the the foregoing is true and correct.

/s/ James A. Finch
JAMES A. FINCH

[Notarization Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF DAVID A. GARDNER

STATE OF PENNSYLVANIA)
) ss:
COUNTY OF CUMBERLAND)

David A. Gardner, being first duly sworn, deposes and says:

1. I am an employee of Raystay Co. and have been employed by it or its predecessor companies since 1962.

2. Raystay Co., a Pennsylvania Corporation organized in 1969, and its predecessor companies have operated cable television systems since 1951. It presently operates cable television systems in the communities serving Clinton County; Lycoming County; Cumberland County; Perry County; Franklin County, Pennylvania; Washington County; Frederick County, Maryland; Berkeley County, West Virginia; Marion County, Mississippi; Gila County; Apache County; and Coconino County, Arizona. Raystay Co. currently provides service to 50,200 basic cable subscribers.

3. TV Cable of Carlisle serves Cumberland County and Perry County in Pennsylvania. It has 14,800+ subscribers. It is in the Harrisburg, Pennsylvania television market. It carries a full compliment of Harrisburg network and public television stations. It is a 57 channel system and all channels are filled with program services.

Under the new must-carry rules as passed in 1992, the Carlisle system would be required to add WWPB, channel

31, Hagerstown, Maryland, a Maryland public television station from a smaller television market in Maryland. There has been no request by the viewing public for a Maryland public television service. If this service were required to be added, a cable program service such as C-SPAN II, The Learning Channel, or Black Entertainment Television would need to be dropped to provide channel space to add this service.

In addition to that, the system does not carry some Harrisburg market television stations that would be required under the new must-carry rules. Those specifically are: WLYH, channel 15, Lancaster, Pennsylvania; and WGCB, channel 49, Red Lion, Pennsylvania. Additional cable programming services would have to be dropped to make room for these broadcast stations.

4. TV Cable of Waynesboro serves Franklin County, Pennsylvania; Washington County, Maryland; and Frederick County, Maryland. It has over 8,800 subscribers. The system has a headend that serves the three communities, two of which are in the Washington D.C. ADI, and one of which is in the Hagerstown, Maryland ADI. The signals are processed at one location and go from the Washington ADI thru the Hagerstown ADI to a community in the Washington ADI. Therefore, the only way to serve must-carry signals in two markets would be to carry all signals from the headend on one cable since the Washington ADI signals' community that is served from the Hagerstown ADI community has so few subscribers as to not be cost efficient to provide a separate headend. The system has 42 cable channels and currently carries a full compliment of network and PBS signals. However, under the new must-carry rules, the cable system would have to add the following broadcast signals: WHMM, WFTY, WTKK, all Washington D.C.; a Maryland public television station from Frederick, Maryland, however its transmitter is almost in Washington,

D.C.; and WNVC, WNVT public television stations in Virgina.

To provide additional channel space for these new broadcast services, cable program services such as C-SPAN, Discovery, etc. would have to be dropped.

5. TV Cable of Inwood serves Berkeley County, West Virgina with approximately 3,500 basic subscribers. It carries a full compliment of network stations and a West Virgina public television broadcast station.

Under the new must-carry rules, it would be required to add a Maryland public television station from the Hagerstown, Maryland smaller television market; and WNVC, WNVT, WFPT, all public television stations. Since the system is 35 channels and completely full, it would be required to drop a cable program station such as C-SPAN or the Learning Channel.

6. TV Cable of Central PA, the Avis system serves 6,800 subscribers in Lycoming and Clinton County, Pennsylvania. It has been in operation since 1955. It has carried a full compliment of network and public television signals, and the CBS station that it carries has been significantly viewed since before 1972. The cable system is completely full and has no available channels; therefore, any new channels added would require the dropping of an additional channel. Under the new must-carry rules, this system would be required to carry WYOU from Scranton, Pennsylvania. This would require the dropping of either the current CBS affiliate that is significantly viewed (and has been since before 1972), or a cable program service such as C-SPAN or The Learning Channel. The Lycoming County area presently has a television station licensed to it but not on the air. Therefore, the situation in this system is confused as to which television market Lycoming County is in and which television market Clinton County is in. There is one headend that serves both areas and the signals cannot be broken down.

7. In the Raystay Co. systems, the new must-carry rules will displace cable program services that provide diversity of choice to the subscribers with broadcasters stations that have not been provided in the past due to lack of interest by the subscribing public. This will lead to a reduction in the diversity of programming available to the public.

This third day of December, 1992.

s/ David A. Gardner
DAVID A. GARDNER

Date Dec. 3, 1992

[Notarization Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF DAVID L. HANSON

STATE OF WISCONSIN)
) ss:
COUNTY OF EAU CLAIRE)

David L. Hanson, being first duly sworn, deposes and says:

1. I am Vice President of Operations of the General Partner of Marcus Cable Partners, L.P., a limited partnership operating cable television systems in Wisconsin. I first joined the Marcus Organization in 1982 and was appointed to my present position in 1990. I submit this Affidavit in support of plaintiff's Motion for a Preliminary Injunction.

2. Marcus Cable Partners, L.P. operates 53 small cable systems in Wisconsin.

3. The cable system serving Hayward, Wisconsin was built in 1972 with a channel capacity of 20 channels. Marcus Communications purchased the system in 1988 and upgraded the equipment to allow for channel capacity of 35. There is currently one available channel (35) not in use. The system served 846 customers in 1988 and currently serves 1235.

4. Marcus Cable initiated a Broadcast Only level of service in June of 1992. This level of service includes 11 broadcast signals from: Duluth, MN; Minneapolis, MN; Eau Claire, WI; Park Falls, WI; Chicago, IL; and Atlanta, GA, consisting of two CBS affiliates, two ABC affiliates, two NBC affiliates, one PBS affiliate, one FOX

affiliate and three independent stations. Security for these services is by negative traps to ensure compatibility with cable compatible VCR's and televisions. The channel line-up for this level of service was determined by reviewing customer requests and response. Local officials were consulted in the decision making process.

5. Marcus Cable has not programmed channel 35 to allow for the addition of a service that would offer diversified programming that would benefit and/or be requested by the cable customers of the community. Such programming now available or being discussed includes: Court Television, The Cartoon Network, pay-per-view, Milwaukee Brewer Baseball, etc. . . or other such programming that would not be normally duplicated on the system's line-up that Marcus Cable, in the exercise of its programming discretion, may choose to provide.

6. On November 24, 1992, Marcus Cable received a letter from WDSE-TV demanding carriage of the broadcast channel on channel 8 of the Hayward cable system beginning December 4, 1992. Marcus Cable does not wish to carry this signal. The rights of Marcus Cable to determine the content of it's offering would be affected and limited by this action, with no benefit to any party other than WDSE-TV.

CONSEQUENCES

Implementing this demand may force Marcus Cable to:

1. Rearrange its present line-up. WDSE-TV has requested carriage on channel 8 on the system. This channel is currently programmed by WLEF-TV, the Wisconsin PBS provider from Park Falls, Wisconsin.

2. Delete a broadcast signal currently carried by the system in response to significant consumer requests that Marcus Cable wishes to continue to carry.

3. Use channel 35 for a broadcast signal. This action would cause significant expense to the system to remove

the traps currently used for security while placing a new security method in place, in addition, use of channel 35 would also not allow Marcus Cable to take action in the future to meet the requests for non broadcast programming.

/s/ David L. Hanson
DAVID L. HANSON
V.P. Operations of the
General Partner

[Notarization Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF JONATHAN B. MARX

I, Jonathan B. Marx, declare as follows:

1. I am Vice President and General Manager of Viacom Cable and, in this capacity, am responsible for the operations of Viacom's San Francisco cable system. This system has 54 usable channels with no available channel capacity at this time.

2. Viacom San Francisco has received two written requests from noncommercial broadcast stations seeking carriage on our system pursuant to Section 5 of the new Cable Act. The first is from KRCB-TV in Rohnert Park, California; the second is from Station KCSM in San Mateo. Copies of these letters are attached hereto. Both requests demand carriage under the Act commencing December 4, 1992.

3. Because of the lack of any available channel capacity, the must carry requirements have created a very difficult situation for us. To comply with the requests for carriage, we will be forced to drop two cable program networks from our offerings. We have not yet determined which networks we will stop carrying.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed this 3rd day of December, 1992.

[s] Jonathan B. Marx
JONATHAN B. MARX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF JOSEPH A. WYANT

1. I am General Manager of Storer Communications of Northern Kentucky, Inc. ("Storer"), a cable television system serving 56,000 customers in Kenton, Boone, and Campbell Counties and the City of Newport, KY. I have held this position since July of 1991. My experience in cable television dates back to May of 1981 when I was named Director of Programming for Viacom Cablevision of Cleveland (OH), Inc. In 1984, I was named Director of Marketing of Viacom Cablevision of Dayton (OH), Inc. In 1989, I was named General Manager of TKR Cable Co. of Warwick (NY), Inc., where I served until coming to Northern Kentucky. I submit this Affidavit in support of plaintiffs' Motion for a Preliminary Injunction.

Factual Background

2. Storer operates a dual cable system in Northern Kentucky with 64 channels devoted to subscriber service.

3. Additionally, some parts of the system, including the City of Newport, rural Campbell County, and yet-to-be-built sections of rural Kenton County are single-cable, with a capacity of 54 channels.

4. Storer presently carries two public television stations, WCET (Cincinnati) and WCVN (Covington). In addition, the system offers Kentucky Educational Television's ("KET") STAR Network, specialized in-school classroom and teacher education programming on an educational access channel.

5. The system now has two open channels available for new programming channel B3 and channel B12.

6. Prior to passage of the new cable law, Storer had conducted consumer research into new programming desired by its customers. As a result of that research, "Comedy Central", a cable network devoted to comedy-oriented programming, was chosen for launch over "Sci-Fi", a brand new service featuring science fiction programming. "Sci-Fi", however, could have occupied the second of the two available channels, eventually. Upon realizing that passage of the new cable law was imminent, the system and corporate staff decided to cancel these plans because of the uncertainties presented by the new law.

7. Subsequent to the decision to cancel the launch of "Comedy Central", the system received notice from Greater Dayton Public Television on November 30, 1992, demanding carriage of its two non-commercial affiliates WPTO (Oxford, OH, ch. 14) and WPTD (Dayton, OH, ch. 16). A copy of that notice is attached. Greater Dayton Public Television further claimed its right under the new law to have carriage on-channel, thereby creating a need for Storer to change its existing line-up by removing the existing programming from those two channels, replacing it with the new, non-commercial must-carry stations.

8. The two channels affected are, respectively, Boone County government access and WSTR (off-air, ch. 64), a Cincinnati independent commercial broadcaster.

Impact on Storer

9. The requirement to carry the two Greater Dayton Public Television affiliates consumes all remaining free space for new programming on the system, preventing Storer from adding any of the new basic cable programming services, e.g., Comedy Central, Sci-Fi, or Bravo.

10. Relocation of the Boone County Government Access channel from channel 14 will cause the system significant hardship in its relations with the Kenton Boone CATV Board which oversees most of the franchise territory. That entity has been an extremely active programmer over the years, operates the adjacent channel (15) as the Kenton County Government access channel, and has maintained a strained relationship with Storer, historically.

11. Channel 14 also serves as government access for Campbell County and the City of Newport. Relocation for those communities will entail expenditures to revise current delivery methods for access into their areas, disrupting their programming activity and leading to animosity toward Storer.

12. Storer will be in a position of having to carry four similar public television stations, limiting viewer options rather than expanding them as would be possible with the addition of cable services noted above.

Conclusion

13. Addition of the two stations operated by Greater Dayton Public Television will not serve the best interests of the cable television subscribers in Storer's Northern Kentucky system. Instead of broadening their viewing choices, carriage of those two stations will eliminate Storer's ability to offer other, truly differentiated programming.

14. Furthermore, Storer's relations with area franchising authorities, upon whom the cable operator is dependent for renewal in 36 months, will be strained by the demand to relocate their existing government access channels.

15. Finally, channel realignments are always disruptive to customers, no matter how carefully planned and promoted. The arbitrary and illogical addition of the two Greater Dayton Public Television stations will be per-

ceived as a bad decision on Storer's part, rather than as the mandated action it is, in fact.

I affirm that the foregoing is true and correct.

This 3rd day of December, 1992.

/s/ Joseph A. Wyant
JOSEPH A. WYANT

[Notarization Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

DECLARATION OF WILLIAM GOODWYN

I, William Goodwyn, declare as follows based on my own personal knowledge:

1. I am Vice President of Discovery Communications Inc., with responsibility for The Learning Channel a programming service owned by Discovery Communications.

2. I submit this affidavit in support of plaintiff's motion for summary judgment. While the basic facts supporting the motion are undisputed, this affidavit is submitted to show the injury to plaintiffs and the need for immediate review. *See, Abbott Laboratories v. Gardner,* 387 U.S. 136, 152 (1967).

3. I am in charge of affiliate sales and relations. My responsibilities include marketing, promotion, and distribution of The Learning Channel to cable operators. Accordingly, I am in frequent contact with cable system operators.

4. Discovery Communications, Inc. acquired The Learning Channel in early 1991 as a complimentary service to the Discovery Channel for $31.5 million. Discovery Communications improved The Learning Channel's programming and relaunched it in October, 1991. To date, Discovery Communications has invested an additional $43 million revamping and upgrading The Learning Channel. Discovery Communications plans to spend an additional $150 million on The Learning Channel over the next few years.

5. The Learning Channel currently provides 18 hours of programming every day of the week. It is carried on approximately 15% of cable systems in the United States.

6. The Learning Channel is the only cable network that offers people of all ages enjoyable, entertaining ways to learn and to satisfy their natural curiosity. The Learning Channel features entertaining educational programming for people of all ages. The Learning Channel's programming includes:

a. *Preschool educational programming.* The Learning Channel is offering breakthrough programming to prepare preschoolers for school. As of December 28, 1992, The Learning Channel introduced a six-hour block of commercial-free preschool educational programming on weekday mornings, known as "Ready, Set, Learn." Its objective is to enhance readiness for school. Rooted in proven learning methods and designed to hold youngsters' attention, the "Ready, Set, Learn" programs aim to develop preschoolers' skills across the learning spectrum. Children are exposed to developmental learning areas such as reasoning, whole language learning, social interaction, basic reading, conceptualization and imagination. "Ready, Set, Learn" is recommended for viewing by the National Education Association ("NEA"). It follows the seven steps expressed in the education mandates from the Carnegie Foundation For The Advancement of Teaching. According to John Hendricks, Chairman of Discovery Communications, Inc. "It is up to all of us in the television industry to contribute to the enrichment and preparedness of preschool children. We saw a glimpse of that promise and vision in the early years of television, but that vision fell victim to commercially-driven programming that primarily targets adults, not children." For more details of "Ready-Set, Learn" see Exhibit A hereto.

b. *Elementary school programming.* The Learning Channel programming aimed at elementary school students includes "Beakman's World", "Ask Cassie or

Laurie" and "Mad Math," which teaches fractions, decimals, and ratios in an entertaining manner. Starting in January, The Learning Channel will carry a weekly hour-long, commercial-free program, "The Learning Channel Elementary School." This series will provide teachers with copyright-cleared programming which teachers can tape and use in their classrooms for up to 2 years to supplement curriculum materials. It will be the only such series available to elementary school teachers. For more details about The Learning Channel's programming for elementary school students, see Exhibit B hereto.

c. *High School programming.* Weekly programs such as "A Practical Guide to the Universe" and "Ten Great Writers" are offered for high-school age and others. The Learning Channel also offers a service called "So You Want to Be In [name of profession]" which introduces young people to different career opportunities in many industries. For more details, see Exhibit C hereto.

d. *Adult education programming.* The Learning Channel's "No Problem" is a weekly series designed to teach English to Spanish-speaking people. To help illiterate adults learn to read, The Learning Channel presents a weekly series entitled "Learn to Read." Also in September, on International Literacy Day, The Learning Channel premiered a special one-hour program "To Read" in partnership with the Newspaper Association of America. The Learning Channel also offers other practical programming that makes people more competent in their daily life. See Exhibit D for more details about this programming.

e. *Teacher training programming.* The Learning Channel's "Teacher TV" is produced by, for, and about teachers. It appears weekly and concerns such topics as school reform, teacher innovation, profiles of outstanding educators and teacher training. It is recommended for viewing by the NEA. See Exhibit E hereto for more details on programming for teachers.

7. Although a service called "The Learning Channel" has been in existence since the early 1980's, The Learning Channel is regarded as a start-up channel because of the substantial changes Discovery Communications made to it after acquiring it in 1991. As a start-up channel, it is struggling to obtain channel space. Cable system operators generally have between 36 and 54 channel spaces available for programming. The Learning Channel usually vies for one of the last available channel spaces.

8. Prior to the passage of the Cable Act of 1992, The Learning Channel's efforts to expand its carriage were succeeding. The Learning Channel was adding 400,000 new subscribers per month by late summer 1992. After the Cable Act became law, The Learning Channel growth slowed substantially. The Learning Channel now projects it will add fewer than 75,000 subscribers per month on average, and The Learning Channel may even experience a loss of subscribers as cable operators replace it with must-carry programming mandated by the Act. The Learning Channel currently has about 17.5 million subscribers.

9. The Act's requirement that cable operators must carry local over-the-air broadcast stations has harmed The Learning Channel. Cable operators who had been considering adding The Learning Channel have not done so because of the need to preserve channel space for mandated local over-the-air broadcasting stations. Among the cable operators who have refused to add The Learning Channel because of the Act's requirements are Continental Cablevision in Stockton, California, Continental Cablevision in Marysville, California, and Bresnan Cable in Essexville, Michigan.

10. The must-carry provisions of the Act also will cause The Learning Channel to be dropped by some cable operators to make room for additional local over-the-air broadcast stations. For example, TKR in Piscataway, New Jersey has informed The Learning Channel that it

may have to drop three cable networks, which may include The Learning Channel in order to add three local independent broadcasters are required by the Act.

11. The Act's rate-regulation provisions are harming The Learning Channel. The Act specifies the minimum content of a basic rate-regulated tier of programs, which will have the widest audience. Cable programs, including The Learning Channel, are not specified for inclusion, and no cable operator has offered to put The Learning Channel in the minimum tier. Rather than being considered for the basic tier, The Learning Channel is now being considered in most cases only for inclusion in a new experimental tier which will have a very limited audience. Among the cable systems who were considering adding The Learning Channel to basic service, but who have added it as part of an experimental new tier, are Scripps Howard of Chattanooga, Tennessee, and Scripps Howard of Knoxville, Tennessee. The Learning Channel has reduced its long-term subscriber projections by more than 25% because of the impact of the movement of The Learning Channel to higher tiers as a result of the Cable Act of 1992.

12. The increased financial pressure caused by rate regulation also has injured The Learning Channel. Thus, some cable system operators have expressed greater reluctance to carry programming such as The Learning Channel which have fewer revenue generating opportunities. For example, a cable system in Corona, California is no longer considering adding The Learning Channel, but will fill its remaining channel space with pay-per-view channels and must-carry requirements.

13. The Act's "channel positioning" provision reserves for over-the-air broadcast stations the cable channel which corresponds with its over-the-air broadcast channel. Thus, over-the-air broadcasters will obtain a disproportionate number of low number channels and cable programmers will have a disproportionate number of high-number chan-

nels. As a general rule, low-number channels are likely to have larger audiences than high-number channel numbers. When viewers "graze" or "browse" through channels, they generally start at the low channel numbers.

I declare under the penalty of perjury that the foregoing is true and correct. Executed on February 10, 1993.

/s/ William F. Goodwyn
WILLIAM GOODWYN

ALL ABOUT
READY,
SET, LEARN!

[Picture Omitted]

READY, SET, LEARN!

- Opportunity: Educators and legislators are recommending quality television as part of a campaign to help send children to school ready to learn. But to hold a preschooler's attention, these programs must also be involving and fun. To put parents at ease and create an uncluttered learning environment, such programs should also be free of commercials. Something parents can feel good about letting their preschoolers watch and learn from.
- Solution: As an affiliate of The Learning Channel, you will air Ready, Set, Learn! A 30-hour-a-week morning block on The Learning Channel created to get preschoolers ready to learn. This unique, commercial-free programming airs every weekday morning, 6AM to Noon, ET.
- Hosted by popular children's singer composer Rory
- Makes learning fun with delightful, insightful series like:

  —Magic Box—teaching reading fundamentals

  —Join In!—encouraging social interaction

  —Bookmice—sharing the joys of reading

  —Zoobilee Zoo—develops creativity

  —Kitty Cats—solving problems and developing interpersonal skills

  —Iris the Happy Professor—teaching children that learning is fun

- Recommended for viewing by the National Education Association
- Commercial-free environment puts parents at ease
- Inspired by the Carnegie Foundation's objective to better utilize "television as a teacher"

- Benefits:
  - Watching cable helps preschoolers prepare for school in an intellectually stimulating and totally enjoyable forum
  - Parents can feel good about having their children spend quality time interacting with TV
  - The entire nation gains from having a better prepared generation of children "ready to learn" when they enter school

- Local Benefits:
  - You'll be a hero in your community and demonstrate to community leaders and legislators that cable really cares
  - You'll be promoting cable programming that appeals to non-subscribers

Find out how you can offer Ready, Set, Learn! programming to an audience that's truly cable-ready.
Call your local TLC representative today.
Eastern/Central: (301) 986-1999
Western: (310) 551-1611

[TLC Logo]

The Learning Channel
7700 Wisconsin Avenue
Bethesda, Maryland 20814-3522
(301) 986-1999

READY, SET, LEARN!

In January of 1993 The Learning Channel will introduce an exciting new block of programming especially designed for pre-school children. The block titled *Ready, Set, Learn!* will provide parents and tots with a forum to learn relevant developmental skills such as reasoning, whole language skills, social interaction with others, basic reading, and conceptualizing imagination skills. The block will air Monday through Friday mornings.

The Magic Box

This entertaining half-hour program teaches pre-school children to read. Key learning concepts are presented in an entertainment style with songs, alphabet games and individual stories and books. US Premiere.

Bookmice

Take three curious puppet mice who love to read, make them secret residents behind the walls of the neighborhood library and watch a lively, new television series unfold. Designed for children to discover the thrill of books and libraries, *Bookmice* combines wonderful puppetry and people, live action and animation, songs and storytelling. US Premiere.

Zoobilee Zoo

This Emmy nominated series stars Emmy and Tony award-winner Ben Vereen leading an ensemble cast of singers, dancers and actors through adventures in discovery, creativity and fun. Vereen portrays "Mayor Ben" a wise and magical leopard who resides on a mountain top overlooking Zoobilee Zoo. The other residents of this special place are talented animal characters called Zoobles, each of whom represents a special skill in the creative arts.

Zoobilee Zoo received a coveted Achievement in Children's Television award from Action for Children's Television. It is also recommended by the National Education Association, and endorsed by The American Federation of Teachers, The National Association of Elementary School Principals and The American Association of School Administrators. Cable Premiere.

DESIGNED FOR YOUNG LEARNERS

MAD MATH

An Original TLC Series

As part of TLC's educational initiative, we present *Mad Math,* an accessible, fun-filled weekly sitcom that explains math fundamentals to viewers ages 9-14. Students will replace fear of challenging math concepts, such as decimals, fractions, and percents, with confidence and knowledge as they participate in this engaging, enjoyable, trust-building adventure. Saturdays from 9:00-9:30amET.

BENEFITS

- Parents will be delighted to see a series that helps them by helping their children conquer their fear of math.
- Students gain an entertaining yet useful television option, and an alternative to standard Saturday morning fare

SO YOU WANT TO BE IN . . .

An Original TLC Production

If you love baseball, lots of jobs can get you into the ballpark. *So You Want To Be In . . .* introduces young people—and grown-ups, too—to real career opportunities in glamour industries like baseball, rock and roll, and movies. An original TLC series of specials, *So You Want To Be In . . .* features profiles of intriguing people who combined life-long passions with job skills to pursue careers both in and "next to" the limelight. Watch for upcoming episodes.

BENEFITS

- Excellent promotion opportunities through local tie-ins with schools

- Young people will be inspired—and parents will be pleased—to hear how they can use their studies to fulfill their career dreams

A WORLD OF IDEAS

MAD MATH

He's wild! He's crazy! He's animated! And boy, does he know math! Mad Math explains math fundamentals to viewers ages 9-14 in an accessible, fun-filled weekly sitcom that's part of The Learning Channel's educational initiative.

[Picture Omitted]

Air Dates

Premiering on May 9, Mad Math will air Saturdays from 9:00-9:30 AM (ET). The series will feature 13 original half-hour programs.

Mad Math's Promise

This series uses the entertainment power of television to help children, with their parents, learn the fundamentals of math. Students will replace fear of math with confidence and knowledge as they learn how to permanently vanquish *Bad Math* from their minds. Mad Math will capture students' attention and make learning math what it should be . . . an engaging, enjoyable, trust-building adventure.

Format

This learn-at-home program offers an engaging, information-packed format that uses both live and animated characters.

Mad Math revolves around two young Hispanic-American actors who portray a brother and sister. The younger brother is a computer and math whiz who tutors a school jock. Each episode will find the trio in a new situation which leads to a mathematics lesson on *fractions, decimals & percents,* or *ratios & word problems* via videotape.

The animated character Mad Math and his nemesis *Bad Math* lead the video graphic portion of the program.

[Picture Omitted]

THE LEARNING CHANNEL, Cable's premiere educational network, is dedicated to entertainment that educates and inspires 18 hours a day. TLC is a part of Discovery Communications, Inc., which also owns and operates The Discovery Channel.

[TLC Logo]

DISCOVERY COMMUNICATIONS, INC.
7700 Wisconsin Avenue
Bethesda, Maryland 20814-3522
301-986-1999

Affiliate Sales Offices:

Northeastern Region & Corporate	301.986.1999 ext 5457
Southeastern Region	404.435.3599
North Central Region	312.946.0909 ext 428
Pacific Region	310.551.1611 ext 5912

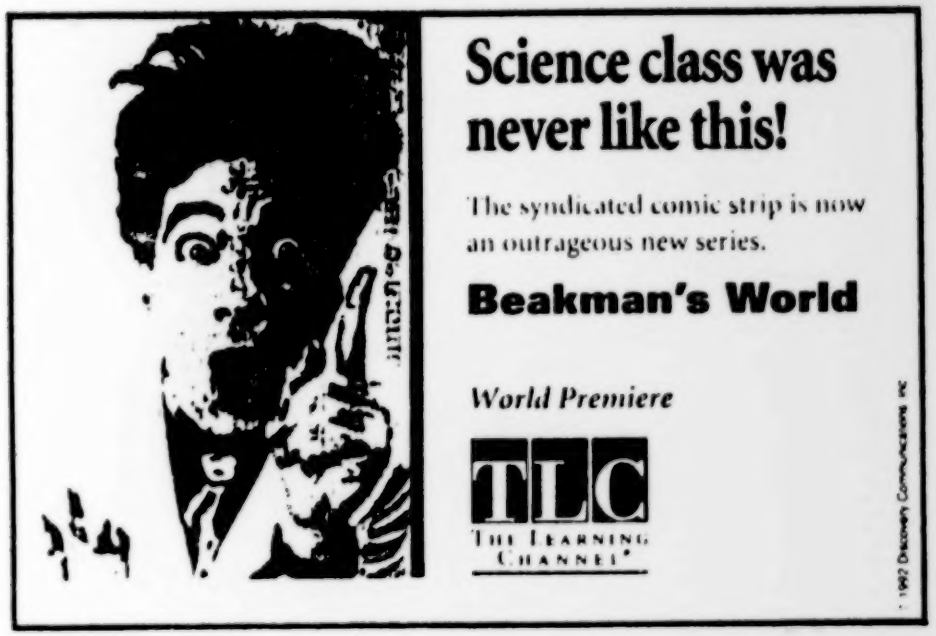
Science class was never like this!

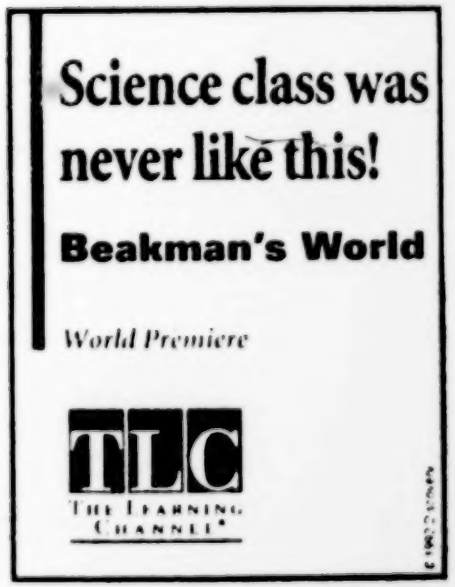
The syndicated comic strip is now an outrageous new series.

Beakman's World

World Premiere

TLC
THE LEARNING CHANNEL





Beakman's World
Wednesdays, Beginning Sept. 30

8pm ET
7pm CT

9pm MT
8pm PT

WEEKLY SIGNATURE SERIES

[Title Illegible]

THE NEW LEARNING CHANNEL

We've transformed The Learning Channel
into groundbreaking, trend-setting television
that awakens the amazing power of the mind
and encourages thought in viewers of all ages.

It enlightens, delights, and stretches the imagination.
It makes an enriching and positive difference.

It's stimulating, provocative, and fun-to-watch.
It's the ongoing result of millions of dollars
and commitment to excellence you'll recognize
from the creative talents of the people at Discovery.

Television has the power to educate,
entertain and inspire.
The Learning Channel makes this a reality
18 hours a day.

[TLC Logo]

[Picture Omitted]

100 Great Books

What books changed the course of human history? Curl up with The Learning Channel and explore the artistic and social impact of humanity's literary masterworks, from the *Koran* to *The Origin of the Species* and *Walden Pond*.

A Practical Guide To The Universe

In practical terms we can all understand. The Learning Channel explains such celestial wonders as stars, planets, asteroids, the Big Bang, quarks, and other mysteries of the cosmos.

Science Frontiers

[Picture Omitted]

Today's theories are tomorrow's realities. Take an in-depth look at 21st Century science and its far ranging impact on life as we know it. From Bio-engineering to the origins of the universe *Science Frontiers* patrols the cutting edge of scientific thought.

TLC's What to Know

Who was Nietzsche and what did he have to say? And when we say "Freudian slip," are we really sure what we mean? What's the difference between Bach and Beethoven and, for that matter, is Modigliani a pasta dish or an artist? This series irreverently takes us through the icons

[Picture Omitted]

of science, the arts and the humanities, turning the vague into the familiar by supplying bite-size chunks of information and insight. It's expressly tailored for the impatient knowledge-seekers of the 90's.

[Picture Omitted]

10 Great Writers

Dramatization and documentary profiles of ten of the world's leading authors and their works, from James Joyce to Virginia Woolf.

[Picture Omitted]

The Human Condition

This series of fast-paced hours features themed episodes that cast a fresh light on human health and behavior in our families, workplaces, and key relationships. Whether it's "problem" children, stress, or sexual harassment, *The Human Condition* tells engrossing human stories that offer insight and authoritative solutions for common problems.

[Picture Omitted]

The Naked Eye

British author Desmond Morris and the BBC cameras focus on the most intriguing animals of all—humans—in this enthralling look at our behavior. Human work, play, families, sex, creativity and language will be analyzed from the perspective of one of the world's premier observers of the species, whose path breaking book, *The Naked Ape*, took the world by storm in the mid-1960's.

[Picture Omitted]

Archaeology

New this fall. The Learning Channel teams up with *Archaeology* magazine and the American Institute of Archaeology to take you on the dig of a lifetime. Host John Rhys Davies, of *Raiders Of The Lost Ark* fame, explores archaeology in today's world and shows how modern, high-tech equipment is being used to unearth clues to past civilizations . . . how the people lived, what they achieved, and what we can learn from their mistakes and triumphs.

[Picture Omitted]

A Traveler's Journal

Venture into unfamiliar places within familiar countries. The Learning Channel's special guides reveal their native and adopted homelands as only those who live there are able to. Join guest guides like Diana Rigg on an insider's tour of her native Scotland, and Gore Vidal on a lively escapade through the palaces and pleasure houses of Venice.

[Picture Omitted]

People of the 20th Century

They influence what we wear, what we think, and how we view our world. Meet the intriguing personalities of our century as The Learning Channel introduces viewers

to "The Kennedy Women," "Famous Couples," "False Messiahs," and others.

Charlie Rose

Emmy award-winning journalist and former CBS *Nightwatch* anchor Charlie Rose offers a thought-provoking alternative to mind numbing talk shows.

[Picture Omitted]

J.P. Donleavy's Ireland

Don your kilt, heft your bagpipes and join renowned author J.P. Donleavy as The Learning Channel presents a world premiere special showcase of the people, culture, and creativity of the Emerald Isle. Experience the magic of all things Irish through profiles of James Joyce, Irish cuisine, Irish history, and the lush Irish countryside.

Designed For Community Outreach

TO READ

On Original Special Produced in Conjunction With The Newspaper Association Of America

To Read celebrates the transformational power of reading. Join a cast of celebrities in the fields of sports, entertainment, art, and literature as they share their personal, inspirational, often humorous experiences with reading. *To Read* covers the gift of reading—and reveals the value of this unique human ability. Premiering on *International Literacy Day,* Tuesday, September 8 at 8:00pm ET, with repeat airings throughout the week.

Benefits

- Positions your system as a leader in promoting reading and adult literacy in your community
- Exceptional promotional opportunity through participation in TLC's literacy promotion campaign in conjunction with *To Read*

LEARN TO READ

Learn To Read eases those adults who can't read into a gradual understanding of the English language, introducing viewers to letters, vowel sounds and complete words. During the series, viewers gradually build a knowledge of written forms. Sundays at 9:30am ET.

Benefits

- Gives adults the opportunity to learn to read in the safety and privacy of their homes
- Enhances your community image

NO PROBLEM!

TLC presents an English language initiative for Spanish-speaking viewers. It offers practical lessons which come out of real-life situations like job hunting, house hunting, opening a checking account, and more. Sundays at 9:00am ET.

BENEFITS

- Provides a valuable service to the Spanish-speaking community
- Opportunity to use Spanish language cross channel spot for promotion

[TLC LOGO]

Announcing A Major Literacy Effort By
The Learning Channel, The American Newspaper
Publishers Association And You.

Newspapers and magazines bring us the world. Books offer inspiration and insight. Signs and messages tell us where we're going and warn us of dangers. No other human skill is as important as reading. From the first symbols in clay more than 6,000 years ago through the explosion created by the printing press, reading has changed and molded our history and culture.

Original Special Kicks Off Campaign

To Read: 1 hour-long special. A celebration of what it means to be able to read. The Learning Channel, in conjunction with the American Newspaper Publishers Association, presents an original production on the beauty, importance and personal experience of reading. But more than just facts and interviews, this compelling one-hour documentary brings viewers personal, sometimes humorous experiences with reading by celebrities in the fields of sports, entertainment, art and literature—and reminds us of the value inherent in this glorious gift.

On-Going Literacy Programming

Learn To Read: 29 half-hour episodes which allow adults who can't read the opportunity to learn in the privacy of their own homes.

No Problem: 13 half-hour episodes which highlight everyday transactions in English, giving Spanish-speaking immigrants and Americans useful, practical skills in day-to-day personal and business situations.

Take Credit As A Partner In The TLC/ANPA
Literacy Project:

In mid-July the ANPA Foundation will be sending literacy supplements to their member newspapers to be included

in the September 8 issue of the local paper. Last year, more than 300 newspapers nationwide published this supplement. This year, TLC offers you, our affiliate, the opportunity to customize, as a sponsor, this insert (also called To Read). Highlight your schedule, promote your commitment to community issues, and promote literacy.

[TLC Logo]

Designed For Your Educator Audience

TEACHER TV

An Original Series Co-Produced By TLC and The NEA

Teacher TV is an energetic, visionary program by, for, and about teachers shot on location in schools throughout the country. Created with the input of thousands of educators, *Teacher TV* provides teachers with a means to share techniques, ideas, and resources. The half-hour program profiles teachers, schools, and communities that dare to challenge the educational status quo. Sundays from 6:00-6:30pm ET.

Benefits

- Built-in audience of more than 2 million NEA members
- Local tie-in opportunities with location shoots
- Destined to become required viewing for all Americans interested in what is happening in education today
- Reflects cable's commitment to education and the community

Critical Acclaim

- "Cum laude to The Learning Channel's *Teacher TV*."
  —*TV Guide*
- "TLC gives weary teachers a voice . . . The series is something that's desperately needed . . . a show we can all learn from."
  —*Cable World*
- "A unique source of professional development."
  —*NEA Today*

[TLC Logo]

A WORLD OF IDEAS

TEACHER TV

Teacher TV is an energetic, upbeat, magazine-style show, shot on location in schools across the country featuring candid profiles of teachers, schools and communities daring to challenge the status quo. It's a place for educators to share techniques, ideas and resources, created with input from thousands of educators. Produced by the two-million-member National Education Association and The Learning Channel, *Teacher TV* television's only national program for, by and about teachers.

[Picture Omitted]

Teacher TV offers practical advice for teachers, parents and the entire community. Go into the classroom with a 22-year-old student-teacher about to teach his very first class. Visit a school that uses interactive videodiscs to teach ninth-grade chemistry to sixth graders. And listen to teachers who've won the Christa McAuliffe Award explain how they use technology to enhance their teaching. Do all this and more on *Teacher TV*, the continuing half-hour series on The Learning Channel.

PROGRAM HIGHLIGHTS

Teacher Presentation

In the next five to ten years, nearly half of America's teachers will retire. Who will teach America? The three segments of this episode address an educational crisis and show some unorthodox methods for training our future teachers. In the first segment, we'll go into a classroom to learn what it takes to become a teacher. In the second segment, we'll examine an innovative five-year training program in Maine. And the third segment will take us to Switzerland, where we'll have an opportunity to see how some of Europe's best teachers ply their trade.

The Changing Role of Schools

With broken families on the rise and social community services on the decline, schools and teachers are often left

to take on the roles of psychiatrist, social worker, counselor, and even father and mother. But at what cost? This episode examines what the extra pressure means to our educational system, as well as how teachers are rising to the challenge of relating to their students in new ways.

[Picture Omitted]

Design A School

Teacher TV explores three schools that have thrown out the manuals and are redesigning themselves. We'll go on location to Indianapolis, Indiana, upstate New York, and Austin, Texas. We'll meet the teachers, parents and students who are revolutionizing the way schools are designed and run. And we'll look at the difficult lessons they're learning in the process.

[Picture Omitted]

[TLC Logo]

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

PLAINTIFFS' STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

Pursuant to Local Rule 108(h) and in support of plaintiffs' cross-motion for summary judgment, plaintiffs Turner Broadcasting System, Inc., et al. ("the cable program networks"), submit this statement of material facts as to which there is no genuine issue:

1. Cable programming services are full-fledged First Amendment speakers, providing the public with a broad range of video programming. Affidavit of Terence F. McGuirk, Executive Vice President, Turner Broadcasting Systems, Inc., ¶¶ 18-19 & 36; Affidavit of Lisa A. Kerr, Senior Director of Affiliate Relations of National Cable Satellite Corporation, d/b/a/ C-SPAN, ¶ 6. Approximately 80 national, regional, and local cable programming services—commonly called cable program networks—now provide a diverse mix of news, entertainment, public affairs, sports, financial, religious, minority-oriented, and children's programming. McGuirk Affidavit ¶ 11.

2. The named plaintiffs in Civil Action No. 92-2247 are companies that operate 15 cable program networks, including Cable News Network ("CNN"), Headline News, Turner Network Television ("TNT"), The Cartoon Network, The Arts & Entertainment Network ("A&E"), The Black Entertainment Television Network ("BET"), E! Entertainment Television, Lifetime Television Network ("Lifetime"), The Family Channel, C-SPAN, C-SPAN 2, QVC Network, The Travel Channel, USA Network and The Sci-Fi Channel. Amended Complaint, No. 92-2247,

filed November 5, 1992. In addition, Plaintiff Turner Broadcasting System, Inc. owns and operates Station WTBS, Atlanta, Georgia, also known as TBS SuperStation, which is carried on cable systems throughout the country. *Id.* The National Interfaith Cable Coalition, Inc., operating as the Vision Interfaith Satellite Network ("VISN") has moved to intervene in No. 92-2247. Cable program networks The Discovery Channel and The Learning Channel are represented in No. 92-2558, and networks Home Box Office, Cinemax, Comedy Channel, and Courtroom Television Network are represented in No. 92-2495.

3. Cable operators select programming to present to their subscribers from various sources, including local broadcast station signals, signals of distant broadcast television stations, locally-originated cable programming, and cable network programming, and transmit the programming over coaxial and fiber optic cables to their subscribers. McGuirk Affidavit ¶¶ 8, 11; Affidavit of Thomas F. Burchill, President and Chief Executive Officer, Hearst/ABC-Viacom Entertainment Services, ¶ 5. Because cable program networks are distributed almost exclusively through cable systems, they reach only the approximately 60 percent of television homes that subscribe to cable. *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(3).

4. Broadcast television stations, by contrast, possess multiple means of transmitting their signals to their audiences. Broadcast stations are licensed by the FCC free-of-charge to utilize specified portions of the radio-magnetic spectrum to transmit their signals over-the-air to the 98 percent of American homes that own television sets. Broadcast stations are also able to transmit their programming over-the-air to cable systems for subsequent retransmission to cable subscribers. Thus, even absent carriage of a broadcast station on a cable system, most television viewers in a broadcast station's licensed community are able to receive the programming of that station. McGuirk Affidavit ¶ 9.

5. While cable system channel capacity has increased during the last decade, many cable systems currently have reached or are close to reaching the limit of their channel capacity. *See* McGuirk Affidavit ¶¶ 24-26; Affidavit of Nickolas Davatzes, President and Chief Executive Officers of Arts & Entertainment Network, ¶ 7; Affidavit of Lee Masters, President and Chief Executive Officer, E! Entertainment Television, Inc. ¶ 6; Affidavit of Joseph M. Segel, Chairman and Chief Executive Officer of QVC Network, Inc., ¶¶ 9-10; Affidavit of Timothy B. Robertson, President and Chief Executive Officer, International Family Entertainment, Inc., ¶¶ 5 & 7; Affidavit of E. Roger Williams, President and Chief Operating Officer, The Travel Channel, Inc., ¶ 6; First Affidavit of Douglas V. Holloway, Senior Vice President-Affiliate Relations, USA Networks, ¶¶ 8-10; Affidavit of Sylvia Sycamore, Senior Vice President Policy, Planning and Administration, Chambers Communications Corp., ¶ 3. Because many cable systems have little or no available channel capacity, competition for cable system carriage is intense, especially for newer cable networks such as The Cartoon Network and The Sci-Fi Channel to obtain cable system carriage. McGuirk Affidavit ¶¶ 24-29; Williams Affidavit ¶ 6.

6. Government imposed rules requiring cable systems to carry broadcast stations—"must carry" rules—harm cable program networks by guaranteeing cable channels for broadcast stations and by forcing cable programmers to compete for a diminished number of available channels on cable seystems. This harm was recognized by the U.S. Court of Appeals for the District of Columbia Circuit in *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169, (1986) and in *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988).

7. Since the FCC's must carry rules were first struck down as unconstitutional in 1985, the number of broadcast television stations—both commercial and non-commercial—has nonetheless grown significantly. The FCC's own data demonstrates that the total number of full power commercial television stations has increased by more than 25 percent since the decision in *Quincy*. *Compare* FCC News Release: Broadcast Station Totals as of December 31, 1992 (Jan. 13, 1993), *with* FCC News Release: Broadcast Station Totals for July 1985 (Aug. 9, 1993). The number of noncommercial stations has also grown substantially, increasing approximately 21 percent during the same period. Moreover, the number of low power broadcast television stations has grown dramatically from 343 stations in July 1985 to 1310 in December 1992—a 282 percent increase.

8. FCC factfinding has also demonstrated that since the demise of the FCC's must carry rules, most local broadcast stations are still being carried by cable systems. FCC Staff Report, Policy and Rules Division of the Mass Media Bureau, *Cable System Broadcast Signal Carriage Report*, Sept. 1, 1988, at 11, 13. Moreover, roughly 80 percent of the cable systems responding to the FCC survey reported *no* instances of discontinued or denied carriage, while an additional 10 percent of the systems reported discontinuing or denying carriage of a *single* station. *Id.*

9. The elimination of must carry requirements has produced a substantial increase in the number and diversity of cable programming services:

(a) cable program networks have been able to expand their viewing audiences (McGuirk Affidavit ¶ 17; Davatzes Affidavit ¶ 4; Burchill Affidavit ¶ 8; Robertson Affidavit ¶ 4);

(b) new cable networks like TNT and E! Entertainment were successfully launched (McGuirk Affi-

davit ¶ 6; Masters Affidavit ¶ 3; Williams Affidavit ¶ 4; First Holloway Affidavit ¶¶ 4, 7); and

(c) cable program networks have invested substantial resources in original entertainment, informational, news and children's programming, providing a rich diversity of speech to the public. McGuirk Affidavit ¶¶ 18-19; Davatzes Affidavit ¶ 5; Burchill Affidavit ¶ 8; First Holloway Affidavit ¶ 7. Basic cable program networks spent $340 million for programming in 1984; in 1991, that investment in programming had increased to $1.5 billion. H.R. Rep. No. 628, 102d Cong., 2d Sess. 31 (1992).

10. By granting special, federally-mandated carriage privileges to broadcasters, the must carry requirements of the 1992 Cable Act will significantly impair the ability of cable program networks to reach their intended audiences. In order to accommodate additional broadcast stations on their systems, cable program networks—including those of plaintiffs—will be and are being dropped or denied carriage by cable systems. McGuirk Affidavit ¶¶ 27-29; Davatzes Affidavit ¶¶ 6-7; Burchill Affidavit ¶ 10; Kerr Affidavit ¶¶ 9-14; Affidavit of Craig Ronald Sherwood, Vice-President Managing Director of Affiliate Relations, International Family Entertainment, Inc., ¶ 2; Affidavit of David L. Hanson, Vice President of Operations, Marcus Cable Partners, L.P., ¶¶ 3 & 5-6; Affidavit of Joseph A. Wyant, General Manager, Storer Communications of Northern Kentucky, Inc., ¶¶ 6-7; Affidavit of Dana A. Michaelis, Vice President, Affiliate Sales, of The Travel Channel, Inc., ¶ 2; Affidavit of Jonathan B. Marx, Vice President and General Manager, Viacom Cable, ¶ 3; Affidavit of James A. Finch, President, Limestone Cable Vision, Inc., ¶ 3.

11. The channel position requirements of the 1992 Cable Act will also significantly impede the ability of cable program networks to reach their intended audiences

by according broadcast stations special rights to inherently unique cable system channel positions. McGuirk Affidavit ¶¶ 30-35; Davatzes Affidavit ¶¶ 6, 8; Burchill Affidavit ¶¶ 10-11; Segel Affidavit ¶ 11; Robertson Affidavit ¶ 6; First Holloway Affidavit ¶ 11; Hanson Affidavit ¶ 6; Wyant Affidavit ¶¶ 10-11 & 14; Sherwood Affidavit ¶ 3.

12. Relatively new, diverse cable program networks, such as The Sci-Fi Channel, The Learning Channel, The Cartoon Network, and Court TV will be especially burdened by the new must carry and channel position requirements. McGuirk Affidavit ¶¶ 24-29; First Holloway Affidavit ¶¶ 9-10; Second Holloway Affidavit ¶ 3; Williams Affidavit ¶¶ 5-6.

13. The must carry and channel position requirements of the 1992 Cable Act will substantially limit the editorial discretion of cable operators. Affidavit of John w. Goddard, President and Chief Executive Officer, Viacom International Inc., ¶ 4; Affidavit of Jonathan B. Marx, Vice President and General Manager, Viacom Cable, ¶ 3; Affirmation of Richard Conrad, Regional Manager, Adelphia Cable Communications, ¶ 1; Affidavit of James A. Finch, President, Limestone Cable Vision, Inc., ¶¶ 3-4; Wyant Affidavit ¶¶ 7, 9 & 14; Affidavit of Lynette J. Simpson, Vice President of Marketing and Acquisitions, Sun Country Cable, ¶ 9; Second Affidavit of David A. Gardner, Raystay Co., ¶¶ 10-13; Hanson Affidavit ¶ 6; Sycamore Affidavit.

14. The consequences described above occur regardless of the preferences of the viewing public. Cable systems ascertain viewer preferences by means of surveys, focus groups, phone-in numbers, and other methods. Simpson Affidavit ¶ 6; Hanson Affidavit ¶ 4; Wyant Affidavit ¶ 6; Sycamore Affidavit ¶¶ 6-7; Second Gardner Affidavit ¶¶ 5-6. The new must carry requirements will cause cable operators to act in *contravention* of subscriber preferences by forcing them to drop cable program networks sub-

scribers wish to receive in order to carry broadcast stations in which subscribers have expressed little or no interest. Simpson Affidavit ¶¶ 6 & 8-10; Wyant Affidavit ¶¶ 6, 9 & 12; Finch Affidavit ¶¶ 3-4; Conrad Affirmation ¶ 1; Sycamore Affidavit; Second Gardner Affidavit ¶¶ 12-13.

Respectfully submitted,

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Dated: February 12, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

PLAINTIFFS' RESPONSE TO NAB'S STATEMENT OF MATERIAL FACTS

Plaintiffs Turner Broadcasting System, Inc., et al. ("the cable program networks"), hereby respond to the Statement of Material Facts of defendant intervenor-applicant National Association of Broadcasters ("NAB") submitted in support of its motion for summary judgment. NAB's statement consists almost entirely of a verbatim repetition of various "findings" contained in Section 2(a) of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"). Many of the assertions contained therein are not statements of "fact" at all, but rather conclusory assertions of "governmental interests" and policies (*e.g.*, there is a "substantial governmental interest" in promoting a "diversity of views"). Other statements, while arguably of a "factual" nature, are so vague as to preclude a meaningful response (*e.g.*, "the cable television industry has become a dominant nationwide video medium"). With these objections noted, plaintiffs' respond to NAB's statement as follows:

1. Plaintiffs admit that most cable systems in a particular geographic area do not face direct competition from competing cable systems. Plaintiffs further admit that this is a result largely of local franchising requirements, including the common practice of local franchising authorities of granting exclusive franchises and denying the opportunity for further competition. In response to this situation, Congress has now prohibited exclusive fran-

chises and barred local franchising authorities from unreasonably excluding competing cable operators. 1992 Cable Act § 7. The FCC has found not only that competition between cable systems is increasing but also that "several factors are likely to encourage the *further increase* in the number and extent of competitive cable systems." *1990 Cable Report*, 5 F.C.C. Rcd at 5014, 5033-35 (emphasis supplied). The FCC noted, for example, that cable operators were becoming more interested in expanding into markets already served by a cable system as the availability of attractive unwired markets declines. *Id.* Plaintiffs deny that cable operators not facing direct competition from another local operator "face[] no local competition." Cable television competes with various other media outlets for public audiences, including broadcast television. *See Report Concerning General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C.2d 143, 196-221 (1985) ("*FCC Fairness Report*"); *In re Complaint of Syracuse Peace Council*, 1 F.C.C. Rcd 5043 (1987); *Order*, 2 F.C.C. Rcd at 5043. Millions of Americans chose not to subscribe to cable even where it is available, *see* H.R. Rep. No. 628 at 30 (noting that cable "passes" more than 95 percent of households, while approximately 60 percent subscribe), and most Americans who subscribe to cable could if they wished cancel their subscriptions at any time and receive broadcast television signals over-the-air by means of an indoor or outdoor antennae. *See In the Matter of Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems*, 1 F.C.C. Rcd. 864 (Nov. 28, 1986). Plaintiffs cannot meaningfully respond to the assertion that "the cable operator" has "undue market power," and deny any suggestion that the "market power" of cable operators could somehow be considered uniform throughout the country. Plaintiffs also dispute that the fact that some cable operators do not face direct competition from other cable operators in the same community is material

to the constitutional issue before the court. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 247-57 (1974).

2. Plaintiffs admit that approximately 60 percent of American households subscribe to cable television. Whether, when or how much, this percentage will increase in the future depends on a number of variables. The assertion that the "cable television industry" has become a "dominant" nationwide video medium is vague and meaningless and requires no response; to the extent a response is deemed necessary this assertion is denied.

3. The assertion that the "cable industry" has become "highly" concentrated is vague and meaningless and requires no response; to the extent a response is deemed necessary this assertion is denied. The House report acknowledges that the two prevailing measures of market concentration are the "top four firm" concentration ratio and the Herfindahl-Hirschman Index (HHI), and that the Justice Department and "prevailing economic theory" consider market power to exist when the four firm ratio exceeds 50 percent or the HHI exceeds 1,000. H.R. Rep. No. 628 at 42. The report admits that the information submitted to the committee indicated that the HHI index for the top twenty MSOs was 491, "well below the Justice Department's threshold of 1,000," and the committee estimated that the four firm ratio for the largest MSOs was 36 percent, also "less than the Justice Department's 50 percent threshold." *Id.* The assertion that the "potential effects" of such "concentration" are "barriers to entry for new programmers and reduction in the number of video voices" is utterly speculative, conclusory, vague and requires no response; to the extent a response is deemed to be necessary this assertion is denied. The number of MSOs and or their concentration does not meaningfully reflect the "number of video voices" available to consumers, because any single MSO can carry and offer to subscribers a large and diverse "number" of

"voices" on its system(s). Plaintiffs also dispute that the "concentration" ratios of MSOs is a material fact, or that characterizing concentration as "high" somehow justifies special carriage privileges for all broadcasters at the expense of all cable program networks.

4. The sweeping characterization of the "cable industry" as "vertically integrated" is meaningless and requires no response; to the extent a response is deemed necessary this assertion is denied. Plaintiffs admit some operators have made some investments in some program services, and that these investments—as Congress recognized—often "promote diversity and make the creation of innovative, and risky, programming services possible," and have furthered the development of innovative programming services "that would not have been feasible without the financial support of cable system operators." H.R. Rep. No. 628 at 41. *See also 1990 Cable Report*, 5 F.C.C. Rcd at 5009-10 (summarizing benefits of vertical integration and concluding that "[t]he result for the public is an increase in the quality and amount of programming"). With respect to the assertion that affiliations between operators and cable program networks create "incentives" for operators to favor their affiliated networks with respect to carriage, Congress did not find that this *possibility* was in fact an actual, serious problem. Instead, the House report describes a study by the National Telecommunications and Information Administration (NTIA) of the Department of Commerce concluding that "common ownership of cable systems and cable programming services does *not* appear to affect adversely the supply of cable programming or the diversity of viewing choices for cable subscribers." *Video Program Distribution and Cable Television: Current Policy Issues and Recommendations*, NTIA Report 88-233, June 1988, at 102 (emphasis supplied). Summarizing the study, Congress stated that "NTIA found that *none of the top five multi-system operators (MSOs) showed a pattern of favoring basic services with which they were affiliated.*" H.R. Rep. No. 628 at 41 (emphasis supplied). Plaintiffs deny that "vertical integration," to the extent it exists in the cable industry, has been harmful to the public's interest in "diverse" video programming.

5. The assertions in Paragraph 5 are not statements of fact and no response thereto is required. Plaintiffs deny burdening the First Amendment freedoms of cable programmers and operators for the benefit of broadcasters promotes any "substantial governmental interest," and deny that "First Amendment interests" are furthered by burdening First Amendment freedoms. The must carry requirements will reduce, not promote, diversity in video programming.

6. The assertions in Paragraph 6 are not statements of fact and no response thereto is required.

7. The assertions in Paragraph 7 are statements of policy, not statements of fact, and no response thereto is required. Plaintiffs do not claim that the government can have no interest in promoting "the local origination of programming," but deny that the government may burden plaintiffs' First Amendment rights to promote that interest, and deny that the must carry requirements Congress has enacted are even remotely tailored to further that interest without unnecessarily burdening the First Amendment freedoms of cable programmers and operators.

8. The assertion that broadcast television stations are an "important source" of local news and public affairs programming is vague, conclusory, and no response thereto is required. Again, plaintiffs do not claim that the government can have no interest in promoting local programming, but deny that the government may burden plaintiffs' First Amendment rights to promote that interest, and deny that the must carry requirements Congress has enacted are even remotely tailored to further that interest without unnecessarily burdening the First Amend-

ment freedoms of cable programmers and operators. Moreover, many cable systems provide their own local public affairs programming, such as Channel 8 in the Washington, D.C. television market.

9. Plaintiffs admit that broadcast television programming is supported by revenues generated from advertising broadcast over stations. Plaintiffs further admit—indeed emphasize—that persons who own television sets "do not require cable transmission to receive broadcast signals." The third sentence of Paragraph 9 is a statement of policy, not of fact, to which no response is required. Plaintiffs specifically deny that the continued availability of free television over-the-air is even slightly threatened in the absence of must carry requirements, as evidenced by, among other things, the fact that there has been a significant *increase* in the number of broadcast stations operating and available to the public since the demise of the FCC's must carry rules in July 1985. Indeed, the total number of broadcast stations, including commercial, noncommercial, and low power stations, has grown in every category —nearly doubling overall since 1985. *Compare* FCC News Release: Broadcast Station Totals as of December 31, 1992 (Jan. 13, 1993), *with* FCC News Release: Broadcast Station Totals for July 1985 (Aug. 9, 1985).

10. The assertion that there has been a "marked shift" in market share from broadcast television to cable television is too vague to permit a specific response. Of course the viewership of broadcast stations has declined from the levels that existed when broadcast television represented the *only* video programming choice available. Affidavit of Terence F. McGuirk, ¶ 12. This, however, hardly reflects or portends "harm" to the public's interest in a "diversity of views." The changes in viewing patterns represents the exercise of the viewing public's right to choose freely among diverse program offerings what the viewer wants to watch. *Id.* The decline in broadcast station audiences is also partially attributable to other programming and entertainment alternatives available to television viewers, for example, prerecorded tapes and video games. *Id.* Again, plaintiffs deny that the public's interest in the continued existence of "local broadcasting" is even slightly threatened in the absence of must carry requirements. *See* paragraph 9, above.

11. Plaintiffs admit that cable television systems and broadcast television stations—and newspapers, radio stations, magazines, billboards, and others—compete for advertising revenues. Plaintiffs deny that the public's interest in the continued existence of "local broadcasting" is even slightly threatened by this competition, or that such competition justifies burdening the First Amendment rights of cable programmers or operators with new must carry requirements. *See* paragraph 9, above.

12. Plaintiffs deny that a cable system which carries the signal of a local television broadcaster is "assisting the broadcaster to increase its viewership" and its potential to attract advertising revenues since the local broadcaster already has access to those households over-the-air. The second and third sentences of paragraph twelve are unfounded speculation, not statements of fact. Plaintiffs deny that the mere fact that cable operators and broadcast stations compete to some extent for advertising revenues creates "a substantial likelihood" that broadcast stations will be dropped from cable systems or repositioned by cable operators for the purpose of harming them, absent a must carry "requirement." 1992 Cable Act § 2(a)(15). Plaintiffs deny that the theoretical economic "incentive" postulated in paragraph 12 has translated into any significant number of real world instances of noncarriage of broadcast stations. Congress admits that it "has *not* found that cable systems are engaging in a widespread pattern of denying carriage of local television stations. . . ."). H.R. Rep. No. 628 at 52 (emphasis supplied). *See also id.* at 67 (noting that "most cable systems have continued to carry a number of local over-the-air signals. . . ."). Further, the principal evidence before Congress relating to noncarriage of broadcast stations, a 1988 FCC Staff

Report, confirms that most broadcast stations *are* being carried by cable systems. FCC Staff Report, Policy and Rules Division of the Mass Media Bureau, Cable System Broadcast Signal Carriage Report, Sept. 1, 1988 ("1988 Staff Report"), at 10. Roughly 80 percent of the cable systems reported *no* instances of discontinued or denied carriage, with an additional 10 percent reporting discontinuing or denying carriage of a *single* station. *Id.* Cable systems seek to provide to their subscribers programming that their subscribers want to receive. If they fail to do so, subscribers can choose not to spend their money on cable service and elect to receive broadcast stations over-the-air by means of an indoor or outdoor antennae. *See Report and Order,* 1 F.C.C. Rcd. 864 (Nov. 28, 1986). The evidence cited above shows that cable systems are in fact choosing to continue to carry most broadcast stations. Plaintiffs deny that the public's interest in the continued existence of "local broadcasting" is even slightly threatened by the number of instances in which local broadcast stations have been denied carriage on cable systems (*see* paragraph 9, above), or that the less than "widespread" number of instances in which noncarriage has occurred justifies burdening the First Amendment rights of cable programmers or operators with sweeping new must carry requirements.

13. Plaintiffs emphatically deny that the "economic viability of free local broadcast television" is, or "will be," "seriously jeopardized." *See* paragraph 9, above. The assertion of NAB's in-house economist that there is a possibility that "the *quality* of service the public receives will be affected, even if stations are able to survive" (Fratrik Affirmation ¶ 6, emphasis in original), even assuming this assertion to be true, could not justify burdening the First Amendment freedoms of cable programmers and operators through imposition of new must carry rules. Such burdens would plainly affect the quality of the programming cable program networks are able to offer.

14. The assertion that consumers who subscribe to cable "often" do so to obtain local broadcast signals which they otherwise would not be able to receive, or to obtain improved signals, is too vague to permit a specific response. Certainly "sometimes" that is true. Similarly, the assertion that most subscribers "do not or cannot" maintain antennas to receive broadcast signals, do not have input selector switches, *"or"* cannot otherwise receive broadcast signals, even if assumed to be true, does not demonstrate that any cable subscriber is actually *precluded* from receiving broadcast signals over-the-air. Rather, this simply shows that subscribers have simply *chosen* not to maintain such enhanced capability because they are satisfied with the offerings of their cable system, including the broadcast stations carried by the system. Nothing in the legislative record suggests that if subscription fees became too high, or if a cable system failed to carry popular broadcast stations that viewers wished to receive, that most viewers who *wished* to do so could not choose simply go back to receiving broadcast stations over-the-air. With respect to the third sentence of paragraph 14, plaintiffs admit that the FCC's must carry requirements existed at the time the Cable Communications Policy Act of 1984 was enacted, but otherwise deny the assertions contained therein.

15. It is unclear what is meant by the "most efficient" distribution system for television programming; plaintiffs therefore are unable to respond meaningfully to the first sentence of paragraph 15 and deny the assertions contained therein to the extent a response is deemed necessary. The second sentence of paragraph 15, asserting that the use of input selector switches is not "an enduring or feasible method of distribution and is not in the public interest," is more of a statement of policy than a statement of fact, but plaintiffs deny it in any event. Again, even assuming most cable subscribers do not maintain indoor or outdoor antennas and input selector switches, this fact simply shows that subscribers are satisfied with the offer-

ings of their cable system, including the broadcast stations carried by the system. The assertion that it is not in the "public interest" for cable subscribers to maintain the ability to receive signals over-the-air is remarkable. There is no evidence that the equipment needed is prohibitively expensive, yet, rather than encouraging use of the capacity of *both* the airwaves and cable systems, Congress has opted to provide duplicative paths for broadcasters to reach program audiences while crowding out the speech of cable program networks. Further, to the extent broadcast stations play a special role during disasters and emergencies (*see* NAB Mem. at 25; S. Rep. No. 92 at 42), the "public interest" clearly would be better served if television viewers were able to receive both cable and over-the-air transmissions, in case one or the other were to become inoperable.

16. With respect to the statement that "broadcast programming that is carried remains the most popular programming on cable systems," plaintiffs admit that certain broadcast programming—particularly network affiliates—tend to be viewed more than cable program networks, but deny that all broadcast stations carried on cable systems or that all broadcast stations generally are uniformly more popular than all cable program networks. Plaintiffs admit that cable programming placed on channels adjacent to popular off-the-air signals often obtains a larger audience than on other channel positions, but this is true of any programming so situated (hence, for example, Station WNYC's desire to be on channel 3 of Time Warner's Manhattan cable system), and this can be attributed in part to the fact that these channel positions also tend to be lower ones more accessible to "grazing." *See* H.R. Rep. No. 628 at 55. With respect to the third sentence of paragraph 16, the benefits of carriage have been *mutual* between cable systems and broadcast stations, but the competitive "balance" will shift dramatically in favor of broadcasters under the must carry/retransmission consent regime Congress has enacted, as cable systems will be forced to carry

less popular broadcast stations without compensation while at the same time having to pay to retransmit the signals of more popular stations. To the extent the last two sentences could be construed as statements of fact, plaintiffs deny them, and deny that broadcasters are entitled to be compensated for cable systems' distribution of programming produced by Hollywood and others.

17. Plaintiffs emphatically deny the assertions contained in paragraph 17. *See, e.g.*, McGuirk Affidavit ¶ 27; Davatzes Affidavit ¶¶ 6-7; Burchill Affidavit ¶ 10; Segel Affidavit ¶¶ 7-10; Collins Affidavit ¶¶ 12 & 17.

18. Plaintiffs deny the assertions contained in paragraph 18, and note that the Sherman Affirmation—which selectively provides Nielsen ratings for 4 cable program networks, two of which had slightly higher ratings and two of which had slightly lower ratings—fails to present evidence establishing the generalized assertion contained in paragraph 18. Plaintiffs also doubt that the allegations contained therein, even if true, are material or would in any way affect the determination of the constitutional issue before the Court.

19. Plaintiffs deny the assertions contained in paragraph 19, and note that the Sherman Affirmation—which selectively provides data for particular stations for a single month in a single market—fails to present evidence establishing the sweeping assertion contained in paragraph 19.

20. The assertion that for "many" cable systems the lack of capacity to accommodate additional cable programming is not a "problem" is too vague to be meaningful and no response thereto is required; to the extent a response is deemed necessary the assertions contained in paragraph 20 are denied. Further, the fact that some cable systems, in the exercise of their editorial discretion, use some channels for multiplexing for the convenience of subscribers does not establish that channel capacity is not a "problem," nor does it controvert the fact that

must carry removes channels from the market that cable program networks otherwise could compete for.

21. Plaintiffs admit that technological developments may, possibly, some day, allow some operators to offer a greater number of channels on some cable systems. Whether this will be technically and economically feasible for a significant number of cable systems remains to be seen. The fact remains, as the affidavits before the Court plainly establish, that available channel capacity presently is very tight, magnifying the impact of the must carry requirements on cable program networks. *See* McGuirk Affidavit ¶¶ 24-26; Davatzes Affidavit ¶ 7; Masters Affidavit ¶ 6; Collins Affidavit ¶¶ 15-17; Segel Affidavit ¶¶ 9-10 & 12; Robertson Affidavit ¶¶ 5 & 7; Williams Affidavit ¶ 6; Holloway Affidavit ¶¶ 8-10. The possibility that capacity might increase at some unspecified and uncertain time in the future is not material to the Court's determination of the constitutional issue in this case.

22. Plaintiffs take no position with respect to the assertions contained in paragraph 22 and leaves any response thereto to cable operators.

Respectfully submitted,

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Dated: February 12, 1993

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

PLAINTIFFS' RESPONSE TO INTV'S STATEMENT OF MATERIAL FACTS

Plaintiffs Turner Broadcasting System, Inc., et al. ("the cable program networks"), hereby respond to the Statement of Material Facts of defendant intervenor-applicant Association of Independent Television Stations, Inc.'s ("INTV") submitted in support of its motion for summary judgment. Plaintiffs admit the allegations in paragraph 1, but note that the Act did not become law until October 5, 1992, the date Turner Broadcasting System, Inc., filed its complaint. Plaintiffs admit the allegations in paragraphs 2 through 6. With respect to the allegations contained in paragraph 7, plaintiffs admit that plaintiffs' cross motion for summary judgment is ripe for decision. Defendant intervenor-applicants' motions for summary judgment may not be ripe for decision to the extent that certain issues in dispute may be deemed to be factual in nature. For example, the broadcasters rely heavily on certain conclusory "findings" contained in Section 2(a) of the Act, *e.g.*, that the "economic viability" of free broadcast television will be "seriously jeopardized" in the absence of must carry requirements, which plaintiffs maintain are wholly insupportable. Plaintiffs maintain that the bald assertions that the economic viability of broadcast television is "seriously jeopardized" fail to raise a *genuine* issue of material fact in view of the overwhelming evidence to the contrary. At minimum, if the Court deems this issue to be material, the evidence precludes the Court's adoption of this finding as a matter of fact, and bars

summary judgment for the broadcasters and or the government.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

PLAINTIFF TIME WARNER ENTERTAINMENT COMPANY, L.P.'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE IN THE MUST CARRY PROCEEDINGS

Pursuant to Local Rule 108(h) of the Rules of this Court and in support of its Motion for Summary Judgment on its claims against §§ 4, 5 and 6 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), plaintiff Time Warner Entertainment Company, L.P. ("TWE") submits this statement of material facts as to which there is no genuine issue.

The 1992 Cable Act.

1. The 1992 Cable Act became law on October 5, 1992.

The Parties.

2. TWE is organized under the laws of the State of Delaware as a limited partnership, the majority which is indirectly owned and fully managed by Time Warner Inc., a publicly traded Delaware corporation. TWE's principal place of business is located at 75 Rockefeller Plaza, New York, New York.

3. TWE is comprised principally of three unincorporated divisions: Time Warner Cable ("TWC"), which operates cable television systems; Home Box Office ("HBO"), which operates pay television programming services; and Warner Bros., which produces and distributes

motion pictures and television programs. TWE also owns, directly or indirectly, interests in various other cable television programming services, some of which it manages. (Collins Aff. ¶ 10)

4. Defendant Federal Communications Commission ("FCC") is an independent agency of the United States Government created under the Communications Act of 1934, as amended, 47 U.S.C. § 151, *et seq.*. The FCC has a principal place of business in Washington, District of Columbia.

The Activities and Operations of TWE as a Cable Operator.

5. Through TWC, TWE owns and operates cable systems in approximately 1,600 franchise areas throughout the United States, which have a combined book value of approximately $8.2 billion, and which reach approximately 6.9 million subscribers. (Collins Aff. ¶ 11)

6. TWC's cable systems have channel capacities that generally range from 30 to 70 channels. (Collins Aff. ¶ 12)

7. TWC and its local divisions exercise editorial discretion in determining which program services should be offered to its subscribers. In making such determinations, TWC personnel choose from among the entire array of programming services that are available based on a variety of factors. The content of programming services is often decisive in making such determinations. (Collins Aff. ¶ 15)

8. TWC cable operators continually refine their channel line-ups so as to increase their appeal and subscriber satisfaction. In 1991 and 1992, TWC conducted over 60 subscriber preference and satisfaction surveys. (Collins Aff. ¶¶ 16-17)

9. In addition to deciding which services to carry, TWC cable operators also decide how services are to be

"packaged" in offerings to subscribers. In most TWC systems, subscribers can choose from among two or more packages or "tiers" of services, for which different prices are charged. TWC systems typically offer a "basic" tier of services and a "standard" tier, with the latter including a large array of satellite-delivered programming services. (Collins Aff. ¶ 18)

10. In developing tiers and in creating a programming package, TWC personnel consider a variety of factors and seek to maximize customer interest and satisfaction. (*Id.* at ¶ 18; Rosenblum Aff. ¶ 5)

11. TWC cable operators also exercise editorial discretion in determining the channel positions on which particular programming will be offered. (Collins Aff. ¶ 19; Rosenblum Aff. ¶ 5) Channel positions are assigned to facilitate tiering, to standardize channel line-ups across systems in a particular locality, or to make the system more accessible to customers. (Rosenblum Aff. ¶ 5)

The Activities and Operations of TWE as a Cable Programmer.

12. TWE operates as a cable programmer principally through its HBO division ("HBO"). HBO operates two programming services known as Home Box Office (the "HBO Service") and Cinemax. HBO also owns and operates, through a joint venture with Viacom International Inc., a programming service known as Comedy Central. (Bewkes Aff. ¶ 2) TWE or its affiliated entities also have interests in various other programming services, including Courtroom Television Network. (Collins Aff. ¶ 10; Bigelow Aff. ¶ 5)

13. Both the HBO Service and Cinemax are premium television programming services, *i.e.*, they are sold to subscribers on a per-channel basis for a monthly subscription fee that is incremental to the monthly fee for the programming tier the subscriber has selected. (Bewkes Aff. ¶ 3)

14. HBO is dependent upon multichannel video programming distributors for conveying their programming to subscribers. The HBO Service and Cinemax are offered to subscribers by cable operators and MMDS and SMATV system operators. They are also offered on a subscription basis to owners of C-band home satellite dishes, both directly by HBO and by packagers of satellite programming. (Bewkes Aff. ¶ 4)

15. HBO has already recently introduced "multiplexing". Under multiplexing, the HBO and Cinemax Services are exhibited to subscribers on two or three different channels, usually at no additional cost to the subscriber. By using differentiated scheduling, different programs appear on each multiplexed channel at a given time in order to appeal to various audiences. Multiplexing is intended to enhance viewing options, to increase subscriber satisfaction, and to better enable HBO to compete with other sources of programming, including broadcast television. Under HBO's multiplexing approach, cable systems have the option of dedicating three channels for HBO or two for Cinemax. (Bewkes Aff. ¶ 8; Kasman Aff. ¶ 2; Collins Aff. ¶ 13)

16. The HBO Service offers a wide variety of programming, including motion pictures, sporting events, concerts and documentaries. Cinemax consists primarily of motion pictures. HBO exercises editorial discretion in determining which programs to include in its program services. In making such determinations, it takes into account such factors as the nature, content and quality of the programming, its acceptance by audiences in other media, its timeliness in relation to current events and issues, and other factors. (Bewkes Aff. ¶ 5)

17. Since its inception, HBO has produced (or others have produced for it) its own programs for exhibition on its programming services, particularly on the HBO Service. Such programs often address issues that are controversial or have great social or political significance. (Bewkes Aff. ¶ 6)

18. Comedy Central, a nonpremium service partially owned by TWE, offers comedy programming, including political satire. Courtroom Television Network, a cable programmer managed and partially owned by TWE, is a nonpremium service that provides coverage of notable, and often controversial, judicial proceedings. Both Comedy Central and Courtroom Television Network are relatively new services, the former being established in April 1991, and the latter in July 1991. (Bewkes Aff. ¶ 2; Bigelow Aff. ¶ 12)

19. TWC cable operators are also active in the production of original programming that is offered to their local subscribers. For example, the New York 1 service recently launched in TWE's New York City cable systems offers continuous 24-hour coverage of local news and events in New York City. (Collins Aff. ¶ 4; Bigelow Aff. ¶ 9)

20. Many cable programmers produce their own programming, devoted to such diverse subjects as news and political events, religious subjects, education, music and general entertainment. (Collins Aff. ¶ 4; Bigelow Aff. ¶ 3)

21. Producing new programming is an expensive endeavor. Recent programming ventures have required expenditures of as much as $75 to $150 million before achieving profitability. (Bigelow Aff. ¶ 4)

TWE Competes with a Wide Variety of Alternate Sources of News, Information and Entertainment.

22. TWC's cable systems compete with a wide variety of alternate sources of news, information and entertainment. In particular, TWC's cable systems compete with broadcast television stations, which, unlike cable systems, offer their programming without direct charges to viewers. (Collins Aff. ¶ 20)

23. Although TWC's cable systems compete with broadcast television stations, the cable industry is differ-

ent from the broadcasting industry. There are no physical limitations on the ability to construct multichannel video distribution systems equivalent to the physical scarcity of the broadcast spectrum. (Collins Aff. ¶ 21)

24. TWC's cable systems also compete with other means of delivering video programming to consumers, including satellite master antenna television ("SMATV") systems, in which apartments in a multiple dwelling unit ("MDU") are connected to antennas that are located on the premises and capable of receiving satellite-delivered program services (some SMATV systems use microwave relays to connect multiple MDUs to a single satellite receiving antenna); multichannel multipoint distribution systems ("MMDS"), often called "wireless cable", which deliver one or multiple channels of programming to subscribers by means of terrestrial microwave antennas; home satellite dishes ("TVROs"), which enable their owners to receive a vast array of programming services that are transmitted by satellite, either through a subscription agreement that is arranged directly with the programmers or indirectly through any of a large number of program packagers, or, in many instances, free of charge; and video cassettes and video disks, which consumers may rent or buy for viewing on home video cassette and disk players. (Collins Aff. ¶ 22)

25. TWC's cable systems also compete with the traditional print media, especially in the provision of news, with radio, especially in the provision of music, and with all these media and broadcast television stations for advertising. (Collins Aff. ¶¶ 22-23)

TWC Has Received Numerous Must Carry Requests.

26. TWC and its affiliated cable operators have received a number of requests for carriage pursuant to the must carry provisions for both commercial stations and noncommercial educational stations. (Apfelbaum Aff. ¶ 2) Cable systems who have received such requests include the following: Yellow Savings (Ohio); Eaton

(Ohio); Troy (Ohio); Tipp City (Ohio); Piqua (Ohio); Paragon Cable (El Paso, Texas); Colorado Springs (Colorado); Tri-County Cable (Salem, New Jersey); Bakersfield (California); American Cablevision (Arvin/Lamont and Tehachapi, California); American Cablevision (Leavenworth, Kansas); Marshall Cable TV (Missouri); Cablevision (Central Florida); Luling Cablevision (Texas); Paragon Cable (Mount Vernon, New York); Cablevision (Savannah, Georgia); and Memphis Cablevision (Tennessee).

The Must Carry Provisions Infringe Upon TWE's Editorial Discretion.

27. If the must carry provisions are upheld, TWC systems will have to add a substantial number of broadcast stations which, in the exercise of their editorial discretion, they would not otherwise carry. Such systems include Bakersfield, California (Grinstead Aff. ¶2-4, attached as Exh. V to Apfelbaum affidavit); Leavenworth, Kansas (Christensen Aff. ¶¶ 3-6, attached as Exh. T to Apfelbaum affidavit); Portland, Maine (Darrell Aff. ¶ 3); Fayetteville, North Carolina (Carey Aff. ¶ 4); and Salem, New Jersey (Rider Aff. ¶¶ 1-3, attached as Exh. U to Apfelbaum affidavit); and Staten Island, New York (Collins Aff. ¶ 26(d)).

28. On average, the 1992 Cable Act requires TWC to relinquish editorial and business control of an estimated 30% of its channels (approximately 8 must carry channels, approximately 2 PEG channels and approximately 3.5 leased access channels). (Collins Aff. ¶ 38) As many as 42 TWC systems may have to carry over an estimated 11 broadcast stations. (*Id.* at ¶ 26(a))

29. If the must carry provisions are upheld, a substantial number of services that TWC's systems presently carry will have to be dropped or repositioned. Such systems include Salem, New Jersey (Rider Aff. ¶ 5; Fayetteville, North Carolina (Carey Aff. ¶ 4); certain systems in

TWC's San Diego Division (Burr Aff. ¶ 5); and certain systems in TWC's Greater Boston Division (O'Connell Aff. ¶ 4). Some systems will incur substantial expense as a result of such displacements. (Rider Aff. ¶¶ 8-12; Carey Aff. ¶ 3)

30. As a result of the must carry provisions, including the channel positioning provisions, TWC's systems in Manhattan recently engaged in litigation with a local non-commercial broadcast station, WNYC-TV, that culminated in proceedings before this Court. During the latter part of 1992, a realignment process was commenced for the channels on all TWC's New York City cable systems, including the Manhattan systems. The objective of the realignment process was to harmonize the offering of programming to subscribers, such that the same programming services would be carried on the same channel position in all of the New York City cable systems affiliated with TWC. The realignment plan was intended to maximize the satisfaction of the current subscribers and present a channel lineup which would be most attractive to potential subscribers. As part of the initial step of a complete realignment plan, WNYC-TV was moved on February 1 from Channel 3 to Channel 31 on TWC's two Manhattan systems. Channel 31 is its off-air broadcast channel as assigned by the FCC and the channel on which WNYC-TV was carried on the other TWC New York City systems. (Rosenblum Aff. at ¶¶ 8-9)

31. Pursuant to the must carry provisions of the 1992 Cable Act, WNYC-TV attempted to stop the realignment process. After having been informed that it would be moved to Channel 31, WNYC-TV requested carriage pursuant to § 5 of the 1992 Cable Act, and requested channel positioning on Channel 3. The request, including the channel position request, was denied on December 21, 1992. One month later, WNYC-TV petitioned the FCC for emergency relief; its petition was denied on January 22, 1993. The Second Circuit Court of Appeals denied

WNYC-TV's petition for a temporary restraining order on January 28, 1993. WNYC-TV's application for a temporary restraining order to this Court was denied on February 1, 1993. (Rosenblum Aff. ¶ 10)

Loss of Available Channel Capacity to TWE's Programming Interests.

32. The dedication of channel capacity required under the must carry provision sharply diminishes the number of cable channels on which HBO's programming can be provided. (Bewkes Aff. ¶ 9; Kasman Aff. ¶¶ 5-6) The must carry provisions have impeded HBO's efforts to provide its programming services in the multiplexed format. (Bewkes Aff. ¶ 11; Kasman Aff. ¶¶ 2-6; Hanson Aff. ¶¶ 2-3)

33. The channel positioning provisions allow local broadcast television stations to demand carriage on channels currently occupied by one of HBO's programming services thereby forcing HBO's services to other channels. (Bewkes Aff. ¶ 12)

34. Similarly, the must carry regime deprives those non-premium services in which TWE holds an interest of channel capacity which would otherwise be available and constitute an opportunity for additional distribution. (Bigelow Aff. ¶¶ 11-12)

Dated: Washington, D.C.
February 12, 1993

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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PLAINTIFFS DISCOVERY COMMUNICATIONS, INC. AND THE LEARNING CHANNEL, INC.'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

Pursuant to Local Rule 108(h), Plaintiffs Discovery Communications, Inc. and The Learning Channel, Inc. submit, in conjunction with their motion for summary judgment, the following statement of material facts as to which there is no genuine issue.

The Discovery Channel

1. The Discovery Channel was founded in 1985 and since then has grown to become the fifth largest cable network with approximately 59 million subscribers, or 96% of the televisions wired for cable.

2. The Discovery Channel features nonfiction documentaries about science, nature, technology, human events and history. Among The Discovery Channel's programs are "The Natural World", "Wildlife Chronicles", "In the Company of Whales," "Red Sea," "Russia: Live From The Inside," "Africa Safari: Live," "People of the Forest," and "Ivory Wars." The Discovery Channel also provides a series of programs with The Smithsonian Institution called "Invention", each original episode of which focuses on different inventions. A number of The Discovery Channel's special programs have won Emmys and Ace Awards.

3. Each week in "Discovery Journal", The Discovery Channel presents issues of social and political significance. Among the subjects covered are famine, over-population, organ donation, capital punishment and AIDS.

4. The Discovery Channel also includes public affairs programming. For example, in February 1992 The Discovery Channel provided a block of 20 minates free time to each of the major Presidential candidates; more than 1.5 million people watched the candidates on the The Discovery Channel sponsored forum, Address To The Nation, which was anchored by Walter Cronkite.

5. The Discovery Channel competes directly with over-the-air broadcasting.

The Learning Channel

6. Discovery Communications acquired The Learning Channel in 1991 as a complementary service to The Discovery Channel. The Learning Channel is regarded as a start-up channel because of the substantial changes made to it after its acquisition and relaunching in October 1991. As a start-up channel, The Learning Channel usually competes for one of the last available spaces a cable operator has available for programming.

7. The Learning Channel features educational programs for viewers of all ages. The Learning Channel schedule includes six hours of commercial-free preschool educational programming every weekday called "Ready, Set, Learn"; programs such as "The Learning Channel Elementary School" and "Mad Math" for elementary school children; weekly programs such as "Ten Great Writers" for high-school age and other viewers; and adult education programs such as "Learn to Read" which gives adults the opportunity to learn to read in the privacy of their own homes.

8. Regular series on The Learning Channel include "Ancient Journeys", "Archeology", "A Traveler's Journal", "The World: A Television History", "Civilization" and "Science Frontiers." These programs provide a broad prospective on history, world culture, science, sociology and anthropology.

9. The Learning Channel currently provides 18 hours of programming every day of the week. It is carried on approximately 15% of cable systems in the United States.

10. Prior to the passage of the Cable Act of 1992, The Learning Channel's efforts to expand its carriage were succeeding. The Learning Channel was adding 400,000 new subscribers per month by late summer 1992.

11. After the Cable Act became law, The Learning Channel's growth slowed substantially. The Learning Channel now projects it will add fewer than 75,000 subscribers per month on average, and The Learning Channel may even experience a loss of subscribers as cable operators replace it with must-carry programming mandated by the Act. The Learning Channel currently has about 17.5 million subscribers.

The Technologies of Broadcasting and Cable

12. Broadcast television and cable television have wholly different technologies. Broadcasters radiate electromagnetic waves from transmitters. The waves are intercepted by the viewers' television receivers and translated to produce video images. Because of the physical limits of the electromagntic spectrum, the number of broadcasters in any area at any time is physically limited. Thus, limited regulation and allocation of the airwaves is essential for over-the-air broadcasters.

13. Cable networks, such as The Discovery Channel and The Learning Channel, sell their programs to cable system operators, who retransmit the programs over coaxial and fiber optic cables to subscribers. The Discovery Channel and The Learning Channel also license their services in other alternative technology markets, includ-

ing the SMATV, MMDS and TVRO markets. The number of channels that can be distributed by cable and the alternate technologies are not limited by the electromagnetic spectrum, although for economic reasons most cable system operators usually carry between 36 and 54 channels.

Injury to The Discovery Channel and The Learning Channel by the Cable Television Consumer Protection and Competition Act of 1992

The Must-Carry Provisions

14. Sections 614 and 615 of the Communications Act of 1934, as added by sections 4 and 5 of the 1992 Cable Act, require each cable system to carry local commercial over-the-air broadcast stations on as much as one-third of the cable operator's channel capacity, plus low power stations and non-commercial educational stations.

15. Each cable system has a finite number of channels for transmitting programs. The requirement that each cable operator dedicate substantial capacity to over-the-air broadcast programs limits the number of channels available for cable signals. Moreover, cable operators now operating at full capacity will be required to drop cable networks to comply with the must-carry provisions.

16. Cable networks such as The Discovery Channel and The Learning Channel must compete for the remaining available usable channels. Cable networks are therefore necessarily less likely to be carried than the over-the-air broadcast stations, which must be carried. Popular networks, such as The Discovery Channel, will face artificially stiffer competition for the remaining channels. Newer networks, such as The Learning Channel, face exclusion.

17. Prior to the Act, The Learning Channel frequently vied for one of the last available channel positions in a cable system. After the Act, The Learning Channel has

experienced greater difficulty as available space has been constricted by the must-carry provisions. The Learning Channel has been rejected or threatened with deletion by cable operators to make channel space available for the broadcast signals which must be added pursuant to the must-carry provisions of the Act.

18. The must-carry provisions of the 1992 Cable Act also reduce the audience for The Discovery Channel. While The Discovery Channel is now carried on the basic service tier by most of its cable operator customers, the must-carry provisions will cause The Discovery Channel to be moved to higher programming tiers which are targeted at narrower audiences. As a result, The Discovery Channel will lose advertising revenue and have to cut back on its programming efforts, at the same time favored broadcast television channels will have artificially larger audiences.

19. The 1992 Cable Act's requirement that cable operators must carry local over-the-air broadcast stations has harmed TLC. Cable operators who had been considering adding TLC have not done so because of the need to preserve channel space for mandated local over-the-air broadcasting stations. Among the cable operators who have refused to add The Learning Channel because of the Act's requirements are Continental Cablevision in Stockton, California, Continental Cablevision in Marysville, California, and Bresman Cable in Essexville, Michigan.

20. The must-carry provisions of the Act also will cause The Learning Channel to be dropped by some cable operators to make room for additional local broadcast stations. For example, TKR in Piscataway, New Jersey has informed The Learning Channel that it may have to drop three cable networks, which may include The Learning Channel, in order to add three local independent broadcasters as required by the Act.

The Channel Positioning Requirements

21. Sections 614(b)(6) and 615(g)(5) of the Communications Act of 1934, as added by the 1992 Cable Act, require each cable operator to retransmit the mandatorily carried over-the-air stations on the channel number on which each such station is currently broadcast, or was broadcast on stated dates, as set forth in the Act.

22. Channel positioning is a significant factor affecting the size of the audience reached. Lower channel numbers, and channels in proximity to other popular channels typically reach larger audiences. Cable networks such as The Discovery Channel with preferable channel positions face displacement to less favorable channel positions by over-the-air broadcast stations. Also, cable audiences associate networks like The Discovery Channel with the channel on which they have traditionally been carried. Cable networks forced to change channels will lose audience recognition. New networks like The Learning Channel will be totally foreclosed from more favorable slots no matter how good the programming.

23. Requiring cable operators to give preference to over-the-air broadcast programmers in making channel assignment invades the editorial judgment of cable operators and denies cable programmers access to positions statutorily granted to over-the-air broadcast stations.

Leased Access

24. Under the leased access provision, cable operators are required to make a certain percentage of their channels available for commercial use under rates, terms and conditions set by the FCC.

25. Each cable system has a finite number of channels for transmitting programs. The requirement that each cable operator dedicate substantial capacity to leased access limits the number of channels available for other cable signals.

26. Cable networks such as The Discovery Channel and The Learning Channel must compete for the remaining available usable channels. Cable networks are therefore necessarily less likely to be carired than leased access broadcasters, which must be carried. Cable networks such as The Discovery Channel and The Learning Channel will face artificially stiffer competition for the remaining channels.

Respectfully submitted,

/s/ Allan A. Tuttle
ALLAN A. TUTTLE
D.C. Bar No. 236976
GARRET G. RASMUSSEN
D.C. Bar No. 239616
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

NATIONAL CABLE TELEVISION ASSOCIATION, INC.'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

Plaintiff National Cable Television Association, Inc. (NCTA) submits this Statement of Material Facts as to Which There Is No Genuine Issue in support of its motion for summary judgment in Civil Action No. 92-2495.

1. Plaintiff NCTA is the principal trade association of the cable television industry in the United States. NCTA represents owners and operators of cable systems serving over 80 percent of the nation's 57.2 million cable households, as well as more than 60 national and regional cable programming networks. Affidavit of Gregory L. Klein ¶ 4.

2. Cable television operators determine what programming will be carried on their systems by selecting among various programming sources. These include commercial and noncommercial broadcast stations; national "basic" cable networks; "premium" networks; regional cable programming; and programming developed by cable operators themselves. Klein Affidavit ¶ 6; Affidavit of Michael J. Egan ¶ 5.

3. Currently, 80 national and 48 regional cable networks offer programming, and 14 more networks are planned. Klein Affidavit ¶ 6.

4. In the future, emerging technologies such as high definition television (HDTV) and interactive programming, as well as innovative services like the presentation of films at staggered starting times on different channels, will compete with traditional sources of programming for available channel capacity. Klein Affidavit ¶ 11.

5. Cable television systems have a defined channel capacity. The average capacity of all systems in the United States is about 40 channels. In 1992, 88 percent of all systems for which capacity information was available had a capacity of fewer than 54 channels. Klein affidavit ¶ 7.

6. About 2,000 cable systems, serving one-third of all cable subscribers, currently have no excess channel capacity available for use. Klein Affidavit ¶ 8.

7. Upgrading or rebuilding a local cable system to increase channel capacity requires large capital investments, generally in the millions of dollars. Klein Affidavit ¶ 9.

8. For the foreseeable future, the supply of available programming will exceed the carriage capacity of almost all local cable systems. Klein Affidavit ¶ 10; Egan Affidavit ¶ 6

9. Sections 4 and 5 of the 1992 Cable Act will require cable television operators involuntarily: (a) to carry certain broadcast stations they otherwise would not retransmit; (b) to offer all subscribers certain broadcast stations as part of basic cable service; and (c) to give those stations preferential treatment in channel assignment. Egan Affidavit ¶¶ 8-13; Affidavit of Joseph J. Collins ¶ 33, *Time Warner Entertainment Co. v. FCC*, Civ. Action No. 92-2494; Affidavit of Terence F. McGuirk ¶¶ 27-29, *Turner Broadcasting System, Inc. v. FCC*, Civ. Action No. 92-2247.

10. Also as a result of the 1992 Cable Act's must-carry requirements, cable operators will deny carriage to non-broadcast programming, delete non-broadcast pro-

gramming from their basic service, and reassign non-broadcast programming to less favorable channel positions. Egan Affidavit ¶¶ 8, 13; Collins Affidavit ¶ 33(b); McGuirk Affidavit¶¶ 28-29; Affidavit of Douglas V. Holloway ¶ 9, *Turner*; Affidavit of Lee Masters ¶ 6, *Turner*; Affidavit of Timothy B. Robertson ¶ 7, *Turner*.

11. Inclusion in a cable system's basic service (as opposed to an optional service tier) and placement on a lower-numbered channel (as opposed to a higher-numbered one) increase the viewership of particular programming. Declaration of John Hendricks ¶¶ 35, 37, *Discovery Communications, Inc. v. United States*, Civ. Action No 92-2558; Affidavit of Nickolas Davatzes ¶ 9, *Turner*; Robertson Affidavit ¶ 6; Affidavit of Joseph M. Segal ¶ 11, *Turner*; Holloway Affidavit ¶ 11.

12. The number of operational, commercial broadcast television stations in the United States rose from 919 in 1986 to 1118 in 1992, an increase of 22 percent. More commercial broadcast stations than ever before were on the air in 1992. Klein Affidavit ¶ 14.

13. The number of operational, noncommercial educational broadcast television stations in the United States rose from 316 in 1986 to 363 in 1992, a 15 percent increase. More educational television stations than ever before were broadcasting in 1992. Klein Affidavit ¶ 14.

14. In October 1991, broadcast television stations were licensed in 594 different U.S. cities, 80 more cities than in August 1985. Klein Affidavit ¶ 15.

15. Thirty-five percent of all television-watching households in the United States receive only broadcast television. Klein Affidavit ¶ 16.

16. Independent commercial broadcasting stations and public broadcasting stations claimed an approximately constant share of all television viewing between the 1985 86 season and the 1991 92 season—about a 20

share and a 3 share, respectively. The top 3 commercial broadcast networks experienced a decline in their share of viewing from a 66 share during the 1985 86 season to a 54 share in 1991 92, but they remain the most-watched programming on television. In total, broadcast programming accounted for more than 70 percent of all television viewing during the 1991 92 season. Klein Affidavit ¶ 17.

17. Ninety-two percent of all television advertising revenue goes to broadcast television. Less than 8 percent goes to cable television. Hendricks Declaration ¶ 35.

18. The average U.S. cable system carried 8.57 local broadcast signals in 1990, 7 percent more than it carried in 1986. Klein Affidavit ¶ 13.

19. Thirty-four of the more than 1500 U.S. cities served by a daily newspaper are served by two or more dailies under separate ownership; as of 1991, there were 53 instances in which two or more cable systems served the same geographic area. Klein Affidavit ¶ 18.

20. Cable television does not rely on broadcast technology and limitations on cable transmission are not attributable to the physical scarcity of the electromagnetic spectrum. Klein Affidavit ¶ 5.

Respectfully submitted,

/s/ H. Bartow Farr, III
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF MARC J. APFELBAUM

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

MARC J. APFELBAUM, being duly sworn, deposes and says:

1. I am Associate General Counsel and Assistant Secretary of Time Warner Cable, a division of Plaintiff Time Warner Entertainment Company, L.P. ("TWC").

2. Notwithstanding the fact that Section 4 of the 1992 Cable Act is not yet in effect, Time Warner Cable and affiliated systems around the country have received several demands for carriage from local commercial television stations, including a religious programming station.

3. Time Warner Cable and affiliated cable systems around the country have also received numerous must carry requests pursuant to Section 5 of the 1992 Cable Act, a number of which are described below.

4. Several TWC systems in Ohio received written must carry requests sent jointly by WPTD and WPTO, which, according to the requests, are noncommercial stations based in Dayton, Ohio, and Oxford, Ohio, respectively. WPTD and WPTO requested carriage under Section 5 on the Yellow Springs cable system, the Eaton cable system (which serves both Eaton and Germantown), the

Troy cable system, the Tipp City cable system, and the Piqua cable system. (Attached as Exhibits A-F are letters requesting carriage of WPTD and WPTO.)

5. Paragon Cable of El Paso, Texas received a written must carry request from KSCE, which purports to be a noncommercial station based in El Paso. (Attached as Exhibit G is the letter requesting carriage of KSCE.)

6. Colorado Springs Cablevision of Colorado Springs received a written must carry request from KBDI, which, according to the request, is a local noncommercial station. (Attached as Exhibit H is the letter requesting carriage of KBDI.)

7. Tri-County Cable in Salem, New Jersey received a written must carry request from WYBE, which, according to the request, is a noncommercial station based in Philadelphia, Pennsylvania. (Attached as Exhibit I is the letter requesting carriage of WYBE.) Although the request was later withdrawn (letter of withdrawal attached as Exhibit J), it could be reinstated at any time under Section 5 of the 1992 Cable Act.

8. TWC's Bakersfield Division in Bakersfield, California received a written must carry request from KVPT, which, according to the request, is a noncommercial station based in Fresno, California. (Attached as Exhibit K is the letter requesting carriage of KVPT.) American Cablevision of Arvin Lamont and Tehachapi, California also received a written must carry request from KVPT. (Attached as Exhibit L is the letter requesting carriage in Arvin Lamont.)

9. American Cablevision of Kansas City, Missouri received a written must carry request from KTWU, which, according to the request, is a noncommercial television station based in Topeka, Kansas. (Attached as Exhibit M is the letter requesting carriage of KTWU.)

10. Marshall Cable TV in Marshall, Missouri received a written must carry request from KMOS, which, according to the request, is a noncommercial public television station out of Warrensburg, Missouri. KMOS requested carriage "upon any and all of the cable systems that your company and its subsidiary firms own and/or operate within the KMOS-TV Grade B broadcast radius (see enclosed contour map)." KMOS enclosed a list of communities in which it expected carriage but stated that "[t]he attached list of communities is not to be construed as inclusive of the full extent of this request." (Attached as Exhibit N is the letter requesting carriage of KMOS.) Marshall Cable TV, the only TWC system operating within KMOS's broadcast radius, already carries KMOS on that station's regular broadcast channel.

11. Cablevision of Central Florida received a written must carry request from WCEU, which, according to the request, is a noncommercial station based in Daytona Beach. (Attached as Exhibit O is the letter requesting carriage of WCEU.)

12. Luling Cablevision in Luling, Texas, received a written must carry request from KLRN, which, according to the request, is a noncommercial station based in San Antonio. (Attached as Exhibit P is the letter requesting carriage of KLRN.)

13. Paragon Cable of Mount Vernon, New York, received a written must carry request from WNYC-TV, which, according to the request, is a noncommercial station based in Manhattan. (Attached as Exhibit Q is the letter requesting carriage of WNYC-TV.)

14. Cablevision of Savannah, Georgia, received a written must carry request from WJWJ, which, according to the request, is a noncommercial station based in Beaufort, South Carolina. (Attached as Exhibit R is the letter requesting carriage of WJWJ.)

15. Memphis Cablevision received a written must carry request from WMAV, which, according to the request, is a noncommercial station based in Oxford, Missis-

sippi. (Attached as Exhibit S is the letter requesting carriage of WMAV.)

16. Some of the hardships which these must carry requests impose on TWC are described in the affidavits of Stephanie L. Chistensen, Vice President of Customer Service of American Cablevision of Kansas City; Michael J. Rider, General Manager of Tri-County Cable in Salem, New Jersey; and Charles William Grinstead, President of TWC's Bakersfield, California Division, attached as Exhibits T, U, and V respectively. Hardships resulting from the must carry provisions are also documented in the affidavits of Jeffrey Bewkes, Thayer Bigelow, Ann Burr, William Carey, Joseph Collins, Jeff Darrell, David Hanson, Matthew Kasman, Terry O'Connell, and Barry Rosenblum, submitted separately.

/s/ Marc J. Apfelbaum
MARC J. APFELBAUM

[Notarization Omitted in Printing]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF JEFFREY BEWKES

STATE OF NEW YORK,)
) ss:
COUNTY OF NEW YORK,)

Jeffrey Bewkes, being duly sworn, deposes and states as follows:

1. I am President and Chief Operating Officer of Home Box Office ("HBO"), a division of Time Warner Entertainment Company, L.P. ("TWE"). I have held that position since TWE's formation in June of 1992. Prior to that, I held the same position with HBO's predecessor, Home Box Office, Inc. I first joined Home Box Office, Inc., in 1979.

Home Box Office

2. HBO operates two programming services: the Home Box Office Service ("the HBO Service") and the Cinemax Service. HBO also owns and operates, through a joint venture with Viacom International, Inc., a programming service known as Comedy Central.

3. The HBO and Cinemax Services are premium television programming services, *i.e.*, they are each generally sold to subscribers for a monthly subscription fee in addition to the monthly fee for the programming tier the subscriber has selected.

4. The HBO and Cinemax Services are offered to subscribers by cable operators, multichannel multipoint dis-

tribution services ("MMDS") and satellite master antenna television ("SMATV") system operators. They are also offered on a subscription basis to owners of C-band home satellite dishes, both directly by HBO and by packagers of satellite programming such as Superstar Connection, Consumer Satellite System, and the National Rural Telephone Cooperative, which HBO has authorized to act as distributors.

5. The HBO Service offers a wide variety of programming including motion pictures, sporting events, concerts, and documentaries. The Cinemax Service primarily offers motion pictures. HBO exercises editorial discretion in determining which programs to include—and which programs not to include—in its programming services. In making such determinations, it takes into account, among other things, the nature, content, and quality of the programming, its acceptance by audiences in other media, its distinctiveness to HBO's programming services, and its timeliness in relation to current events and issues.

6. Since its inception, HBO has produced (or others have produced for it) its own programs for its programming services, particularly for the HBO Service. Such programs often address social or political issues of a controversial nature, and therefore might not be shown on network television, which is subject to broadcast content restrictions and the willingness of advertisers to support such programs. In recent years, for example, HBO has produced (or others have produced for it) notable programs on such subjects as abortion (*A Private Matter*; *The Becky Bell Story: Public Law 106*; *Abortion: Desperate Choices*), gun control (*Without Warning: The James Brady Story*; *Guns: A Day in the Death of America*), AIDS (*AIDS: Everything You and Your Family Need to Know . . .*; *Common Threads: Stories from the Quilt*, *First Love Fatal Love*) and children's advertising (*Buy Me That!*; *Buy Me That Too!*). *See generally* Bill Carter, *HBO as a Modern-Day Dickens*, N.Y. Times, November 1, 1992, at F5 (attached hereto as Exhibit A).

HBO has also produced (or others have produced for it) programs criticizing major U.S. corporations and the U.S. government, such as *Afterburn* (criticizing the U.S. Air Force and General Dynamics in the handling of the death of a pilot in an F-16 test flight) and *The Tragedy of Flight 103* (criticizing the Federal Aviation Administration and Pan American World Airways). HBO also produces programming for others, including broadcasters.

7. To attract new subscribers to its services, HBO offers "free previews" of its programming to subscribers who do not already receive its programming. During these free previews, local cable systems unscramble the signals for HBO and Cinemax so that all subscribers may receive these premium channels. Free previews are an effective marketing tool for HBO. They are also well received by cable operators because, in addition to increasing subscribers, they offer a free benefit—a weekend of premium programming at no cost—to subscribers, even if they do not eventually subscribe to the services. In January, 1993, HBO offered free previews to non-HBO subscribers. Because of the 1992 Cable Act's restrictions on the presentation of free previews, many cable systems did not offer this preview. The January preview was less effective than the previous three previews that we have offered. I believe that this was due at least in part to the 1992 Cable Act's restrictions.

8. HBO has also recently introduced "multiplexing". Under multiplexing, the HBO and Cinemax Services are exhibited to subscribers on two or three different channels, usually at no additional cost to the subscriber. By using differentiated scheduling, different programs appear on each multiplexed channel at a given time in order to appeal to various audiences. Multiplexing is an innovative technique, pioneered by HBO, that is intended to enhance viewing options, to increase subscriber satisfaction, and to better enable HBO to compete with other sources of programming, including broadcast television.

9. The must-carry, public, educational and governmental ("PEG") access, and leased-access provisions of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act") and the Cable Communications Policy Act of 1984 (the "1984 Cable Act") cause injury to HBO in a variety of ways. The 1980s produced a steady increase in the number of available programming services, and, as a result, most cable operators have few or no excess channels. By compelling cable operators to devote channel capacity to broadcast, PEG, and leased-access programming that they would not otherwise provide, the must-carry, PEG, and leased-access provisions sharply diminish the number of cable channels on which HBO's programming can be provided. These restrictions therefore curtail HBO's opportunities to communicate information and entertainment.

10. Similarly, by requiring DBS operators to reserve from 4 to 7 percent of their channel capacity for noncommercial programming of an educational or informational nature, Section 25 of the 1992 Cable Act diminishes the number of channels on which such operators can provide HBO's programming. This restriction therefore also curtails HBO's opportunities to communicate information and entertainment.

11. Moreover, the must-carry, PEG, and leased-access provisions will seriously impede HBO's efforts to provide its HBO and Cinemax services in multiplexed format. The ability of cable operators to make additional channels available is crucial to HBO's efforts to provide its services in a multiplexed format. By diminishing the available channel capacity, the must-carry, PEG, and leased-access provisions impair HBO's ability to engage in multiplexing, thereby diminishing viewing options to HBO and Cinemax subscribers, reducing subscriber satisfaction, and limiting HBO's effectiveness as a competitor.

12. The channel positioning provisions of the 1992 Cable Act will cause further injury to HBO. These provisions will allow local broadcast television stations to demand carriage on a channel that is currently occupied by one of HBO's programming services, forcing the cable operator to move the cable programming services to another channel. The likely result of such a displacement will be consumer confusion, and, ultimately, a loss of subscribers unless the cable operator is willing to undertake an extensive and costly notification program well in advance.

13. HBO regularly examines opportunities to start up new programming services, which in the past have included (in addition to the HBO Service itself) the Cinemax Service, Festival, and the Comedy Channel (to which Comedy Central is a successor). In today's competitive environment, exclusive arrangements can be decisive in securing carriage for new services, as cable operators have often been unwilling to add new services (which are generally perceived as riskier than established services) unless offered an exclusive arrangement. Limitations on HBO's ability to offer exclusive arrangements to cable operators would hamper its efforts to secure carriage for new services, and will thus work as a disincentive to the development of new services. The likely net effect of the exclusive license provisions, then, is to inhibit, not encourage, the development of new programming services by those companies that have the greatest interest in providing a wide variety of programming services. In addition, the likely effect of the exclusive license provisions will be to stifle capital investment by those companies in the programming services of others.

14. Moreover, many of HBO's competitors are not vertically integrated and, thus, not subject to standardized terms and conditions or exclusive license restrictions of the 1992 Cable Act. For example, the Disney Channel, USA Network, and the Weather Channel are all popular programming services owned by companies that, so far as I am aware, have no corporate affiliation with any

cable operator. *See* Cable Network Ownership Chart, Cable TV Programming (April 30, 1992) (attached hereto as Exhibit B). Accordingly, HBO will be at a significant competitive disadvantage.

/s/ Jeffrey Bewkes
JEFFREY BEWKES

[Notarization Omitted in Printing]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF E. THAYER BIGELOW

STATE OF NEW YORK,)
) ss:
COUNTY OF NEW YORK,)

E. Thayer Bigelow, being duly sworn, deposes and states as follows:

1. I am President and Chief Executive Officer of Time Warner Cable Programming ("TWCP"), a division of Time Warner Cable ("TWC"), which itself is an unincorporated division of Time Warner Entertainment Company, L.P. ("TWE"). I have been involved in the cable industry since 1970. Indeed, at various times I have served as President of Home Box Office, Inc. ("HBO") and Manhattan Cable Television, Inc.

2. TWC is a cable operator with cable programming interests. The accompanying affidavit of Joseph J. Collins discusses TWC generally in its role as a cable operator and the injuries that the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act") and the Cable Communications Policy Act of 1984 (the "1984 Cable Act") will inflict on TWC and its divisions, primarily in their roles as cable operators. I will discuss TWC in its role as a programmer and the injuries that the Cable Acts will inflict on TWC and its divisions, primarily in their roles as programmers. The accompanying affidavit of Jeffrey Bewkes discusses HBO, which is also an unincorporated division of TWE, and the

injuries that the Cable Act will inflict on HBO as a programmer.

Programming Background

3. Many cable programmers produce their own programming, devoted to such diverse subjects as news and political events, religious subjects, education, music and general entertainment. Such programming reflects its originator's distinctive approach and point of view. In addition, when they make use of programming created by others, programmers exercise substantial editorial discretion in determining what to include—and what not to include—in the programming services that they offer. Cable programmers also decide, as any speaker does, where, when, by what means, to whom and on what terms they wish to communicate the news, information and entertainment that they offer.

4. Producing new programming is a very expensive and risky endeavor. Recent programming ventures have required expenditures of as much as $75 to $150 million before achieving profitability. This is a substantial amount of money in its own right. However, combined with the unpredictability and changing tastes of the television viewing public, it is even more of an investment risk.

5. To attract carriage of new programming, programmers, including Courtroom Television Network, a cable programmer managed and partially owned by TWC, have offered exclusive licensing agreements to cable operators. Exclusive licensing agreements are crucially important in the distribution of news, information and entertainment. Each media speaker, whether a newspaper, a broadcast television station, or a cable operator, strives to differentiate itself from other sources of news, information and entertainment by entering into exclusive license agreements to ensure that the material it offers will not be duplicated by other outlets. An example of the benefits that may be derived from advocating a strong policy of exclu-

sivity is the success of Turner Network Television ("TNT"). Time Warner Inc., the parent of TWE, is an investor in Turner Broadcasting Co., which operates TNT, and therefore I am generally familiar with its development. It is my belief that a portion of the great success that TNT has enjoyed is due to its policy of entering into exclusive license agreements with cable operators. Indeed, it is my belief that TNT achieved the greatest distribution in the shortest period of time of any service in cable programming history.

6. Indeed, many cable services, such as TNT and Courtroom Television would never have gotten started if the cable operator investors had not believed they could obtain the services on an exclusive basis, and thus differentiated themselves from their noncable competitors. If you have to give a service you developed to your competitor, there is significantly less incentive to develop the service.

7. Exclusive agreements are also valuable in spurring the development of new programming services. Such agreements assure a prospective distributor that others will not "free ride" on the distributor's efforts to promote and sell the new service. They also encourage distributors to make a greater investment in promotional and sales efforts by holding out the possibility of greater returns that exclusive distributorship of a popular product may permit.

8. Exclusive licensing agreements are attractive to cable operators because they allow them to differentiate their programming from that of their competitors, whether they be other cable operators, broadcasters, satellite master antenna television ("SMATV") systems, multichannel, multipoint distribution systems ("MMDS") or direct broadcast satellite ("DBS") systems. Exclusive licensing agreements are attractive to programmers because they not only allow programmers to attract investors, but

also to maximize their profits. Courtroom Television Network has entered into exclusive agreements for such reasons. As the United States Department of Commerce found:

> "Both buyer and seller can benefit from the availability and enforceability of exclusive rights. For the buyer, exclusivity may differentiate the programming, making it more marketable. For the seller, by using exclusivity as a concept to divide the range of possible licensees into different markets, the seller can arrange a sequence of distribution that will maximize revenue from the licensing of that product through several uses."

U.S. Department of Commerce, Video Program Distribution and Cable Television: Current Policy Issues and Recommendations, NTIA Report 88-233, at 109-10 (1988) (footnotes omitted) (relevant pages attached hereto as Exhibit A).

9. TWC cable systems are themselves active in the production of original programming that is offered to their local subscribers. In New York City, Time Warner Cable of New York City recently launched a 24-hour all-news channel, called "New York 1", which offers continuous coverage of local news and events in New York City. The TWC systems located in Ithaca and Rochester, New York, also produce and offer local news programs to their subscribers. Several TWC systems also offer local news segments produced exclusively for them by others, including local broadcasters. Many of TWC's cable systems also engage in the creation and production of other original programming to some extent.

10. Since the passage of the 1992 Cable Act, however, TWC has not invested in or began developing any new video programming services. TWC and other potential investors have little confidence in the ability of any new programming to obtain distribution under the 1992 Cable

Act's regulatory scheme. The rate regulation provisions, must carry requirements, and exclusive agreement restrictions all substantially limit cable programmers' ability to enter into carriage agreements.

11. Individually and together, the must carry, retransmission consent, public, educational and governmental ("PEG") access and leased access provisions of the 1984 and 1992 Cable Acts threaten especially severe and irreparable injury to Comedy Central, Courtroom Television Network and other recently developed non-premium services in which TWE has an interest. Such services obtain revenues from license fees paid by distributors such as cable operators for the right to exhibit the programming to their subscribers and from fees paid by advertisers who sponsor programs on the service. Because license fees and advertising revenues depend upon the number of persons who are able to view the service, it is crucial to the viability of such a service that it persuade as many operators as possible to offer the service to their subscribers.

12. Since they were launched in April and July 1991, respectively, Comedy Central has attracted approximately 22 million subscribers and Courtroom Television Network has attracted approximately 6.2 million subscribers. Each needs millions of additional subscribers to attain economic viability. By requiring cable operators to devote substantial channel capacity to must-carry broadcast stations, PEG channels and leased access programming, which would otherwise be available to Comedy Central, Courtroom Television Network and/or other non-premium programming services in which TWE has an interest, the Cable Acts deprive such services of vital opportunities to gain additional distribution. In addition, by giving broadcast television stations preferred status both as to coverage and as to channel position, the must-carry provisions will also deprive such services of opportunities to gain additional advertising revenues and divert such revenues to broadcast interests.

13. TWE is a vertically integrated programmer in that it owns both cable systems and programming services. However, many of TWE's principal competitors in the production and distribution of video programming are not vertically integrated. For example, The Disney Channel, the Arts & Entertainment Network, CNBC, ESPN, The Nashville Network, the Playboy Channel and USA Network are all popular programming services owned by companies which, as indicated by publicly available data, do not have any corporate affiliation with any cable operator within the meaning of the Cable Act. *See* Cable Network Ownership Chart, Cable TV Programming (April 30, 1992) (attached hereto as Exhibit B). Such programmers will be able to compete with the program services that TWE owns or in which it or an affiliate has an interest (including Sunshine Network, Black Entertainment Television ("BET"), Turner Broadcasting System (TNT, CNN, Headline News), Comedy Central, Courtroom Television Network (managed by TWCP), the Cinemax Service, the Home Box Office Service, and E! Entertainment Television) free of the challenged restrictions on vertically integrated programmers and will thereby gain competitive advantages over such services.

14. The vertically integrated services provisions of the 1992 Cable Act will irreparably injure TWC (i) by creating uncertainty, pending the conclusion of the FCC rulemaking, as to the extent to which cable operators, including those that do not have any corporate affiliation with TWE, may carry HBO and other TWE services simply because they are offered by a vertically integrated programmer; (ii) once FCC rules are promulgated, by limiting the ability of cable operators to continue to offer, or to add to their line-ups, the programming services offered by HBO and other TWE affiliated program services; (iii) by creating uncertainty, pending the conclusion of the FCC rulemaking, as to the extent to which TWC's cable systems may do business with vertically integrated services (whether or not such services have any corporate affiliation with TWC); and (iv) once FCC rules are promulgated, by limiting the ability of TWC's cable systems to continue offering, or to add to their channel line-ups, services of vertically integrated programmers, including program services of, or affiliated with, TWE.

15. During the interim period between the 1984 Cable Act deregulation and the 1992 Cable Act reregulation, cable operators could offer new programming with the expectation that they could adjust their rates to reflect the cost of that programming if necessary. This expectation resulted in a burst of creation of new programming services. Renewed rate regulation will most certainly chill the creation of new programming services and further investment in existing programming services because the ability of cable operators and programmers to profit from such expressive activities will be determined by the governments' views of what are reasonable profits rather than the open-ended potential rewards of the marketplace. Indeed, in the 1992 Cable Act, Congress seems to have chosen to fulfill its purpose of halting broadcasters' decline in the marketplace by using regulation to cripple their cable competitors' ability to continue to create new programming and new programming formats.

16. The rate regulation provisions will also discourage cable operators from investing in new programming for the same reasons. Since operators face limits in their ability to recoup their investment costs, they will be reluctant to invest in new programming. This reluctance is heightened by the vertical integration provisions, which would subject cable programming services to their restrictions as soon as cable operators invest in them.

/s/ E. Thayer Bigelow
E. THAYER BIGELOW

[Notarization Omitted in Printing]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF ANN BURR

STATE OF CALIFORNIA,)
) ss:
COUNTY OF SAN DIEGO,)

1. I am President of the San Diego Division of Time Warner Cable, which is an unincorporated division of Time Warner Entertainment Company, L.P. I have held this position for seven years and have been employed by Time Warner Cable or its predecessors for eighteen years.

2. The Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act") and the Cable Communications Policy Act of 1984 (the "1984 Cable Act") have had a far reaching and negative impact on the San Diego Division. Below I detail only a few of these impacts.

3. *First*, the 1992 Cable Act's requirements regarding free previews of premium channels consume considerable time and create significant costs. For example, two of our systems, Southwestern Cable TV and American Cablevision of Coronado, which in combination have 162,000 subscribers, recently notified their subscribers of an upcoming free preview. The notice, which takes the form of a bill insert, has a cost of between .02¢-03¢ per subscriber, depending on the number of other bill inserts included in a given month, or a total of between $3,240.00-$4,860.00

4. *Second*, because the 1992 Cable Act reinstates liability for cablecasting obscene material, we are compelled to prescreen all public access and leased access programming, which we are obligated to carry by the 1984 Cable Act but over which we have almost no control. This prescreening turns us into censors and forces us to make very difficult decisions for which we lack expertise. The programming that the Division itself chooses to cablecast is not of such a nature that we are required to make close judgments regarding obscenity. Prescreening consumes approximately 312 to 520 employee hours per year.

5. *Third*, the must carry provisions will cause particular problems for our systems that currently utilize 100 percent of their channel capacity. To carry the stations required by the must-carry provisions, these systems will be required to delete programming that they currently provide. It has been our experience that programming deletions of any kind cause more subscriber aggravation than any other action, including temporary outages and rate increases.

/s/ Ann Burr
ANN BURR

[Notarization Omitted in Printing]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF WILLIAM C. CAREY III

STATE OF NORTH CAROLINA,)
) s.s.:
COUNTY OF CUMBERLAND,)

1. I am President of the Fayetteville Division of Time Warner Cable, which is a division of Time Warner Entertainment Company, L.P. I have held this position for over six years and have been employed by Time Warner Cable or its predecessor for thirteen years.

2. If the must carry provisions of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act") are upheld, they will cause several injuries to the Fayetteville, North Carolina System.

3. HBO presently occupies channel 5 on the Fayetteville system, which has approximately 75,000 subscribers. If the must carry provisions are upheld, we could be required to move WRAL, a Raleigh, North Carolina CBS affiliate, to channel 5. On channel 5 we have a negative trap—a mechanism through which we are able to prevent subscribers from receiving HBO programming if they have not purchased it. It would cost the Fayetteville system approximately $500,000 to move HBO to another channel and make the required technical adjustments.

4. In addition, the Fayetteville system could also be required to carry a Goldsboro, North Carolina station, WYED, for which there is little demand. To carry WYED,

the system would possibly have to drop a satellite delivered programming service, such as the USA Network, CNN, ESPN or Courtroom Television Network, services which we would prefer to carry and believe our customers would prefer to receive.

s/ William C. Carey III
WILLIAM C. CAREY III

[Notarization Omitted in Printing]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF JOSEPH J. COLLINS

STATE OF CONNECTICUT,)
) ss:
COUNTY OF FAIRFIELD,)

Joseph J. Collins, being duly sworn, deposes and states as follows:

1. I am Chairman and Chief Executive Officer of Time Warner Cable ("TWC"), an unincorporated division of Time Warner Entertainment Company, L.P. ("TWE"). I am a Managing Director of TWE, and prior to TWE's formation in the summer of 1992 I was Chairman and Chief Executive Officer of Time Warner Cable Group, an unincorporated division of Time Warner Inc., which directed the operations of American Television and Communications Corporation ("ATC"), of which I was Chairman and Chief Executive Officer, and Warner Cable Communications, Inc. I have been involved in the cable industry for 20 years.

Background of Cable Television

2. The printed word is no longer the only, or even the primary, means of mass communication. The past 50 years have witnessed the development of vast new networks of electronic media for the dissemination of news, information and entertainment via television. In the first wave of the video revolution, broadcast television made possible instantaneous communication between broadcast

television stations distributing their signals from terrestrial transmitting antennas and anyone within the station's transmitting range who owned a television set. In that era, most Americans received no more than three broadcast networks and a handful of independent stations, which provided a choice of only homogenous programming. The programming was developed to suit the broadest cross-section of America. Indeed, a former FCC Chairman termed television in this first wave the "Vast Wasteland".

3. In the second wave of that revolution, cable television systems, which transmit from 12 to more than 150 channels of video programming by means of coaxial and fiber optic cable, have made it possible to communicate a vast array of news, information and entertainment programming to persons within the system's service area who pay a fee to subscribe to cable. Today over 54 million people receive cable television.

4. As part of the cable revolution, a large number of new programming services have been developed. These are typically distributed by means of satellite to cable operators and others, who in turn distribute such programming services to their subscribers. The cable revolution has made possible the development of both general entertainment programming services and more specialized services that present programming on such subjects as news, religion, financial information, government, law, education, music and minority affairs. Individual cable systems also create their own local programming services. For example, TWC's cable systems in the New York City area produce and offer to their subscribers a 24-hour local news service called New York 1.

5. In addition to cable, a number of other technologies, including home satellite dishes, videocassettes, video disks, satellite master antenna television ("SMATV") systems and multichannel multipoint distribution systems ("MMDS"), have been developed. These technologies

compete with both broadcast and cable in communicating news, information and entertainment.

6. The cable industry itself is not "highly concentrated" by any customary economic measure (the ten largest multiple system operators ("MSOs") account for approximately 55% of all cable subscribers), and an effect of the increasing size of larger cable operators has been to enhance their ability to finance new programming ventures and thus increase the number of "media voices" that are available. Since cable television prices were deregulated by the Cable Communications Policy Act of 1984 (the "1984 Cable Act"), no fewer than 40 new programming services have been launched, many of them financed in whole or in part by cable operators.

7. Cable operators, including TWC, select which programming sources to include in the array of programming they offer their subscribers. For example, cable operators must choose from among a vast array of programming services devoted to such subjects as news and political developments (C-SPAN I and II, Cable News Network, Consumer News and Business Channel), law (Courtroom Television Network), religion (National Jewish Television, VISN), music (MTV, Video Hits-1, The Nashville Network), minority interests (Black Entertainment Television, Galavision), education (The Discovery Channel, Mind Extension University) sports (ESPN, Sportschannel) and general entertainment programming (USA Networks, WTBS, TNT).

8. In addition, cable operators develop their own distinctive programming for distribution to their subscribers. For example, many of the programming services that characterize contemporary cable communications, including Home Box Office, Showtime, MTV, C-Span, Cable News Network and Headline News, were initially developed or substantially capitalized, in whole or in part, by cable operators, who created or invested in such services to enhance their ability to compete with traditional media

such as broadcast television stations. In addition, individual cable systems create their own distinctive local news programming, as TWC has done with its New York 1 news service in New York City and with its local news services in other locations, including Ithaca and Rochester, New York and other local programming that is produced by many TWC cable systems.

9. Furthermore, many cable operators have produced their own video editorials. For example, TWC's predecessor produced a prize winning series of editorials for telecast on its systems. The series, entitled "American Viewpoints", examined many topical public policy issues. In addition, many TWC systems are very similar to local newspapers, offering national and local weather, local classified advertising, community bulletin boards and television channel listings. Furthermore, many national programming services, such as the Weather Channel and CNN, provide time for local insertions in their programming which TWC and other operators utilize.

Time Warner Entertainment Company, L.P. and Time Warner Cable

10. TWE is a partnership, the majority of which is indirectly owned and fully managed by Time Warner Inc., a publicly traded Delaware corporation. TWE is comprised principally of three unincorporated divisions: TWC, which operates cable television systems; Home Box Office ("HBO"), which operates pay television programming services and which is more thoroughly discussed in the accompanying affidavit of Jeffrey Bewkes; and Warner Bros., which is a major producer of theatrical motion pictures and television programs. Warner Bros. licenses its motion pictures for exhibition in movie theaters, on video cassettes and video disks and by video programmers, including pay-per-view services, premium services, basic services and network and independent television stations. TWE also owns, directly or indirectly, minority interests in various cable television programming services,

which are more throughly discussed in the accompanying affidavit of E. Thayer Bigelow.

11. TWE through TWC and affiliated companies owns and operates cable systems in approximately 1600 franchise areas throughout the United States, which have a total asset value of approximately $8.2 billion, and which reach approximately 6.9 million subscribers. TWE and its predecessors built and acquired these costly assets with the expectation that they, like any other speaker, would have the ability to use their capacities without government interference.

12. TWC's cable systems have channel capacities that generally range from 30 to 70 channels. TWC's cable system in one test area in Queens, New York, which uses advanced fiber optic technology, has the capacity to provide up to 150 channels of programming to its subscribers. With the rapidly expanding technology in the cable industry, TWC anticipates that other systems will be able to achieve similar channel capacity.

13. We believe that one of the developments that may greatly enhance customer satisfaction will be the use of additional channel capacity for multiplexing premium channels and "near video on demand". As more fully explained in the accompanying Affidavit of Jeffrey Bewkes, under multiplexing, premium services are exhibited to subscribers on several different channels, with the same programming scheduled at different times on different channels. This allows, for example, one subscriber to watch a program that starts at 7:00 p.m. on one multiplexed channel, and another subscriber to watch the same program at 8:00 p.m. on a different multiplexed channel. HBO currently offers three multiplex channels and Cinemax offers two. I anticipate that in the future additional multiplexed channels will be offered by other programmers.

14. "Near video on demand" is most easily explained in the context of the Queens system's Quantum programming. Quantum utilizes over fifty channels for pay-per-view movies. Depending on the popularity of the movie, a movie may be offered as often as every 15 minutes on several different channels. We believe this is a much more subscriber-friendly service because it responds to each subscriber's individual schedule. Because of this, Quantum is a prototype for programming that will be presented as other TWC systems' channel capacities increase.

15. TWC and its local divisions exercise editorial discretion in determining which program services should be offered to subscribers. In making such determinations, TWC personnel choose from among the entire array of programming services that are available. They take into account such factors as local tastes; local demographic characteristics, including such variables as age, household size and composition, income levels, occupational characteristics and educational attainments; the quality of programming; the needs and interests of identifiable segments of the local population, including minority and ethnic groups; and the availability of news, information and entertainment to cable subscribers from non-cable sources, including broadcast television stations, movie theaters, cultural and sporting events and non-electronic media. The content of programming services is often decisive in making such determinations. For example, a TWC cable system located in a conservative "middle American" community may choose to offer subscribers a greater array of Christian religious programming, while a TWC system located in an ethnically diverse urban center might place greater emphasis upon program services, including those oriented to persons who speak languages other than English, that would have appeal to large segments of the local population. For example, TWC's cable system in Queens, New York, a community rich in ethnic diversity, offers Greek, Korean and Hindi channels, among others.

16. TWC takes its programming decisions very seriously and exercises the same type of editorial discretion that newspaper editors employ in determining the content of daily newspapers. In addition to individual systems discerning the best way to maximize customer satisfaction, TWC conducted over 60 subscriber preference and satisfaction projects in 1991 and 1992.

17. TWC cable operators continually refine their channel line-ups so as to increase subscriber satisfaction and appeal. Over 55 different program services are carried by at least one TWC cable system; it is estimated that there are no more than three program services that are carried by all TWC cable systems. In fact, the diversity of services offered can be quickly ascertained simply by comparing the channel line-ups of systems across the country. Where a particular program service is carried in all or virtually all TWC systems, it is because that service has demonstrated broad appeal to United States television audiences and is an economically attractive choice.

18. In addition to deciding which services to carry, TWC systems also decide how services are to be "packaged" for subscribers. In most TWC systems, subscribers can choose from among two or more packages or "tiers" of services, for which different prices are charged, and can also elect to purchase premium and pay-per-view services, for which additional charges are made. TWC systems typically offer a "basic" tier of services and an expanded or "standard" tier, which includes a large array of satellite-delivered programming services. Subscribers are usually required to purchase the expanded or "standard" tier in order to purchase premium or pay-per-view services. Premium services are often offered in discounted packages to subscribers who wish to purchase more than one such service. TWC personnel structure and fine-tune such programming tiers and packages based on judgments about local preferences similar to those described above with respect to the choice of individual program services.

19. TWC cable systems also exercise editorial discretion in determining the channel positions on which particular programming will be offered. In determining channel location, TWC personnel consider factors similar to those described above with respect to the choice of individual program service, and weigh those factors with channel accessibility. For a description of channel repositioning in one of TWC's Manhattan systems, see the accompanying Affidavit of Barry Rosenblum.

20. TWC's cable systems compete with a wide variety of alternate sources of news, information and entertainment. In particular, TWC's cable systems compete with broadcast television stations, which, unlike cable systems, offer their programming without direct charges to viewers. Despite this, however, local broadcasting stations achieve a very respectable profit. *See* John C. Severino, *Perspective on Television; No Cable Pie for the Networks' Sky*, L.A. Times, Jan. 27, 1992, B5 ("many local broadcast stations are still making profits in excess of 50 cents on the dollar") (attached hereto as Exhibit A).

21. Although TWC's cable systems compete with broadcast television stations, it is important to note that the cable industry is different from the broadcasting industry. There are no physical limitations on the ability to construct multichannel video distribution systems equivalent to the physical scarcity of the broadcast spectrum.

22. TWC's cable systems also compete with other non-broadcast means of delivering video programming to consumers, including satellite master antenna television ("SMATV") systems, in which apartments in a multiple dwelling unit ("MDU") are connected to a group of antennas capable of receiving satellite-delivered program services that are located on the premises (some SMATV systems use microwave relays to connect multiple MDU's to a single group of satellite receiving antennas); multipoint distribution service ("MDS") or multichannel multipoint distribution service ("MMDS"), often called "wire-

less cable", which deliver one or multiple channels of programming to subscribers by means of terrestrial microwave antennas; home satellite dishes ("TVROs"), which enable their owners to receive a vast array of programming services that are transmitted by satellite, either through a subscription agreement, arranged directly with the programmers or indirectly through any of a large number of program packagers, or, in many instances, free of charge; and video cassettes and video disks, which consumers may rent or buy for viewing on their television sets in conjunction with video cassette players. TWC's cable systems also compete with radio, especially in the provision of music, and with all these media and commercial broadcast television stations for advertising.

23. In addition, TWC's cable systems compete with the traditional print media, especially in the provision of news. Cable television is an electronic publisher which has become a vital, if not primary source for the public of news, opinion, and other information. As of the end of August, 1992, cable passed 95.9% of all homes in the country; 61.7% of these homes, or 54.9 million homes, subscribed. *The Kagan Media Index*, September 28, 1992 at 6-7 (attached hereto as Exhibit B). Cable networks, such as CNN, have assumed great importance to the public in its daily receipt of national and international news. *See, e.g.*, Jay Rosen, *The Whole World is Watching CNN*, 252 The Nation 622 (1991) ("For Americans with cable, CNN serves as a video wire service, offering constant updates on the news. It's also an instant delivery system for dramatic footage from around the globe.") (attached hereto as Exhibit C). CNN's coverage of the Persian Gulf War is a striking example in this regard. Cable also often serves as an immediate source of newsworthy local information. As discussed above, TWC produces local news programs in New York City and Ithaca and Rochester, New York, among other places.

24. One way in which TWC addresses this broad range of competition, is to regularly schedule "free previews" of premium cable services. During such previews, TWC offers a premium cable service for a limited period at no charge to cable subscribers who do not subscribe to that premium service. TWC has found that free previews are an important factor in persuading subscribers to add premium services to their cable package. They are a valuable marketing tool for TWE as both cable system operator and cable programmer because they allow subscribers to actually view, free of charge, the programming they would receive if they subscribed to a particular premium service.

The 1992 and 1984 Cable Acts

25. The Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act") amends the 1984 Cable Act, which had in many respects deregulated the cable industry. In so doing, its reestablishes government regulation that pre-dates the 1984 deregulation. The 1992 Cable Act, however, also goes further. It establishes a broad new regime of federal and local regulation that will, if allowed to stand, destroy the phenomenal development of new programming services. In essence, the second wave of the video revolution could be undone.

The Must Carry Provisions Injure TWE.

26. Implementation of the must carry provisions will cause irreparable injury to TWE in its capacity as a cable operator in at least the following respects:

(a) The provisions will require cable systems of TWC to carry an average of approximately 8 commercial and noncommercial broadcast stations. In fact, as many as 42 systems may have to carry over an estimated 11 broadcast stations. Some of these stations the cable systems certainly do not wish to

carry. For example, in its Canton, Ohio system, TWC may be required to carry a religious broadcast station that it does not currently carry and does not wish to carry. In its Staten Island, New York system, TWC will be required to carry approximately 17 commercial stations, two of which are based in Bridgeport, Connecticut (which is located 70 miles away and has very little, if anything, in common with Staten Island). And, in its Keene, New Hampshire system, TWC will not only be required to add 7 broadcast channels, but to accomplish this, it will also have to purchase and use expensive converter boxes, which it is not now required to use. *See also* Affidavit of Marc J. Apfelbaum ¶¶ 2-15; Affidavit of Jeffrey B. Darrell ("Darrell Aff.") ¶ 3.

(b) Because much of the channel capacity of TWC's cable systems is already in use for other programming services, the must carry provisions will require TWC to displace a substantial number of existing services in favor of commercial and noncommercial broadcast stations that TWC systems would not otherwise carry. *See, e.g.*, Affidavit of Terry O'Connell ("O'Connell Aff.") ¶ 4; Affidavit of Ann Burr ("Burr Aff.") ¶ 5; Affidavit of Stephanie L. Christensen ("Christensen Aff.") ¶¶ 8, 11; Affidavit of Michael J. Rider ¶ 7; Affidavit of Charles William Grinstead ¶ 4. In addition, TWC will be inhibited from offering new, innovative services such as the Cartoon Network, which began operating on October 1, 1992 and Sci-Fi Channel, which began operating on September 24, 1992. TWC's cable service will be made less competitive with other media thereby, and the consumer appeal of and subscriber satisfaction with TWC's cable service will be diminished. Lack of channel capacity presents cable operators with substantial operating problems. Indeed, Paul Kagan Associates, Inc., in a recent solicitation for a publication reviewing cable operator channel capacity problems, termed "the hunt for channel capacity" as "cable's equivalent to the search for the Holy Grail". *See* Exhibit D.

(c) There are no noncommercial educational television stations operating in several of the communities served by TWC cable systems. In each of these communities, TWC will be required to import distant signals from other localities, which could be costly, regardless of whether local subscribers have any interest in receiving such programming and regardless of TWC's judgment concerning the desirability or appeal of such programming.

(d) The must carry provisions will also place TWC cable systems at a disadvantage in competition with other providers of multichannel video programming services that are not constrained by must carry obligations. Under the must carry provisions, TWC will be forced to carry the programming of commercial and noncommercial broadcast television stations regardless of its appeal to or suitability for audiences in the areas served by TWC cable systems, and other, more popular programming will be displaced. Because individual cable systems have a definite number of channels available, these provisions take channels from the cable operators that they could otherwise use in their best editorial judgment. For example, TWC's Staten Island system will be required to carry 17 commercial stations, two of which are based in Bridgeport, Connecticut. But for Section 4 of the 1992 Cable Act, TWC would not provide carriage to these two stations. Competitors such as SMATV and MMDS systems and distributors of programming to owners of home satellite dishes will not be constrained by the must carry provisions. Because viewership of broadcast television programming has steadily eroded in recent years, TWC's cable systems will

be placed at a substantial competitive disadvantage compared to multichannel competitors not bound by those provisions because they will have lost channels that could have provided programming specifically selected for their audiences.

27. The most devastating impact of the must carry provisions, however, is that they empower a broadcast station to single-handedly disturb the programming balance and customer satisfaction in which cable systems invest so many employee and financial resources. A single must carry request can force a system to reconfigure its basic tier, delete customer-favored programming and rearrange its channel lineups. *See* Christensen Aff. ¶¶ 2-15. Each such change can spur hundreds of customer complaints because the customers' "favorite programs" have been moved or deleted.

28. The 1992 Cable Act also empowers commercial broadcast stations to forego must-carry status and instead withhold consent for retransmission of their signals unless the cable operators pay them a fee. I believe stations electing retransmission-consent treatment will withhold their consent unless the cable operator pays them a substantial fee. In addition, it is my opinion that only the most popular, influential and powerful stations will be in a position to elect retransmission-consent treatment. Such stations will attempt to extract substantial payments from cable operators for the right to retransmit their programming.

The Public, Educational and Governmental Access Provisions and Leased Access Provisions Injure TWE.

29. The public, educational and governmental access ("PEG) provisions of the 1984 Cable Act irreparably injure TWC's cable systems by enabling a franchising authority to require those systems to designate channel capacity for such uses without setting any limit on the

number of channels that the authority can so designate and by enabling municipal authorities to require "assurances" that such PEG requirements will be complied with. For example, in Ithaca, New York the franchise authority requires TWC's local system, which has 60 channels, to offer up to 9 PEG channels. *See also* Affidavit of Thomas M. Rutledge ("Rutledge Aff.") ¶ 8 (City of Austin may require as many as 13 PEG channels).

30. The PEG provisions give the franchising authority control over the content of the programs thus exhibited and expressly displace TWC's editorial discretion. Cable systems are placed in the position of carrying programming that they otherwise would not carry. For example, TWC's system in Austin, Texas was provided programming by a public access programmer that combined graphically pornographic scenes, photographs of aborted fetuses and footage of a man shooting himself in the head. TWC's cable system in Indianapolis, Indiana has had to carry on its public access channel "safe sex" programming, which includes sexually graphic descriptions. And TWC's cable system in Cincinnati, Ohio has had to carry on one of its public access channels nude sports programming supplied by a nudist organization. Further, because the PEG provisions enable municipal officials to require TWC to carry governmental channels, they force TWC to carry government speech that TWC may not wish to carry to subscribers who may not wish to receive it, and they enable government officials to displace TWC's chosen messages with their own messages.

31. In addition, by subjecting providers of DBS service to far less stringent PEG requirements than cable operators are subjected to under the 1984 Cable Act, the 1992 Cable Act causes irreparable injury to TWC's cable systems by placing them at a competitive disadvantage by favoring DBS speech over TWC's. TWC is also placed at a competitive disadvantage because neither the 1992

Cable Act, the 1984 Cable Act, nor any other law requires other providers of video programming, including SMATV and MMDS systems and broadcast television stations, to provide PEG channels.

32. The leased access provisions compel TWC to publish the speech of others. These provisions expressly abrogate the editorial discretion of TWC's cable systems and force TWC to be identified with messages it does not wish to convey. Furthermore, the 1992 Cable Act directs the FCC to set the "maximum reasonable rates" that an operator may charge leased access programmers. Thus, TWE is not only compelled to carry leased access, it is limited in the amount it may charge for such access.

33. The provision of Section 10(d) of the 1992 Cable Act, which repeals the immunity from criminal and civil liability with respect to obscene programming carried on PEG and leased access channels that was formerly provided for by Section 638 of the 1984 Cable Act, injures TWC by subjecting it to the risk of criminal and civil liability for programming created by others that it does not wish to carry but is required by law to carry.

34. Section 10(d) requires TWC systems to dedicate valuable employee resources toward making very difficult judgments regarding whether programming is obscene. For example, to evaluate "adult" programming submitted for presentation on leased access channels, Time Warner Cable of New York City ("TWCNYC") has employed two prescreeners to initially screen the programming, who then refer material they believe to be obscene to the channel supervisor or other supervising personnel, who then consult with in-house counsel and outside counsel. This alone is very expensive. Yet, if the decision of TWCNYC's employees, made in consultation with TWCNYC's attorneys, later is judged by prosecutors or others to be wrong, TWCNYC also faces the expense of litigation and possible liability. If TWCNYC believes the

programming is obscene and declines to carry it, federal cable legislation entitles the affected programmer to sue to compel carriage. TWCNYC has already been sued under the 1992 Cable Act for its attempts to exclude obscene programming. *See Goldstein v. Manhattan Cable Television, Inc.*, No. 90 Civ. 4750 (S.D.N.Y. filed Nov. 20, 1992).

35. The provisions of Section 612(h) of the Cable Act permitting TWC to prohibit or restrict obscene programming does not alleviate such injury in that they compel TWC to determine obscenity questions that even Supreme Court Justices regard as exceedingly difficult, and TWC remains exposed to liability if a court later disagrees with its determination. Further, these provisions provide no protection whatever as to obscene programming TWC may be required to carry on PEG channels.

36. In addition, by compelling TWC to yield control of a substantial portion of its channel capacity to unaffiliated programmers, the leased access provisions injure TWC by impairing its ability to offer programming created by others or by itself that it would prefer to carry and that TWC believes its viewers would prefer and by limiting its ability to offer its own programming. *See, e.g.*, Darrell Aff. ¶ 4.

37. By permitting the FCC to regulate the price, terms and conditions of channel leases, the 1992 Cable Act irreparably injures TWC by subjecting it to regulation from which its non-cable competitors are exempt and by placing business control of its communications assets in the hands of government officials.

38. Taken together, the must carry, retransmission consent, PEG and leased access provisions of the challenged legislation injure TWC by requiring it to relinquish editorial and business control of a substantial portion of the cable channels that enable it to communicate. The

average TWC system has approximately 45 channels, is located in an area having approximately 8 local commercial and noncommercial broadcast stations and is required by franchise to provide approximately 2 PEG channels. The Cable Act, therefore, would require TWC to relinquish editorial and business control of over an estimated 30% of its channels (approximately 8 must carry channels, approximately 2 PEG channels and approximately 3.5 leased access channels). This average system with 45 channels must now under the 1992 Cable Act try to serve its subscribers in a responsible way while contending with 10 or so broadcasters dictating where they will be on the system, as well as at least four channels of leased access programmers over whom it has virtually no control and three or more PEG channels with varying programming.

The Free Preview Provisions Injure TWE.

39. The restrictions of Section 15 have already made it more difficult and costly for TWC to offer free previews of premium services. Because Section 15 requires TWC systems to not only notify subscribers who do not subscribe to the premium channel being previewed, but also those who have already requested such channels, TWC systems will incur great expense each time they offer a free preview. For example, each time TWC's San Diego Division sends out a notice, the cost will range from $3,240.00 to $4,860.00. Burr Aff. ¶ 3. In addition, the Division will incur costs for each subscriber that requests a free preview to be blocked. These combined costs are so burdensome that many TWC systems have simply been compelled to discontinue all free previews. *See, e.g.*, Rutledge Aff. ¶ 3; Affidavit of Thomas Sharrard ¶ 2.

40. Section 15, therefore, has significantly inhibited TWC's communications with its subscribers through free previews and I anticipate that premium channel subscriptions will be harmed by this. In addition, Section 15

discriminates against cable operators because it allows non-cable program distributors to promote their premium services without limitation. This places TWC and other cable operators at a competitive disadvantage.

The Exclusive Agreement and Standardized Terms and Conditions Provisions Injure TWE.

41. The exclusive agreement provisions will injure TWC by rendering it difficult or impossible for TWC to obtain exclusive agreements from cable-affiliated programmers, thus impairing TWC's ability to differentiate itself from its competitors. As the Secretary of Commerce and Attorney General have recognized:

> "Requiring programming networks that are commonly owned with cable systems to make their products available to competing distributors could undermine the incentives of cable operators to invest in developing new programming. This would be to the long-term detriment of the American public."

Letter from Barbara Hackman Franklin, Secretary of Commerce and William P. Barr, Attorney General to Congressman Edward J. Markey, at 2 (April 1, 1992) (attached hereto as Exhibit E); *see also* Letter from Robert A. Mosbacher, Secretary of Commerce, and James F. Rill, Assistant Attorney General, Antitrust Division, Department of Justice, to Senator John C. Danforth at 2 (March 13, 1992) (attached hereto as Exhibit F). This is true even if the FCC monitors exclusive agreements through a complaint procedure, as it implies in its Notice of Proposed Rulemaking. No matter how the exclusive license provisions are enforced, they will still hinder TWC from entering into such agreements.

42. These provisions will also impede the creation of new programming services by cable operators, who have historically been among the most important creators of such programming. Any new programming created by

cable operators will, by definition, have attributable cable interests, and therefore be subject to the exclusive license and antidiscrimination provisions of the 1992 Cable Act. I believe that operators will be reluctant to embark on the financial risks of new program service creation when their ability to control the distribution of such services is subject to such intrusive regulation.

The Rate and Content Regulation Provisions Injure TWE.

43. The rate and content regulation provisions discriminate against private cable operators such as TWC simply because they communicate news, information and entertainment by means of cable.

44. The provisions of the 1992 Cable Act that specify the minimum contents of each cable operator's basic tier override TWC's local editorial discretion to determine the contents of the basic tier. These provisions also injure TWC by requiring it to offer basic offerings that it would not otherwise offer and that do not maximize subscriber satisfaction.

45. I believe that under the definition of "effective competition" contained in Section 623(l)(1), the great majority of cable systems in the United States, including those operated by TWC, will be found to lack effective competition. As a result, under Section 623(a)(2), the rates for basic cable service of the great majority of cable systems in the United States, including TWC's, will be subject to rate regulation by local franchising authorities or by the FCC, and the rates for all cable programming services (as defined) offered by such cable systems will be subject to FCC regulation.

46. Neither Section 623 nor any other law purports to prescribe the service offerings or regulate the rates of SMATV systems, MMDS systems, DBS operators, other distributors of programming to home satellite dish owners or cable systems that have "effective competition".

47. The provisions of Section 623(b)(8), which prohibit cable operators from structuring their rates for their premium and pay-per-view services in relation to the non-premium services that a subscriber purchases, also impinge on TWC's editorial discretion because they interfere with TWC's editorial judgment in valuing different forms of speech. Such provisions also place cable operators, including TWC, at a competitive disadvantage as against the non-cable distributors of news, information and entertainment with which they compete.

48. The provisions of the 1992 Cable Act which subject essentially all cable operators to extensive rate regulation for their basic tier and other non-premium service offerings discriminate against cable operators, including TWC, simply because they communicate news, information and entertainment by means of cable. They place TWC at a competitive disadvantage as against the non-cable distributors of news, information and entertainment with which they compete. Such provisions place business control of TWC's communications assets in the hands of government officials.

49. Authorizing local franchise authorities to regulate rates is especially threatening to TWC and other cable operators because franchise authorities are given broad discretion in determining what rates are acceptable for their speech. This broad discretion empowers franchise authorities with jurisdiction over TWC's cable systems to retaliate against systems for political stances and positions that they have taken or may take by lowering the system's rates or refusing to permit needed increases.

50. TWC systems already have endured retaliation from franchise authorities through means other than rate regulation since under the 1984 Cable Act franchise authorities generally had no power to retaliate through rate regulation. For example, Public Cable Company, which serves Portland, Maine and surrounding areas, was

forced to endure a twenty month franchise extension proceeding with its franchise authority, even though the extension was expected to take only six months. The long delay in renewing the franchise is attributable, at least in part, to Public cable's aggressive public campaign against extension of the State sales tax. Darrell Aff. ¶ 2. In fact, one state senator, who represents a district encompassed within the franchise area, threatened retribution against Public Cable. *Id.*

51. In addition, in 1974 the Marion, Indiana franchise authority came very near to revoking the TWC system's franchise because of its programming choices. The system had recently launched the HBO Service, which among other things, offers recently released motion pictures that often portray mature themes. Because of their objection to HBO's content, members of the franchise authority initiated a revocation proceeding to terminate the system's franchise. The system retained its franchise by only a single vote.

52. Furthermore, the recent release of a controversial recording, "Cop Killer" by Ice-T, on a record label owned by an affiliate of TWE resulted in retaliation against TWC by a franchise authority. TWC's Charlotte, North Carolina Division had difficulty obtaining a required transfer approval from the Charlotte City Council due to the displeasure of City Council members with the content of the recording. One City Council member advocated boycotting TWE and urged the Council to vote against the transfer specifically because of his objection to the content of TWE's affiliate's speech. The Council eventually approved transfer of the franchise but there were still council members who voted against approval due to TWE's affiliate's release of Ice-T's recording. *See* Affidavit of Jeffrey B. King. ¶¶ 2-4. TWC's Charlotte Division came very close to having to pay a heavy price for one of its affiliates exercising its guaranteed right to freedom of speech.

53. The discretion that allows this type of retaliation is even more threatening in the context of rate regulation. By giving franchise authorities discretion to regulate, the 1992 Cable Act has given franchise authorities control over the life and death of cable systems. While franchise extensions and transfers occur only infrequently, rate regulation offers a constant opportunity to retaliate against a cable system for its, or any affiliates', controversial speech. Because TWC represents a significant part of TWE's and Time Warner Inc.'s ("TWI") overall business, the rate regulation provisions of the 1992 Cable Act raise the specter of chilling not only TWC's speech but also that of other TWE and TWI divisions, including Time Inc. magazines and Warner Bros. music and movies. With respect to TWC, I believe the threat is particularly clear; since we were almost required to pay a heavy price for the unpopular speech of our affiliate, the price will be even higher if we ourselves, for example, run a hard hitting piece of investigative journalism on one of our local news programs concerning the very same local officials who regulate our rates.

Program Creation, Number of Subscribers, Channel Occupancy, and Exemption of Government-Owned Cable Operators from Franchises and Damages Provisions Injure TWE.

54. By threatening to limit the ability of cable operators, including TWC, to produce and create their own programming, the program creation provisions of the 1992 Cable Act will discourage TWE from creating and disseminating programming that reflects its own distinctive point of view. I believe that cable operators are at present the only multichannel video programming distributors that engage in production and creation of programming to any significant degree. Accordingly, the proposed FCC regulations would, in fact, apply only to program creators affiliated with cable operators. No other program cre-

ators in the United States are subject to such a prospective blanket limitation on their ability to create and produce news, information or entertainment.

55. By threatening to limit the number of subscribers that TWC may serve, the provisions of the 1992 Cable Act directing the FCC to prescribe limits on the number of cable subscribers an operator may serve will prevent TWC from disseminating information to prospective viewers, to its irreparable injury. In addition, those who wish to receive TWC's service will be barred from receiving it.

56. The provision concerning limitations on cable operator size discriminates against cable operators because of the means of communication they have chosen. There are no comparable limitations on the number of persons who may receive or subscribe to newspapers, magazines or other traditional media. Limitations on the number of television stations that can be owned by a given entity have been upheld only because the electromagnetic spectrum over which broadcast television signals are transmitted physically can accommodate only a very limited number of speakers. There are no similar limitations on the number of persons who may communicate by means of cable or other multichannel distribution technologies.

57. Furthermore, the limitation on the number of cable subscribers that TWE may have, like so many other provisions of the 1992 Cable Act, inhibits TWE from developing new programming. Prior to the 1992 Cable Act's passage, TWE was encouraged to invest in new programming because TWE, as a cable operator, was well situated to offer new programming to its broad and expandable customer base. By limiting TWE's customer base, however, the Cable Act also limits the number of subscribers through which TWE may recover its investments in new programming, thereby discouraging TWE from investing in new programming.

58. By limiting the number of channels that can be occupied by a video programmer in which a cable operator has an attributable interest, the 1992 Cable Act interferes with TWC's editorial discretion. It places a limitation on the amount of news information or entertainment that a vertically integrated system may offer. In addition, it discourages TWC and other vertically integrated operators—entities best situated to invest in and develop new programming—from investing in new programming because they will be limited in the amount of such programming that they may carry.

59. TWC currently operates cable systems in at least 10 localities where municipal authorities have expressed an interest in establishing municipally owned cable systems. These localities include St. Petersburg, Florida; Kansas City, Kansas; Schuylkill Haven Borough, Pennsylvania; Somerville, Massachusetts; Belleair Beach, Florida; Haines City, Florida; Plant City, Florida and Orange County, Florida. *See* selected newspaper articles attached hereto as Exhibit G. The provisions of Section 621(f) and 635A will likely encourage other municipalities in which TWC has cable systems to establish such systems. In such localities, the provisions of Sections 621(f) and 635A threaten TWC with injury by subjecting it to regulation by municipal authorities who are competitors and who are exempt from any damages remedy for regulatory misconduct. Such provisions confer upon government officials the power to abuse regulatory authority for purposes of censoring the communications of private cable operators or punishing them for stances they have taken or may take on political issues, including franchising issues. Such provisions also cause irreparable injury to TWC by favoring government officials, and disfavoring private cable operators including TWC, as competitors.

60. As demonstrated above, TWE suffers myriad injuries from the 1992 Cable Act. The overwhelming impact of the 1992 Cable Act is that it radically alters TWE's role in its editorial capacity. Prior to the 1992

Cable Act, TWE based its decision primarily on subscriber satisfaction. The first and most important question asked in making decisions was: Will this directly or eventually increase customer satisfaction? The 1992 Cable Act has altered this. Now the first questions asked are: Does the 1992 Cable Act's provisions allow us to do this? Can we bear the costs and restrictions imposed by the 1992 Cable Act if we do this? The overriding effect of the 1992 Cable Act, therefore, is that it restrains what was cable television's free editorial movement. It restrains creativity, content of programming, breadth of development and presentation of programming.

61. In summary, the must carry, PEG, leased access, free preview restriction, exclusive agreement and standardized terms and conditions, rate and content regulation, limitation on program creation, limitation on the number of cable subscribers, limitation on channel occupancy, and exemption of government-owned cable operators from franchises and damages provisions implement a regulatory structure that in combination discriminate against cable operators in the most harsh and intolerable manner.

/s/ Joseph J. Collins
JOSEPH J. COLLINS

[Notorization Omitted in Printing]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF JEFFREY B. DARRELL

STATE OF MAINE,)
) ss:
COUNTY OF CUMBERLAND,)

1. I am Vice-President of the Public Cable Company. Public Cable is an affiliate of Time Warner Cable and serves Portland, Maine and the surrounding area. I have held the position of Vice-President since 1985 and have worked for Public Cable since 1979.

2. Public Cable faces possible injury from the discretion that the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act") gives to franchise authorities. Recently Public Cable completed a twenty month franchise extension proceeding with one of its franchise authorities, which had been expected to take only six months. We believe that at least part of the long delay in obtaining the extension was related to Public Cable's aggressive public campaign against application of the State sales tax to cable. As part of this campaign, Public Cable presented on a local access channel a scroll that informed subscribers of relevant government officials' names, their telephone numbers and the manner in which they were voting. This was not well received in many political circles. In fact, one state senator, who represents a district encompassed within the franchise area, threatened retribution against Public Cable.

3. In addition, the must-carry provisions of the 1992 Cable Act will compel Public Cable to carry a station that it would not in its editorial discretion otherwise choose to carry. We anticipate being forced to carry a religious low-power television station, which places an emphasis on proselytizing and fund-raising. Public Cable considers it a violation of its First Amendment rights to be required to offer this station as part of its lineup.

4. Finally, the leased access and Public Educational and Governmental access requirements of the Cable Communications Policy Act of 1984 have significantly hindered Public Cable from producing its own local programming. There is no doubt that the cost of providing, as required by our franchise, (1) connections for live television studios in eleven communities; (2) in excess of $600,000 to purchase equipment for these studios; (3) direct operating support of approximately $50,000 per year for these studios; and (4) other support, including labor at a cost of approximately $25,000 per year, has significantly hindered Public Cable's ability to allocate resources to produce its own local programming.

/s/ Jeffrey B. Darrell
JEFFREY B. DARRELL

[Notarization Omitted in Printing]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF MICHAEL J. EGAN

COUNTY OF)
) ss:
STATE OF)

I, Michael J. Egan, make this affidavit and state:

1. I am Vice President for Product Development and Programming of Cablevision Industries Corporation ("CVI"), a position I have held since 1986. I submit this affidavit in support of plaintiff National Cable Television Association, Inc.'s Motion for Summary Judgment in Civil Action No. 92-2495.

2. CVI is one of the top ten independent cable television operators in the United States, based on the number of basic subscribers served by CVI's subsidiary, affiliated or managed cable television systems. CVI manages or indirectly owns 63 cable television systems in 18 states, serving a total of 1,157,922 basic subscribers as of December 31, 1992.

3. CVI is a member of the National Cable Television Association, Inc.

4. The particular characteristics of the many CVI cable television systems vary in many ways including the number of homes passed by the system, the number of subscribers to the system, the number of channels of programming provided to subscribers and the number of local commercial broadcast signals and local noncommercial broadcast signals located in the communities served by each system.

5. In addition to the carriage of many local commercial and noncommercial broadcast stations, CVI systems also transmit the programming of some non-local broadcast stations and also offer to subscribers certain cable programming that cannot be received off-air, including programming carried on public, educational and government access channels. In addition, some CVI systems, including the Sullivan County and San Fernando Valley systems mentioned below, provide their own locally originated programming. Locally originated programming on the Sullivan County system includes nightly news programming.

6. Typically the channel capacity of CVI systems is not adequate to permit carriage of all programming made available by broadcast stations, national and regional cable programming networks, and other suppliers. Nor would CVI wish to carry all available programming even if it could do so. Rather, CVI selects the mix of programming that will, in its estimation, provide the best service to its subscribers. Subscriber preferences are given great weight, but CVI's assessments of program quality and diversity also play an important role in programming decisions.

7. CVI seeks to provide high-quality service through channel assignment and program packaging. As with program selection, CVI gives great weight to subscriber preferences when making these decisions, but other factors—including program content—are considered as well.

8. The "must carry" provisions of the 1992 Cable Act will require CVI to carry certain broadcast stations that are not currently offered to subscribers, at the expense of programming that, in CVI's judgment, would be preferable.

9. The Shandaken headend of the Saugerties, NY CVI cable system, for example, offers its 1507 subscribers 35 channels of programming, including 9 channels of off-air broadcast service. There are no vacant or unused channels on the system. The Shandaken system, which is located in Ulster County, is within the bounds of the New York ADI. In addition to the broadcast signals already carried, the new rules will require the addition of two (2) commercial television stations and, most likely, one (1) non-commercial station (carriage obligations for noncommercial stations, which are defined in terms of mileage from the system's headend, will be dictated by final rules interpreting the "principal headend.") The two commercial stations are Spanish language stations located over 50 miles away and the Shandaken community is less than 2% Spanish speaking.

10. The Hunter headend of the Saugerties, NY CVI cable system, is located in Greene County and is within the Albany, New York ADI. The system offers its 1436 subscribers 35 channels of programming, including the signals of 9 off-air broadcast stations. There are no vacant or unused channels on the system. In addition to the broadcast signals already carried, the new rules will require the addition of one (1) more commercial broadcast station.

11. The CVI system in Sullivan County, NY, is located within the New York ADI. The system offers its 15,763 subscribers 38 channels of programming, including 12 off-air broadcast stations. One of those signals is carried on a part-time, shared basis with the Arts & Entertainment Network. Under the new must carry rules the station could claim full-time carriage necessitating deletion of the shared programming. There are no vacant or unused channels on the system. In addition, the new rules will require carriage of one (1) more commercial broadcast station and may also require carriage of one (1) more non-commercial station in addition to converting the part-time carriage mentioned above to full-time (again the actual carriage requirements of non-commercial stations will be dictated by the final rules on "principal headend).

12. The CVI system in San Fernando Valley, CA is located within the Los Angeles ADI. The system offers its 91,531 subscribers 58 channels of programming, including 14 off-air broadcast stations. The system currently reserves two channels for future programming use. CVI has seriously considered using one or both of those channels for carriage of new programming services that have recently become available. Although a number of those new services have been well received by subscribers on other cable systems, it has been CVI's belief that it is important to reserve those remaining two channels for future opportunities. The new must carry rules, however, will impose susbtantial new carriage obligations on this system. One (1) station presently carried on a part-time shared arrangement with the Bravo network could demand full-time carriage. Five (5) additional commercial stations may demand carriage as well as, perhaps, one (1) more non-commercial station (depending, again, upon the ultimate headend designation).

13. Each of the above-mentioned systems will be required, pursuant to the "must carry" provisions of the 1992 Cable Act, to carry certain broadcast stations that are not currently offered to subscribers, at the expense of programming that, in CVI's judgment, would be preferable. In preparing this affidavit I looked at the existing channel line-ups for just 14 of our systems of which these systems not only had new carriage obligations but also inadequate channel capacity to carry those stations. Similar new carriage obligations may also apply to other CVI systems. Operation of this government-enforced preference for carriage of broadcast television stations will reduce the amount and diversity of non-broadcast programming that can be offered by CVI and will, in my judgment, impair CVI's ability to offer its subscribers the highest quality service.

CVI and other cable television operators exercise editorial discretion in determining which programming to offer subscribers, on what terms, and on what channels.

The must-carry provisions of the 1992 Act intrude upon that discretion by requiring operators to give over-the-air television stations preferential treatment in each of these areas.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 11th day of February, 1993.

s/ Michael Egan
MICHAEL EGAN
Vice President
Cablevision Industries
Corporation

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

SECOND AFFIDAVIT OF DAVID A. GARDNER

STATE OF PENNSYLVANIA)
) ss:
COUNTY OF CUMBERLAND)

David A. Gardner, being first duly sworn, deposes and says:

1. I am an employee of Raystay Co. and have been employed by it or its predecessor companies since 1962.

2. Raystay Co., a Pennsylvania Corporation organized in 1969, and its predecessor companies have operated cable television systems since 1951. It presently operates cable television systems in the communities serving Clinton County, Lycoming County, Cumberland County, Perry County, Franklin County, Pennsylvania; Washington County, Frederick County, Maryland; Berkeley County, West Virginia; Marion County, Mississippi; Gila County, Apache County, and Coconino County, Arizona. Raystay Co. currently provides service to 50,200 basic cable subscribers.

3. In my affidavit dated December 3, 1992, I have described Raystay Co.'s owned and operated cable television systems.

4. Raystay Co. does not own any interest in or holdings in any cable television programmer or network, other than ownership of 128 shares of series D convertible preferred stock in QVC. Thus any notion Raystay Co. favors any particular network based on an economic interest in that network is not accurate.

5. Raystay Co. has an ongoing program of determining customers preferences for the program services it provides on its cable television systems. Some of the methods Raystay Co. uses in determining these preferences are the use of focus groups and the use of written customer surveys. Focus groups are used in the systems on a regular basis to achieve face to face contact with the customers and determine the preferences they have for different types of cable television programs. These focus groups are selected by many different community organizations and municipal bodies to achieve an excellent cross section of customer representation in the groups.

6. Written surveys are prepared in a professional manner taking in to account the latest techniques involved in creating a survey that provides the best information possible in a cable television system. These surveys are done on a regular basis and the results are widely distributed throughout the company. All decision makers involved in the programming decision receive a copy of the survey results as well as the focus group results.

7. Raystay Co. believes that its program decision makers are in a better position to accurately assess customer preferences within its systems than a government imposed mandate that has no input from the local community.

8. During the past five (5) years, Raystay Co. has committed a major portion of its available capital resources, both internally generated and externally borrowed, to expansion of channel capacity. Raystay Co. has borrowed money made available to it by banks and other lending institutions. Lending is limited by the rate at which customer service charges can be increased, which are being severely limited by the Cable Act of 1992.

9. Therefore, it is not a viable option to increase borrowings to further expand channel capacity on the Raystay Co. systems at this time. In order to accommodate additional broadcast stations, due to new must carry obligations, Raystay will be forced to discontinue carriage

of existing satellite delivered services, and to defer the addition of newly created non-broadcast or satellite services.

10. If new must-carry broadcast obligations are required of the Raystay Co. system, Raystay will be forced to drop the carriage of satellite delivered services. The services that we would drop would be the ones most recently added to the Raystay Co. systems. To accommodate the broadcast stations identified in my earlier affidavit, the services we would be forced to drop include: Sci-Fi Channel, C-SPAN, C-SPAN II, Black Entertainment Television, The Cartoon Network, The Discovery Channel, and The Learning Channel.

11. In three of the systems Raystay Co. operates in Pennsylvania that comprise a major portion of Raystay Co.'s basic subscribers, the must-carry rules as they are presently written would require carriage of many stations from outside of Pennsylvania. These stations include ones from Maryland, the District of Columbia, Virginia, and West Virginia. These stations are not "local" in any real sense.

12. In having served these subscribers since 1962, Raystay Co. and its predecessor have an accumulated history of the knowledge of the local viewers interest as regards to broadcast stations. It is the opinion of Raystay's management, having the history of operations from 1962 and the benefits of numerous surveys and attendance at many local community focus groups that there is very little subscriber interest in receiving additional broadcast stations imported from distant markets (distant as defined by local community subscribers preference).

13. In the Raystay Co. systems, the new must-carry rules will displace cable program services that provide diversity of choice to the subscribers with broadcast stations that have not been provided in the past due to lack of interest by the subscribing public. This will lead to a reduction in the diversity of programming available to the

public, and prevents us from providing cable network programming our subscribers want to receive.

This ninth day of February, 1993.

s/ David A. Gardner
DAVID A. GARDNER

Date Feb 9 1993

[Notarization Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Citation Omitted in Printing]

AFFIDAVIT OF JOHN W. GODDARD

STATE OF CALIFORNIA)
) ss:
COUNTY OF ALAMEDA)

John W. Goddard being first duly sworn, deposes and says:

1. I am Senior Vice President of Viacom International Inc. ("Viacom"); President and Chief Executive Officer of the Cable Division of Viacom. I submit this Affidavit in support of plaintiffs' Cross-Motion for Summary Judgment in the captioned action.

2. Viacom is a diversified company whose business segments include, among other things, the ownership and operation of cable television systems serving approximately 1,000,000 subscribers in and around San Francisco, California; scattered communities in Northern California; Seattle and Tacoma, Washington and their environs; Nashville, Tennessee; Dayton, Ohio and Salem, Oregon.

3. Sections 614 and 615 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Act") require cable systems to allocate up to one-third of their channel capacity for the mandatory carriage of commercial television station signals and allocate a potentially unlimited portion of their channel capacity for the mandatory carriage of non-commercial television station signals. This requirement results directly in reduction of the number of channels which a cable system can use for transmission of non-broadcast signals.

Broadcast stations not currently carried by cable systems can invoke must carry to displace cable program networks that are currently being offered by cable operators, such as Viacom.

4. The potential displacement of existing cable program networks from Viacom's cable systems and foreclosure of potential opportunities for new cable networks or others to speak caused by the new must carry statute is strikingly illustrated by the Viacom systems in Northern California. For example,

(a) The 54-channel Viacom system in San Francisco already carries 11 commercial broadcast stations and 3 noncommercial broadcast stations. The system has no unused channel capacity, yet the must carry provisions of the 1992 Act would require Viacom to add 4 more commercial broadcasters and 2 more noncommercial broadcasters, for a total carriage requirement of 18 broadcasters. This will require the displacement of 4 present speakers.

(b) The 38-channel Viacom system in Marin already carries 14 broadcast stations (10 commercial, 4 noncommercial), equal to the number of basic cable networks being carried. Yet the must carry statute would require up to 3 additional commercial and 1 additional noncommercial station to be carried, displacing 4 cable networks currently reaching audiences in Marin.

(c) A similar situation exists in the 38-channel Viacom system in East Bay. It has no open channels. It already carries 12 broadcast stations (9 commercial, 3 noncommercial). While it has no room for new cable networks, the must carry statute will require East Bay to add up to 6 additional broadcast stations (4 commercial, 2 noncommercial), and potentially therefore require the system to drop half of the

13 basic cable networks East Bay currently carries.

(d) The 37-channel Viacom system in Pinole carries 13 broadcasters (9 commercial, 4 noncommercial). While Pinole currently has 1 open channel, Viacom has undertaken a contractual commitment to its government franchising authority to dedicate use of this channel for the distribution of governmental and civic programming. The must carry statute will require Pinole to add up to 4 additional commercial broadcasters and thus also to displace 4 cable program networks that currently speak on the Pinole system. Attached to this affidavit, as an example of a cable system's carriage line-up, is the current channel card of Viacom's Pinole system.

(e) A similar situation exists in the 37-channel Viacom system in Petaluma, where there is currently one open channel. Although 14 broadcasters are currently being carried (10 commercial, 4 noncommercial), the must carry statute will require Petaluma to carry up to 3 more commercial broadcasters, both preempting use of the open channel and silencing 2 current speakers on the Petaluma system.

5. The situation is not confined to northern California. For example, Viacom is also facing the necessity of displacing cable networks in other areas of the country:

(a) In Viacom's three Puget Sound, Washington systems, Viacom currently has no open channels. Although the 34-channel Puget Sound South system currently carries 9 broadcast stations (7 commercial and 2 noncommercial), it will have to add 2 commercial stations and an additional noncommercial station, displacing 3 current cable network speakers. In Puget Sound

Central, 8 broadcasters are currently carried, but 2 additional commercial and 1 additional noncommercial station will have to be added to the 37-channel system, again displacing 3 cable networks. Two additional commercial stations would be added to the 7 already carried on the 37-channel Puget Sound North system, again displacing two cable networks.

(b) In Dayton, Ohio, Viacom operates a 38-channel system with no open channels. It would have to add 1 additional commercial station, and may have to add 3 Cincinnati noncommercial stations, all within 50 miles of Dayton, which would displace up to 4 cable networks.

(c) The 37-channel Viacom system in Salem, Oregon again has no open channel, but would have to add 2 additional commercial broadcasters to the 6 it now carries, and 1 additional noncommercial station to the 1 it now carries, displacing 3 current cable speakers in Salem.

(d) In Nashville, Tennessee, the 39-channel Viacom system has no open channels. Nashville currently carries 4 commercial broadcast stations and 1 noncommercial station. It would have to add 3 additional commercial stations and may have to add 2 additional noncommercial stations licensed to Bowling Green, Kentucky. Hence, 5 cable speakers could be displaced.

6. Since enactment of the 1992 Act, Viacom already has received must carry and channel positioning requests from five non-commercial broadcasters and one commercial broadcaster. Two separate requests are for carriage in San Francisco; one of the requests is for carriage on 3 different systems. Pursuant to the Standstill Order entered by the Court on December 9, 1992, these requests have not been honored, and one requestor is seeking remedial action by the FCC pursuant to Section 5(j) of the

1992 Act. Copies of the six requests are attached to this affidavit. The requests (and the systems on which carriage is requested) are as follows:

Station	System
KSTC (Tacoma, WA)	Seattle
WPTD (Dayton, OH) *and* WPTO (0xford, OH)	Dayton
KRCB (Cotati, CA)	San Francisco
KCSM (San Mateo, CA)	San Francisco Napa Marin
WHTN (Nashville, TN)	Nashville

At present, none of these stations is carried on the system indicated. However, in addition to its request for new carriage on the San Francisco system, KRCB (Cotati, CA) has filed a separate request to change its channel position in Marin (where it currently is carried).

7. In my view, sections 614 and 615 of the 1992 Act create a preferred class of speakers-—broadcasters with governmentally imposed rights, preferences and guarantees which, in their implementation, directly diminish the rights to speak of the class of non-preferred speakers (such as cable programming networks). It does this without consideration of whether the public even wants to receive any broadcast signals as part of the cable service to which they subscribe in lieu of cable program networks. Some of those speakers who are denied preferred status will lose the ability to be heard by their intended audiences. These disinfranchised speakers must vie with each other for carriage and distribution on a more limited number of available channels than would otherwise be the case in the absence of the requirements imposed by sections 614 and 615 of the 1992 Act.

Because the resulting decreased distribution of cable networks will inevitably lead to decreased revenues for

them, the 1992 Act will inevitably and adversely effect the capacity of this class of non-broadcast speakers to create original programming or to purchase other programming for distribution to subscribers.

I declare under the penalty of perjury that the foregoing is true and correct:

Executed this 12th day of February

s John Goddard
JOHN GODDARD

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF DAVID HANSON

STATE OF ILLINOIS,)
) ss:
COUNTY OF COOK,)

David Hanson, being duly sworn, deposes and states as follows:

1. I am a Regional Director, Affiliate Operations for Home Box Office ("HBO"), a division of Time Warner Entertainment Company, L.P. I have held this position for one year and have been employed by HBO for over eleven years.

2. Prior to the passage of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"), a sales associate and I gave a presentation and proposed an offer to Southwest Missouri Cable Co. regarding Cinemax, one of HBO's premium movie channels. Southwest Missouri Cable was negotiating for its Carthage, Missouri system, which has approximately 4,000 cable subscribers.

3. Following the presentation, Southwest Missouri Cable expressed its interest in and excitement regarding our proposal. It stated, however, due to the impending cable legislation being considered by Congress, it could not make any commitment to dedicating a channel to Cinemax. Furthermore, since the passage of the 1992 Cable Act, Southwest Missouri Cable's System Manager

has informed an HBO Account Service Executive that it cannot now consider adding Cinemax to its channel line-up.

4. In addition, prior to the passage of the 1992 Cable Act, Jones Intercable, Inc. of Carmel, Indiana, which has approximately 12,000 subscribers, provided free previews of HBO to its non-HBO subscribers. Offering such free previews is valuable to both cable systems and HBO because it allows non-HBO subscribers to view HBO's programming without subscribing, thereby sparking interest in its programming.

5. Since the passage of the 1992 Cable Act, however, Jones Intercable of Carmel advised me that it would not participate in the January free previews because of the burdensome nature of the 1992 Cable Act's free preview requirements.

/s/ David Hanson
DAVID HANSON

[Notarization Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

DECLARATION OF JOHN HENDRICKS

I, John Hendricks, based on my own personal knowledge declare as follows:

1. I am Chairman and Chief Executive Officer of plaintiff Discovery Communications, Inc., the owner of The Discovery Channel ("TDC") and The Learning Channel, Inc. ("TLC").

2. I make this affidavit in support of plaintiffs' motion for summary judgment.

3. While the operative facts justifying summary judgment are not in dispute, this declaration is submitted to outline the need for immediate review. *See, Abbott Laboratories v. Gardner*, 387 U.S. 136, 152 (1967).

4. I will set forth the background of the cable industry, the nature of the plaintiffs, the provisions of the 1992 Cable Act as to which summary judgment is sought and generally describe the injury to The Discovery Channel and The Learning Channel. The accompanying affidavit of William Goodwyn demonstrates in greater detail the injury to The Learning Channel.

The Discovery Channel

5. The Discovery Channel was founded in 1985. In the climate of cable deregulation, it flourished. The Discovery Channel has grown to become the fifth largest

cable network with approximately 59 million subscribers, or 96% of the televisions wired for cable.

6. I created The Discovery Channel to reach an audience not adequately served by existing over-the-air stations and cable channels. It is aimed at people who watch television to broaden their understanding and appreciation of the world. The Discovery Channel features nonfiction documentaries about science, nature, technology, human events and history. Among The Discovery Channel's programs are "The Natural World", "Wildlife Chronicles", "In the Company of Whales," "Red Sea," "Russia: Live From The Inside," "Africa Safari: Live," "People of the Forest," and "Ivory Wars." The Discovery Channel also provides a series of programs with The Smithsonian Institution called "Invention", each original episode of which focuses on different inventions. A number of The Discovery Channel's special programs have won Emmys and Ace Awards. See Exhibits B to F of this Declaration for more detail about The Discovery Channel's programming.

7. Each week in "Discovery Journal", The Discovery Channel presents issues of great social and political significance. Among the subjects covered are famine, overpopulation, organ donation, capital punishment and AIDS.

8. The Discovery Channel also includes public affairs programming. For example, because of inadequacies of the over-the-air broadcasters' sound-bite coverage of the Presidential primaries, in February of this year The Discovery Channel provided a block of 20 minutes free time to each of the major Presidential candidates; more than 1.5 million people watched the candidates on The Discovery Channel sponsored forum, Address To The Nation, which was anchored by Walter Cronkite. See Exhibit A of this Declaration.

9. The Discovery Channel competes directly with over-the-air broadcasting, seeking the time and attention of intellectually curious viewers.

10. Discovery Communications acquired The Learning Channel in 1991 as a complementary service to The Discovery Channel. The Learning Channel features educational programs for viewers of all ages. The Learning Channel schedule will soon include six hours of commercial-free preschool educational programming every weekday called "Ready, Set, Learn"; programs such as "The Learning Channel Elementary School" and "Mad Math" for elementary school children; weekly programs such as "Ten Great Writers" for high-school age and other viewers; and adult education programs such as "Learn to Read" which gives adults the opportunity to learn to read in the privacy of their own homes. In September 1991, The Learning Channel premiered "To Read", a The Learning Channel Special Presentation, which celebrates the joy reading brings to our lives. The Learning Channel also has programming for teachers. For example, The Learning Channel's weekly series "Teacher TV" is produced by, for, and about teachers. It profiles innovative teachers who are "breaking the mold" and bringing new kinds of active, involving learning experiences to their students. It addresses the concerns of teachers in a fast-paced, high quality program and has been extremely well received by both parents and teachers. The Learning Channel also provides programming for teachers to tape and use in the classroom.

11. Some of the most watched regular series on The Learning Channel are "Ancient Journeys", "Archeology", "A Traveler's Journal", "The World: A Television History" and "Civilization" and "Science Frontiers." These programs are intended to broaden the viewer's prospective on history, world culture, science, sociology and anthropology. For more detail about The Learning Channel program, see Exhibit G of this Declaration and the accompanying Declaration of William Goodwyn.

The Technologies of Broadcasting and Cable

12. Broadcast television and cable television have wholly different technologies. Broadcasters radiate electromagnetic waves from transmitters. The waves are intercepted by the viewers' television receivers and translated to produce video images. Because of the physical limits of the electromagnetic spectrum, the number of broadcasters in any area at any time is physically limited. Thus, limited regulation and allocation of the airwaves is essential for over-the-air broadcasters.

13. Cable networks, such as The Discovery Channel and The Learning Channel, sell their programs to cable system operators, who retransmit the programs over coaxial and fiber optic cables to subscribers. The Discovery Channel and The Learning Channel also license their services in other alternative technology markets, including the SMATV, MMDS and TVRO markets. The number of channels that can be distributed by cable and the alternate technologies are not limited by the electromagnetic spectrum, although for economic reasons most cable system operators usually carry between 36 and 54 channels.

14. As I will discuss in greater detail in the subsequent paragraphs, the Cable Act of 1992 forces cable system operators to carry additional local over-the-air broadcast stations and to give them preference at the expense of programmers like The Discovery Channel and The Learning Channel. As a result, The Discovery Channel's and The Learning Channel's audience will be artificially limited. In essence, it mandates mediocrity in place of diversity and quality for no good reason.

15. *The Must-Carry Provisions.* Sections 4 and 5 of the 1992 Cable Act require each cable system to carry local commercial over-the-air broadcast stations on as many as one-third of the cable operator's channel capacity, plus low power stations and non-commercial educational stations.

16. Each cable system has a finite number of channels for transmitting programs. The requirement that each cable operator dedicate substantial capacity to over-the-air broadcast programs limits the number of channels available for cable signals. Moreover, cable operators now operating at full capacity will be required to drop cable networks to comply with the must-carry provisions.

17. Cable networks such as The Discovery Channel and The Learning Channel must compete for the remaining available usable channels. Cable networks are therefore necessarily less likely to be carried than the over-the-air broadcast stations, which must be carried. Popular networks, such as The Discovery Channel, will face artificially stiffer competition for the remaining channels. Newer networks, such as The Learning Channel, face exclusion. Prior to the Act, The Learning Channel frequently vied for one of the last available channel positions in a cable system. After the Act, The Learning Channel has experienced greater difficulty as available space has been constricted by the must-carry provisions. Indeed, The Learning Channel has been rejected or threatened with deletion by cable operators to make channel space available for the broadcast signals which must be added pursuant to the must-carry provisions of the Act.

18. The must-carry provisions of the 1992 Cable Act also reduce the audience for The Discovery Channel. While The Discovery Channel is now carried on the basic service tier by most of its cable operator customers, the must-carry provision will cause The Discovery Channel to be moved to higher programming tiers which are targeted at narrower audiences. As a result, The Discovery Channel will lose advertising revenue and have to cut back on its programming efforts, at the same time favored broadcast television channels will have artificially larger audiences. There is no need to favor broadcast television in this respect, since more than 92% of all TV advertising revenue goes to over-the-air broadcast television, while less than 8% goes to cable television.

19. *The Channel Positioning Requirements.* Sections 4(b)(6) and 5(g)(5) of the 1992 Cable Act require each cable operator to retransmit the mandatorily carried over-the-air stations on the channel number on which each such station is currently broadcast, or was broadcast on stated dates, as set forth in the Act.

20. Channel positioning is a significant factor affecting the size of the audience reached. Lower channel numbers, and channels in proximity to other popular channels typically reach larger audiences. Cable networks such as The Discovery Channel with preferable channel positions face displacement to less favorable channel positions by over-the-air broadcast stations. Also, cable audiences associate networks like The Discovery Channel with the channel on which they have traditionally been carried. Cable networks forced to change channels will lose audience recognition. New networks like The Learning Channel will be totally foreclosed from more favorable slots no matter how good the programming.

21. Requiring cable operators to give preference to over-the-air broadcast programmers in making channel assignment invades the editorial judgment of cable operators and denies cable programmers access to positions statutorily granted to over-the-air broadcast stations.

22. There is no justification for Congress' infringement of the rights of cable operators and cable programmers. The justifications offered by Congress in Section 2 of the Act are both inaccurate and inadequate. In particular:

a. Congress purports to find that cable operators and cable programmers have "market power" and are "seriously jeopardiz[ing]" over-the-air broadcasters; in fact, over-the-air broadcasters dominate television. Cable television has grown not because it has "undue market power" but because it has offered more attractive programming.

b. Congress purports to be protecting "local origination of programming." However, local over-the-air

broadcasters do not feature local programming other than news. The bulk of their programming is reruns of sitcoms.

c. Congress purports to be protecting "diversity" of programming. However, diversity in television programming is coming from cable programmers like The Discovery Channel and The Learning Channel, not from the mediocre, lowest-common-denominator fare of broadcast television.

d. Congress states that "more advertising revenues will be reallocated from broadcast to cable television systems" without disclosing that more than 92% of all television advertising revenue goes to over-the-air television broadcasters. See Exhibit H.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on February 12, 1993.

/s/ John Hendricks
JOHN HENDRICKS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

SECOND AFFIDAVIT OF DOUGLAS V. HOLLOWAY

I, Douglas V. Holloway, declare as follows:

1. I am Senior Vice President-Affiliate Relations of USA Networks which owns and operates USA Network and The Sci-Fi Channel. My responsibilities include the sale and distribution of USA Network and The Sci-Fi Channel to cable systems throughout the country. I submit this affidavit in support plaintiffs' cross-motion for summary judgment.

2. The must carry requirements of the 1992 Cable Act already are having a significant adverse effect on the distribution of The Sci-Fi Channel. The Sci-Fi Channel began operations on September 24, 1992. The reaction to the introduction of this new channel has been extremely favorable from cable operators and from cable subscribers. Attached is an article from the February 1, 1993 edition of *Multichannel News* indicating that cable operators named The Sci-Fi Channel most often as the service they planned to add during 1993. Since its introduction, cable operators serving approximately 11 million homes have launched The Sci-Fi Channel.

3. Despite receiving such high praise for The Sci-Fi Channel, cable operators serving approximately 50 million homes have not added The Sci-Fi Channel in their systems. The reasons most frequently given by these cable operators are that their particular systems do not have a sufficient number of channels available to enable it to

add this new service. Many cable operators have added that their channel capacity problems have been exacerbated by concerns arising out of the must-carry provisions of the 1992 Cable Act. As a result, despite the fact that many of their subscribers have requested the addition of The Sci-Fi Channel, these cable operators will not be able to introduce The Sci-Fi Channel until their obligations with respect to the must-carry provisions of the Cable Act are better defined.

4. As a basic service, The Sci-Fi Channel relies on two sources of revenues—subscriber fees and advertising revenues. Each such source of revenue is directly dependent on distribution, and the distribution of the channel is directly affected by the uncertainty surrounding the 1992 Cable Act. USA Networks continues to suffer as a result thereof.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed this 10 day of February, 1993.

/s/ Douglas V. Holloway

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF MATTHEW B. KASMAN

STATE OF NEW YORK,)
) ss:
COUNTY OF NEW YORK,)

Matthew B. Kasman, being duly sworn, deposes and states as follows:

1. I am Vice President, Affiliate Operations for Home Box Office ("HBO"), a division of Time Warner Entertainment Company, L.P. I have been employed by HBO for over 10 years and am very familiar with the cable programming distribution industry.

2. Prior to the passage of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"), HBO had launched a sales initiative for "multiplexing" HBO and Cinemax, two of the cable programming services that HBO offers. Under multiplexing, HBO and Cinemax are presented to subscribers on two or three channels using time differentiated scheduling so that different programming from the service appears at the same time on various channels. This is an important programming service because it (a) increases programming options for subscribers; (b) helps HBO and Cinemax to match the television viewing schedules of various subscribers; and (c) makes subscribers more receptive to HBO and Cinemax programming. Under HBO's multiplexing approach, cable systems have the option of dedicating up to three channels to HBO pro-

gramming and up to two channels to Cinemax programming. Multiplexed services are normally offered at no additional cost to the subscriber, thereby enabling HBO to better compete with other sources of programming.

3. Prior to the passage of the 1992 Cable Act, HBO was discussing with TKR Cable Co., a multiple system operator ("MSO"), multiplexing for its cable system in Nanuet, New York. The Nanuet system has approximately 45,000 cable subscribers, 25,000 HBO subscribers and 7,000 Cinemax subscribers. The system was considering dedicating two additional channels for HBO multiplexing.

4. Since the passage of the 1992 Cable Act, however, TKR has informed HBO that it will not engage in any negotiations regarding multiplexing until the constitutionality of the must-carry regime is decided. It also informed HBO that if the must-carry provisions of the Act are upheld, the Nanuet system would not have room for any channels for multiplexing HBO programming.

5. Another MSO that HBO was negotiating with prior to the passage of the 1992 Cable Act was MultiVision Cable TV Corp. MultiVision was discussing multiplexing for its cable systems in Anaheim and Hermosa Beach, California. The Anaheim system has approximately 37,600 cable subscribers, 10,800 HBO subscribers, and 2,600 Cinemax subscribers. The Hermosa Beach system has approximately 18,000 cable subscribers, 5,600 HBO subscribers, and 1,000 Cinemax subscribers. Both the Anaheim and Hermosa Beach systems were considering dedicating additional channels for HBO or Cinemax multiplexing. In addition, the Anaheim system was considering dedicating an additional channel to "Selecciones", an HBO service that provides programming in Spanish.

6. Since the passage of the 1992 Cable Act, however, MultiVision has informed HBO that it will not engage in any negotiations regarding multiplexing or "Selecciones" until the constitutionality of the must-carry provisions are decided. MultiVision has also informed HBO that if the must-carry provisions are upheld, Anaheim and Hermosa Beach will have to reevaluate their channel capacity for multiplexing HBO or adding "Selecciones" on a dedicated channel, and may not have the capacity to do either.

7. Also affected by the 1992 Cable Act's provisions is programing that HBO offers free of charge to non-HBO subscribers. Prior to the passage of the 1992 Cable Act, HBO could offer, without governmental restriction, programming of public interest to all cable subscribers, whether or not they subscribed to HBO or Cinemax.

8. Since the passage of the 1992 Cable Act, however, cable systems have begun to refuse to offer this type of public interest programming to non-HBO subscribers because they believe that doing so may violate Section 15 of the 1992 Cable Act. (HBO does at times offer movies rated R by the Motion Picture Association of America and therefore, even though a given "preview" of the HBO service to non-HBO subscribers may not include movies rated R, is subject to Section 15.)

9. On January 17, 1993, HBO offered free of charge to non-HBO subscribers, and in the spirit of the presidential inaugural celebration, "An American Reunion: The People's Inaugural Celebration", programming that contained excerpts from the inaugural events. Cablevision Systems Corporation ("CSC"), which has approximately 1,662,000 cable subscribers, 863,000 of which are HBO subscribers and 318,000 of which are Cinemax subscribers, however, initially refused to offer "An American Reunion" to non-HBO subscribers. CSC believed that offering this programming would possibly violate Section 15. Therefore, CSC agreed to present "An American Reunion" to non-HBO subscribers only after HBO provided CSC with an indemnification for any damages that might be imposed for a violation of Section 15. *See* Exhibit A.

10. As part of the inaugural celebration, Disney also offered free of charge to non-Disney subscribers programming that contained excerpts from the inaugural celebration. Paradoxically, Disney was able to offer this programming, which was very similar to HBO's, without restriction because Section 15's terms do not apply to Disney since it is not a premium channel that "offers movies rated by the Motion Picture Association of America as X, NC-17, or R".

/s/ Matthew B. Kasman
MATTHEW B. KASMAN

[Notarization Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF LISA A. KERR

Lisa A. Kerr makes this affidavit and states:

1. I am the Senior Director of Affiliate Relations of National Cable Satellite Corporation, d b a C-SPAN ("NCSC") with overall responsibility for the relationships between NCSC and its cable television system affiliates of C-SPAN and C-SPAN 2, the two public affairs programming services operated by NCSC.

Background

2. C-SPAN and C-SPAN 2 are available on a 24-hour per day basis via cable television and are devoted entirely to information and public affairs programming, including the live gavel-to-gavel coverage of the proceedings of both the U.S. House of Representatives (on C-SPAN) and the U.S. Senate (on C-SPAN 2), and a variety of other events at public forums around the country and the world. Each event on C-SPAN and C-SPAN 2 is provided to the viewer without editorial comment or analysis, and whenever possible, on a live basis. With our 24-hour capacity on two networks, we are also able to deliver the viewer coverage of each event in its entirety.

5. The C-SPAN network is available to 58 million cable television subscribers, representing 62% of all television households in the U.S. The C-SPAN 2 network is available to 29 million cable television subscribers, representing 31% of all television households in the U.S. To-

gether our two networks have attracted a significant and involved audience, and have drawn comment from our colleagues in the news and information business (see the brochure, attached as Exhibit A).

NCSC as a First Amendment Speaker

6. By exercising a significant amount of editorial discretion regarding the types of programming offered by C-SPAN and C-SPAN 2, the NCSC staff is engaged in conduct protected by the First Amendment. Given that status, NCSC is strongly opposed to the aptly-named "must carry" rules that are contained in the Cable Television Consumer Protection and Competition Act of 1992 (the "Cable Act"), and the constitutionality of which is the subject of this proceeding. NCSC believes the must carry rules, as set out in Sections 4 and 5 of the Cable Act, clearly violate NCSC's free speech rights as guaranteed by the First Amendment. The rules grant an inappropriate government-sanctioned preference to broadcast licensees over all cable programmers such as C-SPAN and C-SPAN 2. As such, they also have the practical and intolerable effect of actually reducing NCSC's access to its audience.

The Must Carry Rules "Block" C-SPAN's Access to Its Audience

6. It is my opinion, based on our experience in seeking cable system carriage for C-SPAN and C-SPAN 2, that the must carry rules (when they were on the books) and the threat that the rules will be reimposed have meant less carriage for our services in the past, and will mean the same in the future. The result has been and will be that many cable television subscribers who might otherwise be able to watch their government in action on their cable systems, are denied the opportunity. Although C-SPAN (and to a greater extent C-SPAN 2) has faced scores of such cable system access problems related to the

must carry rules, the following few situations illustrate the problem very well.

Systems Where the Rules "Block" C-SPAN's Access to its Audience, or Put It at Risk

7. For example, throughout the Eighties, we were told by the manager of the cable system in Walnut Creek, California that he could not carry C-SPAN on his system on a full-time basis because the must carry rules forced him to dedicate too many channels to local, and frequently similarly-programmed broadcast stations. His solution was to force C-SPAN to share a channel with another service. The proof of the "blocking" effect of the rules on C-SPAN carriage was that as soon as one of the broadcast stations with must carry status simply stopped operating, the manager immediately placed C-SPAN on the system on a full-time basis.

8. The situation in San Mateo, California is similar, except that even today, after 14 years of trying to get C-SPAN its own channel on that system, we are still part-time there. It was made clear to us by every system manager or marketing manager there since 1979 that if it were not for the must carry rules, C-SPAN would have had its own channel, a long time ago.

9. Now, as many cable operators believe the must carry rules will soon become law again, our marketing representatives are being told to expect that C-SPAN and C-SPAN 2 will be dropped from their channel lineups. Just last month, for example, the executive vice president of Simmons Cable expressed his concern to us that the must carry rules may hurt C-SPAN's current and future carriage on the Simmons systems, which serve more than 180,000 subscribers. Today, C-SPAN is seen by 83% of the Simmons subscriber base. After the new rules are applied, C-SPAN will likely be seen by fewer Simmons Cable subscribers, but the size of the audience we will lose is uncertain at this time.

10. The same problem exists for us in New York City. On January 6 of this year we met with the management of the cable systems in New York to discuss the rebuild plans for one of the Manhattan systems. We were pleased to know that both our services are scheduled to be carried full-time when the rebuild of the system is complete. However, our sales representative was told that because the new must carry rules could require the carriage of local broadcast signals that are not now in the proposed 76 channel line up, the system would be forced to drop some services. We are concerned that C-SPAN 2 would be a cable service vulnerable to being dropped.

11. Just last week we talked to the general manager of the Intermedia Partners-owned system in Santa Clara, California about finally getting at least our primary service, C-SPAN, carried to its 20,000 subscribers who now are unable to see it. The San Francisco-area system has 28 channels of capacity, 16 of which are taken up with local broadcast stations. The general manager pointed out that given the number of local stations in the San Francisco Bay area that would qualify for must carry status under the proposed Cable Act, it would be highly unlikely that he would be able to carry C-SPAN, much less C-SPAN 2, in the future unless he completely rebuilds the system.

12. In response to the passage of the Cable Act, we took care this week to review the carriage status of C-SPAN and C-SPAN 2 for the Viacom Cable-owned systems in the San Francisco Bay area. Given the large number of broadcast stations in that market that would certainly qualify for must carry status, many cable programming services will likely be dropped to accommodate them. C-SPAN and C-SPAN 2 are particularly vulnerable. For example, in the fully programmed 54-channel San Francisco system, C-SPAN 2 must currently share a channel with one of three PBS stations carried on the system, KMTP-TV. Since the Cable Act became law, the system has received demands for carriage by two other

PBS affiliates, KCSM-TV and KRCB-TV. The effect, of course, is that the system will have to drop two cable services to accommodate them. Moreover, it is probably only a matter of time before KMTP-TV, the station that shares a channel with C-SPAN 2, submits its demand for full-time carriage. The effect, of course, is that C-SPAN 2 will lose its channel, and may not find another.

13. Viacom's East Bay system carries just C-SPAN, and even so we share a channel with the same PBS affiliate, KMTP-TV, with which C-SPAN 2 shares a channel in the San Francisco system. All of the East Bay system's 38 channels are full. If the must carry rules are applied, the system could be required to drop as many as 7 non-broadcast services to accommodate the additions. Again, our service, C-SPAN, is at risk of losing access to our audience.

14. The Marin County system has 37 channels, all of which are fully programmed with 14 local commercial and educational broadcast stations. Fortunately, C-SPAN is carried on a full-time basis as of today. Unfortunately, the must carry rules would require that 4 additional channels be found for those broadcast stations that qualify for carriage. Short of a rebuild of the system, we believe that C-SPAN would be at risk of losing carriage on the Marin system, and the likelihood of adding C-SPAN 2 in the future is made even more remote.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed this 2nd day of February, 1993

/s/ Lisa A. Kerr
Lisa A. Kerr

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF GREGORY L. KLEIN

DISTRICT OF COLUMBIA ss:

GREGORY L. KLEIN makes this affidavit and states:

1. Since January 1986, I have held the position of Director of Economic Analysis at the National Cable Television Association, Inc. (NCTA). I submit this affidavit in support of plaintiff National Cable Television Association, Inc.'s Motion for Summary Judgment in Civil Action No. 92-2495.

2. I hold a Masters degree in Engineering Economics from Indiana State University in Terre Haute, Indiana and a Masters degree in Economics from Boston College in Chestnut Hill, Massachusetts. I am responsible for collecting, tabulating, and analyzing information that bears on NCTA's positions before Congress and the Federal Communications Commission. I have testified as an expert witness before the Copyright Royalty Tribunal.

3. The information contained in this affidavit is based on personal knowledge as well as on information found in reports and other professional publications that are generally relied on by experts in the field of cable programming and operations.

4. NCTA is the principal trade association of the cable television industry in the United States. NCTA represents owners and operators of cable systems serving over 80 percent of the nation's 57.2 million cable households, as well as more than 60 national and regional cable programming networks.

5. Television signals are electromagnetic impuses that are transmitted to viewers' television receivers, where they are translated to produce video images and sound. The primary difference between broadcast technology and cable technology is the medium through which these electromagnetic impulses travel. Broadcast transmissions travel through the air in various frequencies, with the sum of all available frequencies being the frequency "spectrum." This spectrum is physically limited, and can bear only a certain number of television signals. Cable television, by contrast, transmits electromagnetic impulses to viewers through metal wires such as coaxial cable, with different signals traveling at different frequencies inside the cable. In effect, the cable acts as a self-contained electromagnetic spectrum: this allows cable television operators to transmit signals without regard to the specific spectrum limitations that govern broadcast television. As I explain below, however, the carriage capacity of cable television is limited.

6. The number of programming sources available to cable television operators has risen sharply as the number of subscribers to cable service has increased. In 1976, there were 4 national cable programming networks. Currently, 80 national and 48 regional cable networks offer programming and 14 more networks are planned. Cable programming not available through broadcast television includes satellite-delivered networks specializing in quality children's programming, black entertainment programming, artistic programming, science and nature documentaries, sports, news, and public affairs, including coverage of the United States Congress.

7. All cable television systems have a defined channel capacity. As of April 1, 1992, 88 percent of all U.S. systems for which capacity data was available had a maximum capacity of less than 54 channels. Twenty-six percent had a capacity of less than 30 channels. The average cable system currently has a capacity of approximately 40 channels.

8. According to the A. C. Nielsen Company's Cable On-Line Data Exchange (CODE), an industry database, about 2,000 cable systems, serving one-third of all cable subscribers, have no excess channel capacity available for use.

9. Upgrading or rebuilding cable systems to increase channel capacity requires large capital investments—generally in the millions of dollars for any particular local system. Paul Kagan Associates, Inc. estimates that the cable television industry spent $595 million on rebuilding cable systems in 1992, at an average cost of $25,000 per mile. Another $240 million was spent on upgrading cable systems, at an average cost of $7,500 per mile. These costs are not expected to fall; rather, Paul Kagan Associates predicts that the average cost of rebuilding a cable system will increase to $29,000 per mile by the year 2000, while the average cost of upgrading a system will rise to $10,300 per mile. To give a specific example of the expense involved, Continental Cablevision recently agreed as part of franchise renewal to upgrade its 7,600-subscriber Watertown, Massachusetts system from 52 to 61 channels, at a cost of more than $3 million. Brown, *Watertown Win*, Broadcasting, March 30, 1992, at 89. Although emerging technologies such as video compression may provide new ways of expanding capacity, these technologies, too, promise to be expensive.

10. Considering existing channel capacity and the cost of adding new channels, as well as the continuing development of new source of programming, it is clear that, for the foreseeable future, the supply of programming available to cable television operators will exceed the carriage capacity of all but a handful of local cable systems.

11. In the future, emerging technologies such as high definition television (HDTV) and interactive programming, as well as innovative services like the presentation of films at staggered starting times on different channels, will compete with traditional sources of programming for available channel capacity.

12. In the course of my work at NCTA, I have had occasion to review most if not all publicly available research regarding carriage of local broadcast television signals by cable television operators. The most comprehensive study of the incidence of broadcast system carriage was conducted by NCTA and Price Waterhouse during the summer of 1988. This investigation showed that the 3,966 responding cable television systems were carrying 98 percent of all broadcast stations that would have qualified for a carriage preference under the interim must-carry rules invalidated in *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987). Ninety-four percent of these systems reported carrying all stations qualified for must-carry status under the interim rules, and an additional 3 percent carried enough qualified stations to satisfy their carriage obligations under the rules struck down in the *Century* decision.

13. Cable television systems in the United States increased their carriage of local broadcast stations during the late 1980s. In 1990, the average cable system carried 8.57 local broadcast signals, 7 percent more than in 1985.

14. According to the *Television & Cable Factbook* compiled by Warren Publishing, the number of operational, commercial broadcast television stations in the United States rose from 919 in 1986 to an all-time high of 1118 in 1992. The number of operational, noncommercial educational broadcast television stations in the United States rose from 316 in 1986 to 363 in 1992, a 15 percent increase. As with commercial stations, more educational television stations than ever before were broadcasting in 1992. Warren Publishing, *Television & Cable Factbook*, Services Vol. 60 at G-3 (1992).

15. Warren Publishing's *Television & Cable Factbook* (Stations Volumes) shows that as of October 1991, broadcast television stations were licensed in 594 U.S. cities, 80 more cities than in August of 1985. This represents an increase of about 16 percent in the number of cities hosting broadcast stations during these years.

16. Cable television (including the broadcast programming it carries) serves about 61 percent of all U.S. households with television. Competing technologies (such as MMDS, SMATV, and TVRO) provide service to approximately 4 percent of television homes, while 35 percent of all television households receive *only* broadcast service.

17. Both independent and public broadcasting stations have claimed a relatively constant share of all television viewing over the last 6 years: they recorded about a 20 share and 3 share, respectively. The top 3 commercial broadcast networks experienced a decline in their share of viewing from a 66 share during the 1985/86 season to a 54 share during the 1991/92 season, but they remain the most-watched programming on television. Combined, broadcast television accounted for more than 70 percent of all television viewing during the 1991/92 season.

18. Figures provided by the Newspaper Association of America indicate that although daily newspapers are published in over 1500 American cities, only 34 of those cities (or approximately 2 percent) are served by two or more competing dailies. The Senate Committee on Commerce, Science, and Transportation found that, as of 1991, there were 53 communities in which two or more cable systems served the same geographic area. S. Rep. No. 92, 102d Cong., 1st Sess. 13 (1991).

19. In 1980, 55 percent of homes passed by cable television actually subscribed. Sixty-two percent of homes passed by cable currently subscribe.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 12th day of February, 1993.

/s/ Gregory L. Klein
GREGORY L. KLEIN

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF DANA A. MICHAELIS

I, Dana A. Michaelis, declare as follows:

1. I am Vice President, Affiliate Sales, of The Travel Channel, Inc. I have held this position since July 1992. In this capacity I am responsible for the distribution of The Travel Channel to cable systems throughout the country. Prior to serving in this position I was, Vice President, Special Projects, Sales/Marketing, for The Weather Channel, Inc. A summary of the history and programming of The Travel Channel is contained in the affidavit of E. Roger Williams, previously submitted in connection with this action. I submit this affidavit in support plaintiffs' cross-motion for summary judgment.

2. The must carry requirements of the 1992 Cable Act already are having a significant adverse affect on The Travel Channel. Attached hereto is a chart, several pages in length, which I have prepared describing cable systems which have in fact already dropped The Travel Channel because of the must carry requirements, which have informed us they will not be able to add The Travel Channel to their line-ups because of must carry, and which have informed us that they may have to drop our programming in the near future because of must carry obligations.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed this 9th day of February, 1993.

/s/ Dana A. Michaelis
DANA A. MICHAELIS

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF TERRY O'CONNELL

STATE OF MASSACHUSETTS,)
) ss:
COUNTY OF MIDDLESEX,)

Terry O'Connell, being duly sworn, deposes and states as follows:

1. I am President of the Greater Boston Division of Time Warner Cable, which is an unincorporated division of Time Warner Entertainment Company, L.P. I have held this position since January of 1991 and have worked for Time Warner Cable or its predecessor since May of 1982.

2. The Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act") and the Cable Communications Policy Act of 1984 (the "1984 Cable Act") have caused several injuries to the Greater Boston Division cable systems. Below I outline only a few of these injuries.

3. Because the 1992 Cable Act reinstates liability for cablecasting obscene material, the Division has been compelled to prescreen the Lynn, Massachusetts Cable Group's public access programming for such material. The Division's Access Supervisor prescreens programming for a total of approximately 250 hours per year.

4. In addition, if the must carry provisions of the 1992 Cable Act are upheld, the basic tiers of cable systems

throughout the Greater Boston Division will have to be expanded. Depending on the system, the basic tier will have to be expanded by three or four channels. This expansion of the basic tiers will force a reduction of the number of services offered on most systems' expanded and standard tiers. We anticipate that possibly three channels will have to be dropped from most systems' line-ups. Unfortunately, we would be compelled to drop some of our more popular services, such as the satellite delivered Superstations from Chicago, Atlanta and New York.

5. Furthermore, the provisions of the 1992 Cable Act that authorize franchise authorities to require funding for Public, Educational and Governmental ("PEG") programming place significant financial burdens on cable systems. The Greater Boston Division has already been required by franchise agreements to commit millions of dollars to PEG programming. Below is a table which shows the total dollar amount spent by our cable systems over the terms of their franchises, which range from ten to fifteen years.

PEG Expenditures over Life of Franchise

Municipality	PEG Operating Cost	Facility/ Equipment Cost	Maintenance Hours Required
Somerville	$ 4,485,000.0	$ 700,000.0	0
Medford	1,621,000.0	825,000.0	0
Salem	1,950,000.0	400,000.0	0
Melrose	1,482,500.0	225,000.0	0
Everett	500,000.0	185,000.0	120 hrs.
Chelsea	626,000.0	215,000.0	120 hrs.
Lynn	1,500,000.0	390,000.0	no limit
Malden	1,700,000.0	310,000.0	120 hrs.
Swampscott	615,000.0	175,000.0	no limit
Wakefield	1,950,000.0	523,000.0	0
Winthrop	1,200,000.0	200,000.0	0
	$17,629,500.0	$4,148,000.0	

/s/ Terry O'Connell
TERRY O'CONNELL

[Notarization Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIRMATION OF MICHAEL C. RAU

District of Columbia: ss

I, Michael C. Rau, affirm pursuant to 28 U.S.C. § 1746, as follows:

1. I am the Senior Vice President, Science & Technology, of the National Association of Broadcasters. I submit this affidavit in support of the Opposition of Intervenor-Defendant Applicant National Association of Broadcasters to Motions for a Preliminary Injunction Restraining Enforcement of Sections 4 and 6 of the 1992 Cable Act Filed by Plaintiffs TWE, NCTA and Discovery in these cases. This affidavit supplements the information in my earlier affidavit submitted November 22, 1992, in *Turner Broadcasting System* v. *FCC*, Civ. Action No. 92-2247 (SFW, TPJ, SS), and describes recent developments in fiber optics, video compression, and digital video servers for cable television.

2. I am responsible for a broad range of NAB technical affairs and for providing technical advice and guidance to the membership and Board of Directors of the Association. As part of my duties, I review technological developments which may affect the television industry, either through changes in broadcast television systems or changes in other technologies used to distribute television signals, including in particular cable television. Prior to joining NAB in 1981, I was employed by Jules Cohen &

Associates, an engineering consulting firm, and by Rau Radio Stations, Inc., a broadcasting company with cable television interests.

3. Plaintiffs have alleged that the must carry requirements of the 1992 Cable Act may cause displacement of certain cable program services because of a lack of capacity in cable systems. However, the channel capacity of cable television systems is being rapidly expanded by cable television companies. The increasing deployment of fiber optics and the use of video compression techniques will expand significantly the number of channels of capacity available to all cable customers, eliminating any shortage of channel capacity for desirable programming. Perhaps more importantly, however, the development of cost-effective video switching devices to provide video-on-demand completely removes any ceiling or limits on the availability of video programs through cable systems. Video switches shift the program-delivery limitations of cable television systems from the channel-carrying capacity of the systems to the unlimited capacity to store programs in each system's video library. Video switching technology is being depioyed not only by cable television systems, but also by telephone companies offering to provide so-called video dial-tone services.

Fiber Optics

4. Recent developments confirm that fiber optics is becoming increasingly prevalent in cable television systems. There are more than 1 million miles of fiber-optic cable in cable systems throughout the U.S. and another 620,000 miles is expected to be installed this year.[1] In fact, the Myers Reports survey of 834 cable system operators reported that 38% of systems with 12-36 channels, and 40.6% of systems with 37 or more channels, plan

[1] Kathy Berlin, *Fiber Deployment '93: 85 Miles an Hour, Every Day*, Cable World, January 18, 1993, at 32.

to install fiber optic technology.[2] Overall, 3 out of 4 cable operators are making plans to expand channel capacity.[3]

5. For example, Time Warner has announced that it plans to upgrade its U.S. cable systems, serving 6.8 million subscribers, to fiber.[4] Likewise, Tele-Communications, Inc. (TCI) plans to provide fiber to 90% of its subscribers over the next 4 years.[5] TCI's Barry Marshall estimates that the use of fiber in multiple system operators' (MSO's) cable trunks will expand from its present percentage of 20% to as much as 40% by the end of 1993[6]

6. Technology and cost improvements continue to drive the use of fiber. For example, Jerrold has advertised that its STARFIRE 750 fiber optic laser system can provide 60 analog, or 500 digitally compressed, TV channels on a single fiber. Thus the technology is now in place to expand cable channel capacity to 500 or more channels and cable operators are beginning to implement it.

Video Compression

7. Video compression is the technology that is "launching the era of 500-channel cable systems."[7] In the past three months, major cable MSOs (Multiple System Operators) have announced plans for systems which will deliver digitally compressed cable television signals into viewers' homes by 1994. This will dramatically multiply the number of signals which can be carried on *existing* cable systems without the need to replace the cable lines.

[2] Rich Brown, *Operators Plan Growth Along Fiber Lines*, Broadcasting, February 1, 1993, at 29.

[3] *Id.*

[4] Carl Weinschenk, *Time Warner's Billion-Dollar Fiber Plan*, Cable World, December 14, 1992, at 44.

[5] *TCI Boosts Spending*, TV Digest, January 18, 1993, at 4.

[6] *Id.*

[7] Carl Weinschenk, *Compression Kickstart*, Cable World, December 9, 1992, at 1.

8. On December 2, 1992, TCI announced that it had agreed to purchase up to 1 million home set-top terminals for receiving compressed digital video signals.[8] TCI, which operates 443 local cable systems, expects to begin installing the technology in late 1993 or 1994 and expects compression to be available to as many as 95% of its systems by 1995.[9] It will offer compressed digital video to 1 million of its 9.2 million customers beginning this year.[10] As a spokesman for Time Warner noted, the TCI venture "absolutely accelerates compression into the here and now." [11]

9. Initially, TCI plans to convert six or seven analog channels to digital, yielding a total of 60-70 new channels.[12] Eventually, a 50-channel system will be able to offer 500 channels with this compression technology. TCI expects the near term cost of implementing digital compression to be "de minimis," in part because existing analog set-top converters can be upgraded and reused for roughly $80 each.[13]

10. On January 26, 1993, Time Warner announced its own digital compression plans.[14] Time Warner announced that it will use digital compression to provide hundreds of channels to its customers as part of its "Full

[8] Peter Lambert, *TCI: $200 Million for Channel Explosion*, Broadcasting, December 7, 1992, at 4, 15.

[9] Geoffrey Foisie, *TCI Sees Compression Paying For Itself*, Broadcasting, December 21, 1992, at 31.

[10] Kevin Maney, *Technology to Expand Cable TV Services*, USA Today, December 3, 1992, at B1.

[11] Lambert, *supra* at 4.

[12] Carl Weinschenk, *Compression Kickstart*, Cable World, December 7, 1992, at 1. *See also* Edmund L. Andrews, *Cable Concern Plans to Offer 500 Channels*, N.Y. Times, December 3, 1992, at A1.

[13] Foisie, *supra*.

[14] Geraldine Fabrikant, *Time Warner Plans Cable System of Hundreds of Channels*, N.Y. Times, January 28, 1993, at D15.

Service Network" serving residential cable subscribers in Orlando, Florida by 1994.[15] Time Warner emphasized that the Orlando system is not a test and that it is "completely committed to putting this endpoint system" into all its cable clusters.[16] Other companies have also announced plans to implement digital compression. Viacom, the Public Broadcasting Service, and Request TV have all announced deals to upgrade to digitally compressed video.[17]

11. Realizing that the 500 channel cable system is imminent, Discovery Communications has developed Your Choice TV, an interactive menu system for accessing hundreds of channels of digital programming.[18] Viewers will use the menu-driven, remote control system to navigate their way through the hundreds of viewing options which will soon be available to them. First generation equipment is expected by the end of 1993.[19]

Video Server Technology

12. As digital video compression is being combined with video server and switching technology, cable systems are now entering an era, as described by a Time Warner spokesman, of "infinite capacity." [20] Video server technol-

[15] Randy Sukow & Rich Brown, *Time Warner Unveils 'Full Service' TV*, Broadcasting, February 1, 1993, at 6.

[16] *Time Warner's 'Electronic Superhighway Into The Home'*, TV Digest, February 1, 1993, at 3. *See also* Johnnie L. Roberts & Mary Lu Carnevale, *Time Warner Plans Electronic 'Superhighway'*, Wall St. J., January 27, 1993, at B1.

[17] Weinschenk, *Compression Kickstart*, *supra*. *See also*, Lambert, *supra*.

[18] Peggy Ziegler, *500-Channel Future Prompts Menu System from Discovery Comm.*, Cable World, December 14, 1992, at 1.

[19] *Id.*

[20] Sukow & Brown, *supra*.

ogy is the key to providing true "video on-demand" to cable television viewers.

13. Video server technology fundamentally changes the way in which a cable system delivers video programming to the home. In a conventional cable system, all available programs are simultaneously transmitted through the entire cable system to every television receiver, even though each individual television set can only display one program at a time. Thus, to increase the number of channels available to the viewer, the cable must have the capacity to deliver all of these channels simultaneously to every viewer.

14. Video server technology changes all of this by effectively implementing the channel selector switch upstream in the cable system, toward the cable headend, so that only a single program is transmitted at a time to each receiver, much in the way the telephone system works. This means that the cable to the television receiver no longer needs the capacity to carry dozens of channels simultaneously, but only enough capacity to carry the program to be viewed. Thus, even without the use of fiber optics or video compression, existing cable infrastructure can carry a virtually limitless number of programming choices by use of video server technology.

15. In the Time Warner system being built in Orlando, Florida, homes are to be equipped with high-capacity, random access, digital storage devices capable of holding hundreds or even thousands of video programs.[21] Digitally compressed video programs will be sent in high speed bursts to the customer's home storage device and accessed "on demand" by the home viewer. High speed digital switching will handle the traffic flow of data bursts to the home storage device and allow Time Warner to offer telephone and data transmissions over the two-way system.[22]

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[21] *Id.*

[22] *Id.*

16. Video server and switching technology is being aggressively developed and implemented, not only by cable operators, but by the telephone companies to provide "video-on-demand."[23] It can and will provide virtually infinite capacity, since it eliminates the need to simultaneously transmit all available channels to each TV receiver.

17. Bell Atlantic is using digital compression and video server technology in its video dial tone systems.[24] Later this year, Bell Atlantic plans to begin offering this video-on-demand service over existing copper wires to 400 subscribers in Fairfax County, Virginia.[25] The Bell Atlantic system will store digitally compressed video on large, random access storage devices. A viewer will dial up the program of choice which will be routed through a video server, over existing copper wire telephone lines, to the viewer's home. Bell Atlantic will build two-way video server-based networks this summer in Morris County and Dover Township in New Jersey.[26] In each case, video server and video switching technology will be used to provide video dial tone service.

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[23] For example, US West recently announced a plan to build a fiber-based broadband network to deliver telephone, interactive video, and video-on-demand services to its 13 million customers in 14 western states. The system will reach its first 100,000 customers by 1994, with half a million new customers a year to be added after that. The US West system initially will be capable of carrying 70-100 video channels, expandable to 500 with compression. *US West Answers Video Dialtone Call*, Broadcasting, February 8, 1992.

[24] Harry A. Jessell, *Bell Atlantic Takes Early Lead*, Broadcasting, January 4, 1993, at 45. *See also* Carl Weinschenk, *Bell to Cable Industry: We'll See You in Court*, Cable World, December 21, 1992, at 1, 25.

[25] Jessell, *supra*.

[26] *Id. See also*, Rich Brown, *Twain Meet Over Video Dial Tone*, Broadcasting, November 23, 1992, at 4.

Conclusion

18. Recent events have confirmed that channel capacity limitations in cable television systems are vanishing and will shortly be a thing of the past. Cable operators are deploying fiber optics at a rapid pace. Video compression is being aggressively implemented as a cost effective method for literally multiplying the number of channels available. And, with the implementation of video server technology, we are witnessing the initiation of truly "infinite capacity" cable TV systems.

/s/
MICHAEL C. RAU

[Notarization Omitted in Printing]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF BARRY ROSENBLUM

STATE OF NEW YORK,)
) ss:
COUNTY OF NEW YORK,)

BARRY ROSENBLUM, being duly sworn, deposes and says:

1. I am the President of Time Warner Cable of New York City ("TWCNYC"). I have been employed by Time Warner Cable and its predecessor entities for nearly 13 years.

2. TWCNYC consists of four cable franchises located in Brooklyn, Queens and Manhattan and also manages another franchise in Queens. TWCNYC is a division of Time Warner Cable ("TWC"), which is itself a division of Time Warner Entertainment Company, L.P. ("TWE"). TWCNYC reports to the Time Warner New York City Cable Group ("TWNYC Cable Group"), which oversees all New York City cable systems operated by or affiliated with TWC.[1]

3. TWCNYC's system in Manhattan operates pursuant to a renewal franchise granted by the City of New York on June 28, 1990 (the "Manhattan system"). The Man-

[1] In addition to those franchises comprising TWCNYC, TWNYC Cable Group also includes Staten Island Cable and Paragon Cable Manhattan ("Paragon"), the cable system operating in upper Manhattan.

hattan system covers the area of Manhattan from 86th Street on the East side and 79th Street on the West side South to the Battery, as well as Roosevelt Island ("Southern Manhattan"). The Manhattan system serves approximately 270,000 residential subscribers, along with bars, hotels and restaurants.

4. In my capacity as President of TWCNYC, I oversee the selection of programming services to be offered on TWCNYC's systems. TWCNYC's decision to offer a particular programming service to subscribers is a matter of editorial discretion. In selecting programming to offer to TWCNYC's subscribers, we consider such factors as the needs and interests of local audiences, including particular segments of that local audience, the educational and occupational characteristics of subscribers and the availability of news, information and entertainment from other sources, as well as any other factor that may reflect local demographic characteristics or the interest of subscribers.

5. TWCNYC also exercises its editorial discretion in determining the manner in which programming is made available to its subscribers. TWCNYC determines which programming should be packaged together into particular tiers or on a per channel basis. TWCNYC also assigns channel positions to each programming service to either facilitate tiering, to coordinate with other cable systems or to help make the system more accessible to the consumers. In developing its "package" of programming for subscribers, TWCNYC seeks to maximize the interest and satisfaction of its subscribers.

6. I am familiar with the provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"). In particular, I am familiar with §§ 4 and 5 of that Act, the so-called must carry provisions. These provisions directly impinge upon TWCNYC's editorial discretion to select programming and thereby create a programming line-up that maximizes the satisfaction of subscribers. These provisions may force

TWCNYC to carry programming it does not want to offer to its subscribers and in which TWCNYC believes its subscribers have virtually no interest. Further, TWCNYC may be forced to eliminate a number of popular programming services in response to carriage requests under the Act, including some services which have particular appeal to diverse segments of TWCNYC's subscriber base.

7. The must carry provisions also provide broadcast channels with certain channel positioning rights. With its ability to assign channel positions constrained as it is by the Act, TWCNYC cannot package programming in the manner it believes best accommodates the wishes of its viewers.

8. An example of the intrusion upon TWCNYC's editorial discretion effected by the must carry provisions was recently presented to this Court in the proceedings involving TWCNYC and WNYC-TV. During the latter part of 1992, TWNYC Cable Group, in the exercise of its editorial discretion, decided to begin a realignment process for the channels on all its New York City cable systems, including the Manhattan system. The objective of the realignment process is to harmonize the offering of programming to subscribers (across the 76 or more activated channels each systems has), such that the same programming services would be carried on the same channel position in all TWC New York City cable systems. The realignment plan was intended to maximize the satisfaction of our current subscribers and present a channel lineup which would be most attractive and convenient to potential subscribers. Consistent channel alignment also facilitates TWCNYC's ability to advertise and submit program listings to newspapers and magazines. The realignment occurred on February 1, 1993 as the first step towards complete channel alignment.

9. As part of the realignment that occurred on February 1, WNYC-TV, a local non-commercial broadcast station, was moved from Channel 3 to Channel 31 on TWCNYC's Manhattan system and on the Paragon system. Channel 31 is its off-air broadcast channel as assigned by the FCC and the channel on which WNYC-TV was carried on the other TWC New York City systems.[2] As of February 1, WNYC-TV is carried on Channel 31 on all TWC New York City systems.

10. Although the repositioning of certain programming, including WNYC-TV, occurred on February 1, this exercise of TWCNYC's editorial discretion was not without substantial interference. Using the must carry provisions of the 1992 Cable Act, WNYC-TV attempted to abrogate TWCNYC's decision to realign its channels. After having been informed that it would be moved to Channel 31, WNYC-TV requested carriage pursuant to Section 5 of the 1992 Cable Act on the Manhattan system, and requested channel positioning on Channel 3. The carriage request, including the channel position request, were denied on December 21, 1992. WNYC-TV, after waiting nearly one full month, petitioned the FCC on January 19, 1993 for emergency relief seeking to stop TWCNYC's realignment plan and its repositioning to Channel 31. When the FCC denied that request on January 22, 1993, WNYC-TV proceeded to the Second Circuit Court of Appeals. Its request for a temporary restraining order was denied by that Court on January 28, 1993. This Court denied WNYC-TV's application for a temporary restraining order on February 1, 1993, after the realignment scheduled for that day had been completed.

[2] WNYC-TV was already carried on Channel 31 on TWCNYC's systems in Brooklyn and Queens, which serve a total of approximately 385,000 subscribers. It has been carried at that channel location on these systems since they commenced operation. On TWC's Staten Island system, serving approximately 75,000 subscribers, WNYC-TV has been located on Channel 31 since the Staten Island system commenced operation. Generally, it is our preference to put broadcasters with off air numbers on channel positions with the same number in order to avoid subscriber confusion. WYNC-TV was originally placed on Channel 3 on the Manhattan system because the Manhattan system at that time had fewer than 31 channels. As a result of the upgrading of the Manhattan system's physical plant, the system had sufficient activated channels to permit the positioning of WNYC-TV on Channel 31.

11. These proceedings, instituted by WNYC-TV pursuant to the must carry provisions, directly interfered with TWCNYC's editorial discretion. WNYC-TV tried to preclude TWCNYC from delivering programming to its subscribers in the manner TWCNYC believes is most responsive to their interests and in accord with TWCNYC's best business judgment.

12. The interference with TWCNYC's editorial discretion in carrying out the first step of its channel realignment plan could have been significantly more severe. As part of its goal to present a package of programming in a manner most responsive to subscribers' interests, TWCNYC's Manhattan system also moved WLIW, a local noncommercial broadcast station, from the Channel 34 position to its FCC assigned Channel 21 on the Manhattan system. Further, the Paragon cable system moved WLIW and WNYE, another local noncommercial broadcast station, to their respective FCC assigned channels on the Paragon system. This involved moving WLIW from Channel 10 to Channel 21 and WNYE from Channel 6 to Channel 25.

/s/ Barry Rosenblum
BARRY ROSENBLUM

[Notarization Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF CRAIG RONALD SHERWOOD

I, CRAIG SHERWOOD, declare as follows:

1. I am Senior Vice President Managing Director of Affiliate Relations of International Family Entertainment, Inc., owner and operator of The Family Channel. I have held this position since January 22, 1993. My responsibilities include the sale and distribution of The Family Channel to cable systems throughout the country. Prior to serving in this position, I was Vice President Managing Director of Affiliate Relations, of International Family Entertainment, Inc. A summary of the history and programming of The Family Channel is contained in the affidavit of Timothy B. Robertson, previously submitted in connection with this action. I submit this affidavit in support of plaintiffs' cross-motion for summary judgment.

2. The must-carry requirements of the 1992 Cable Act already are having a significant adverse affect on The Family Channel. Our ability to obtain further carriage on cable systems has come to a virtual halt since the passage of the 1992 Cable Act. Numerous operators have informed us that they will not be making any decision to add The Family Channel to their line-ups until after it becomes clear what their obligations will be with respect to must-carry. Many have expressed concern that must-carry will preclude them from adding new satellite services.

3. In addition, a number of cable systems have recently informed us that they are moving The Family

Channel from its existing channel positions to higher channel numbers in connection with their compliance with the must-carry requirements. Specifically, we have been informed that the changes listed on Exhibit "A", attached hereto and incorporated herein by above reference, will be made. (This listing is not exhaustive.)

I declare under the penalty of perjury that the foregoing is true and correct.

Executed this 10th day of February, 1993.

/s/ Craig R. Sherwood
CRAIG R. SHERWOOD

[Notarization Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF LYNETTE J. SIMPSON

STATE OF CALIFORNIA)
) ss:
COUNTY OF ALAMEDA)

Lynette J. Simpson, being first duly sworn, deposes and says:

1. I am Vice President of Marketing and Acquisitions of Sun Country Cable, Inc., Sun West Cable, Inc. and Oregon Sun Cable, Inc. (dba Sun Country Cable, "Sun"). I have been with the company since its inception in 1985. I have been Vice President and a Director of the company since 1987. I submit this Affidavit in support of Plaintiffs' motion for summary judgment.

Factual Background

2. Sun is a cable television company which presently operates 20 cable television systems serving 11,300 subscribers in the states of Washington, Oregon, and California. The size of these cable systems ranges from 76 subscribers in Wilson Creek, WA, to 1,729 in Groveland, CA. The cable systems are owned by two limited partnerships, Pacific Sun Cable Partners and Shady Cove Cable Partners.

3. Sun has no financial interest in any programming services, and does not select programming based on any internal financial interest.

4. The channel capacity in Sun's systems ranges from 30 to 60 channels. The amount of capital available to add programming on a system is largely a factor of the number of subscribers served by the system, particularly the cost of equipment necessary to receive and process each broadcast or satellite signal. At a minimum, adding one channel of programming in one system costs an average of $2,500 for headend and receiving equipment alone, regardless of whether there are 100, 1,000, or 10,000 subscribers in a system.

5. The company's objective in selecting new programming is to offer as much diversity as possible within the financial constraints imposed by the limited number of subscribers in each system. New channels are by necessity selected on the basis of their appeal to the greatest number of subscribers in each system.

6. Subscriber interest in a new service is primarily ascertained in three ways: (1) annual surveys which ask customers for their preferences on *type* of programming, as well as their interest in *specific* program services; (2) calls to the "Customer Hotline," which are received at company headquarters in Pleasanton, CA; and (3) requests customer service representatives get in the regional offices.

7. There are competing interests for inclusion on the remaining channels available in Sun's systems. In the last seven years, we as cable operators have exercised editorial discretion in choosing program offerings for carriage on our systems. In recent years, we have had much greater choice with the introduction of new programming networks, including those of Turner Broadcasting, Inc.

8. Because of the relative cost of adding channels in small systems, and limited channel capacity in some, the new commercial and non-commercial must-carry requirements contained in the Cable Television Consumer Protection and Competition Act of 1992 will mean that in some

systems we can no longer exercise editorial discretion in selecting new programming, and customer preference may have no standing whatever as we select that programming.

9. On the 36-channel Quincy, WA system, which serves 1,436 subscribers, all channels are filled. The system presently carries all five of the available Spokane broadcast stations, plus four Seattle/Tacoma stations. The system does not carry one independent broadcast station that could request carriage under the commercial must-carry statute. The station is not carried due to lack of subscriber interest. If forced to carry this station, we would have to drop another channel, and would be left with no discretion in choosing programming which is of greatest interest to our customers.

10. Two 36-channel systems, Coulee City, WA, with 268 subscribers, and Royal City, WA, with 200 subscribers, do not presently carry a noncommercial station because they are outside the market of any such stations. Under Section 5(b)(3) of the Act, Sun may be required to "import and carry" noncommercial stations to satisfy the Act's noncommercial requirements. In systems this size, programming choices must be made very carefully and appeal to the largest number of customers to justify the expense. For these systems to carry non-commercial stations which presently cannot be received "off-air," it would mean an expenditure of many thousands of dollars in each system, if it was technically possible to do it at all. This would certainly mean foregoing any other channel additions on these systems for a long time. For example, we would not be able to respond for requests from subscribers for services including The SciFi Channel or to add C-Span in locations where it is not presently carried.

Conclusion

11. The must-carry statute interferes with Sun's editorial discretion on what programming is carried on its

cable systems. It also interferes with our ability to make programming selections based on the preferences of our customers, and gives broadcasters preference in attaining carriage on our cable TV systems. Finally, it interferes with our rights as speakers under the First Amendment.

This 8th day of February, 1993.

/s/ Lynette J. Simpson
LYNETTE J. SIMPSON

[Notarization Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF SYLVIA SYCAMORE

STATE OF OREGON)
) ss:
COUNTY OF LANE)

Sylvia Sycamore, being first duly sworn, deposes and says:

1. I am Senior Vice President/Policy, Planning and Administration of Chambers Communications Corp., an Oregon corporation, which owns cable television systems in Oregon, Idaho and California through its various subsidiaries. I joined Chambers at its inception in 1983 and was appointed to my present position in 1992.

2. Novato Cable Company, dba Chambers Cable of Novato, is a wholly-owned subsidiary of Chambers Communications Corp., and operates a 35-channel cable television system serving approximately 17,400 subscribers in Novato, California and in adjacent portions of Marin County, California.

3. Chambers Cable of Novato is currently carrying programming on all 35 channels. That carriage includes twelve (12) local commercial television stations, three (3) non-commercial educational television stations and one (1) access channel. A list of the broadcast stations is attached. (Attachment 1).

4. Under the must carry rules in effect in 1983 when Chambers began operating this cable system, Chambers

formerly carried additional local broadcast signals. After those must carry rules were found unconstitutional, Chambers gradually dropped duplicative or minimally viewed stations in order to make channel space available to respond to customer demand for satellite-distributed cable programming and information services.

5. As of March 29, 1990, Chambers carried two additional local non-commercial educational stations, KCSM/San Mateo and KQEC/San Francisco.

6. On June 1, 1991, Chambers dropped KQEC in order to make channel space available to carry TNT, a satellite-delivered program service which was in strong demand by customers. According to a customer survey conducted by Chambers, KQEC was minimally viewed.

7. On January 27, 1992, Chambers dropped KCSM in order to make channel space available for an electronic program guide which replaced a print (paper) program guide which was seen as "environmentally irresponsible" by large numbers of subscribers and which had engendered intense public opposition. The same customer survey referred to in paragraph 6 indicated that KCSM was also minimally viewed.

8. On or about November 25, 1992, David H. Hosley, General Manager of KCSM, wrote to Kathleen Wagner, Area Manager of Chambers Cable of Novato, requesting carriage pursuant to Section 5 of the Cable Television Consumer and Competition Act of 1992. According to Ms. Wagner, that letter was received by her on December 2, 1992. At my request, she sent a copy to me via fax transmittal. A copy of that letter is attached. (See Attachment 2).

9. On December 9, 1992, I sent a letter to David H. Hosley via Federal Express declining his request. A copy of that letter is attached. (See Attachment 3).

10. On or about January 13, 1992, KCSM filed a Petition For Declaratory Ruling Under Section 5 of the

1992 Cable Act regarding its request for carriage. A copy of that Petition is attached. (See Attachment 4).

11. Chambers does not wish to carry KCSM.

CONSEQUENCES

If Chambers must carry KCSM, Chambers will be required to follow one of the following courses of action:

1. Drop one of the satellite program services currently carried to make room for KCSM. This action could constitute a breach of contract by Chambers with the dropped programmer. It would also be likely to cause intense customer dissatisfaction because customers could no longer view the dropped signal. Chambers has not yet identified which service might be dropped.

2. Activate cable channel 36. To do this would require Chambers to place a converter in the home of every subscriber who wished to view the programming on Ch. 36. Chambers has not yet determined which service might be placed on Ch. 36.

To automatically place a converter in all 17,400 homes could be prohibitively expensive, especially in the light of present uncertainties about how the FCC will allow operators to recover the cost of such equipment.

If customer are required to purchase or rent a converter in order to receive only one additional channel, many would understandably be outraged. We would expect considerably fewer than 17,400 to avail themselves of this programming. We would therefore expect strong protest and could be subject to potential legal action from any programmer whose programming was moved into the Ch. 36 position.

3. Rebuild the cable system to create more channels. This option is even more costly than No. 2. While it is likely that the cable system in Novato will eventually be rebuilt or otherwise technologically altered to increase

channel capacity, Chambers feels very strongly that this should happen as a result of a well-thought out business plan based on long-term customer demand and willingness to pay for additional services. Forced expansion to accommodate KCSM would be a poor business move.

In any of the above situations, further disruption would ensue if KCSM (Channel 60) continues in its demand to be carried on the cable channel where it was carried on July 19, 1985. Nickelodeon, a highly acclaimed children's channel is currently carried on cable channel 13, where KCSM was carried in 1985.

/s/ Sylvia Sycamore
SYLVIA SYCAMORE
Senior Vice President
Policy, Planning & Administration

[Notarization Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

INTERVENOR-DEFENDANT APPLICANT NATIONAL ASSOCIATION OF BROADCASTERS' RESPONSE TO PLAINTIFFS' STATEMENTS OF MATERIAL FACTS

Pursuant to Local Rule 108(h) of the Rules of this Court, Intervenor-Defendant Applicant National Association of Broadcasters ("NAB") submits this response to the statements of material fact submitted on February 12, 1993 by the Turner, TWE, NCTA and Discovery plaintiffs ("plaintiffs") in support of their untimely motions for summary judgment regarding the must carry provisions.

First, plaintiffs' statements of material fact should be stricken, and no response thereto should be required, because they are untimely, and plaintiffs have waived their right to seek summary judgment with respect to the must carry provisions.[1]

Second, without prejudice to NAB's argument that no response to those untimely statements of material fact is required, NAB denies those statements of material fact insofar as they dispute the Congressional findings of fact contained in Sec. 2(a) of the 1992 Cable Act. There was ample evidence before Congress to support those findings of fact. *See* the Amicus brief of the United States Senate, filed February 12, 1993; Intervenor Defendant National

[1] *See* NAB's Reply To The Daniels And Turner Oppositions To NAB's Motions For Summary Judgment, And Opposition To The Untimely Motions For Summary Judgment Regarding The Must Carry Provisions Filed By Turner, TWE, NCTA and Discovery, filed herewith.

Association of Broadcasters' Corrected Memorandum In Opposition To The Plaintiffs' Motion For Preliminary Injunction, dated November 24, 1992, at 9-26; Affirmation of Jack N. Goodman dated November 24, 1992.

Third, to the extent plaintiffs' statements of material fact assert other facts, and to the extent the Court deems those other facts to be material, NAB denies those facts pursuant to Rule 56(f), Fed. R. Civ. Pro. until it has had an opportunity to investigate those facts through discovery.[2]

Fourth, to the extent plaintiffs' statements of material fact are really legal conclusions, no response is required.

Respectfully submitted,

/s/ Bruce J. Ennis, Jr.
BRUCE J. ENNIS, JR.
(D.C. #360598)
DAVID W. OGDEN
(D.C. #375951)
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Counsel for National
Association of
Broadcasters

[2] *See* the Affirmation of Jack N. Goodman, submitted herewith.

Of Counsel:
HENRY L. BAUMANN
BENJAMIN F. P. IVINS
JACK N. GOODMAN
NATIONAL ASSOCIATION OF BROADCASTERS
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(202) 429-5430

Dated: February 19, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF JACK N. GOODMAN

DISTRICT OF COLUMBIA: SS

I, Jack N. Goodman, affirm pursuant to the penalties of perjury, as follows:

1. I am special counsel to intervenor-defendant applicant National Association of Broadcasters ("NAB"). I submit this affirmation pursuant to Rule 56(f), Fed. R. Civ. Pro., in opposition to the motions for summary judgment regarding the must carry provisions of the 1992 Cable Act filed on February 12, 1993 by the Turner, TWE, NCTA and Discovery plaintiffs ("plaintiffs"). NAB believes those motions should be stricken or denied on the ground they were not timely. This affirmation is submitted without prejudice to that argument.

2. Those motions were accompanied by detailed statements of material fact that were allegedly not in dispute, and by lengthy affirmations and affidavits in support of those allegations.

3. Insofar as those statements of material fact dispute the Congressional findings of fact contained in Sec. 2(a) of the 1992 Cable Act, NAB vigorously denies them. The Congressional findings of fact were amply supported by the evidence before Congress. *See* my Affirmation dated November 24, 1992, which is incorporated by reference, and the Amicus Brief of the United States Senate.

4. Insofar as those statements of material fact assert *other* facts, and insofar as the Court deems those other facts to be material, NAB has been utterly unable, between receipt of plaintiffs' papers and today, February 19th, to investigate the factual accuracy and veracity of those other factual assertions. In the limited time available it has not been possible to compile specific responses, with references to the record (insofar as there are facts in the record) to each of the assertions of fact. Nevertheless, I believe that many of those other factual assertions are incorrect, exaggerated, or so taken out of context as to be misleading, and I believe that if NAB were permitted to engage in discovery, that process would produce facts essential to opposing plaintiffs' motions for summary judgment.

5. NAB believes that the only facts that are relevant, material, and necessary to resolution of the constitutionality of the must carry provisions are the facts found by Congress in Sec. 2(a) of the Act, and supported by the extensive hearing record and committee reports described in my November 24, 1992 Affirmation. Nevertheless, if the Court believes that any facts other than the facts contained in the record before Congress may be relevant, material or necessary to resolution of the constitutionality of the must carry provisions, NAB respectfully requests, pursuant to Rule 56(f), the opportunity to engage in discovery regarding those facts.

6. Specifically, if facts other than the facts before Congress are to be considered, NAB requests the opportunity to depose all persons submitting affirmations or affidavits on behalf of any of the plaintiffs in these consolidated actions, the opportunity to propound interrogatories and document requests to plaintiffs, and the opportunity to depose other persons who may have knowledge relevant to those other facts.

7. The subjects of that discovery process should include, without limitation, plaintiffs' actual plans regarding

dropping or repositioning broadcast stations or cable programmers; plaintiffs' plans regarding expansion of channel capacity and installation of addressable converters in the next five years; the financial and other relationships between cable operators and cable programmers; the extent to which cable operators have disregarded viewer preferences, particularly when their financial self-interests differed from those preferences; whether cable operators have reached explicit or implicit agreements among themselves to drop and/or reposition certain broadcast stations, and/or to add and/or reposition certain cable programmers; whether cable operators reached explicit or implicit agreements among themselves not to drop or reposition broadcast stations while Congress was considering enactment of the 1992 Cable Act; the profitability of cable systems and their financial ability to expand channel capacity; etc.

8. If plaintiffs' motions for summary judgment are not stricken or denied as untimely, and if the Court deems it appropriate to consider facts other than the facts before Congress, NAB respectfully requests that those motions be adjourned without date so that NAB can have an opportunity to engage in the discovery described above.

/s/ Jack N. Goodman
JACK N. GOODMAN

DATED: February 19, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF SEYMOUR KAPLAN

STATE OF NEW YORK)
) ss:
COUNTY OF QUEENS)

Seymour Kaplan, being duly sworn, deposes and says:

1. I am the Senior Vice President of Affiliate Relations of Hearst/ABC-Viacom Entertainment Services ("HAVES"). I make this affidavit in support of the plaintiffs' cross-motion for summary judgment.

2. HAVES is a joint venture operating as a partnership under the laws of the State of New York. Among HAVES' owners are The Hearst Corporation, Capital Cities/ABC Inc. and Viacom International, Inc.

3. HAVES offers television programming for exhibition to viewers primarily over the facilities of cable system operators on its television program service called The Lifetime Television Network ("Lifetime"). Lifetime is a 24-hour per day service offering original and previously produced television programs of particular interest to women six days per week (Monday through Saturday). On the seventh day (Sunday), Lifetime offers Lifetime Medical Television ("LMT"), the world's foremost provider of television programs produced for medical professionals.

4. Lifetime is made available to viewers primarily through cable television operators. The cable operators receive or originate television signals from different sources and retransmit such signals to subscribers over coaxial and fiber optic cables. Operators select the programming to offer to their subscribers from sources including local television broadcast stations, distant television broadcast stations, locally originated cable programming, and cable network programming, such as Lifetime.

5. Since the enactment into law of the Cable Television Consumer Protection Act of 1992 (the "Act"), Lifetime's ongoing effort of retaining and expanding its universe of subscribers has met with resistance from cable operators which are concerned about the application of the Act to their operations. For example, the cable operators listed below do not currently carry Lifetime and, prior to the enactment of the Act, were negotiating with HAVES for the right to do so. Since passage of the Act, however, each of these cable operators has adopted a "wait-and-see" attitude, indicating that they may or may not be able to carry Lifetime in the future because of the Act's must carry requirements.

Time Warner for Marion, Indiana

Comcast/Storer for Groton, Connecticut

Western Cable for South, San Francisco

Cableholdings for Oak Ridge, Tennessee

Omega Cable for Omega, Illinois

6. Channel position is important to all telecasters, broadcast and cable alike. Telecasters seek to develop viewer association through channel position. Also, as a general proposition, the lower numbered the channel position the more desirable it is to the telecaster. Since the enactment of the Act, Lifetime has been materially harmed by having its channel position changed on the following cable systems as follows:

Operator	Location	Channel
Cable Vision Industries	Chatsworth, CA	from 25 to 63
Telecommunications, Inc.	Westchester, NY	from 15 to 58
Sammons	Glendale, CA	from 17 to 36
Booth American	High Dessert, CA	from 13 to 33
Adelphia	Charlottsville, VA	from 48 to 57

In each instance these changes have been brought about because of anticipated obligations under the "must-carry" provision of the Act.

This 16th day of February, 1993

/s/ Seymour Kaplan
SEYMOUR KAPLAN

[Notarization Omitted in Printing]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

AFFIDAVIT OF EDWARD J. WEISS

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

EDWARD J. WEISS, being duly sworn, deposes and says:

1. I am associated with the firm of Cravath, Swaine & Moore, counsel for plaintiff Time Warner Entertainment Company, L.P. ("TWE"). I make this affidavit in support of TWE's pending Motions for Summary Judgment and for a Preliminary Injunction and in Opposition to the Government's Motion to Dismiss.

2. I have examined the 1993 catalog of a national electronics retailer, Radio Shack, a Division of Tandy Corporation. The 1993 catalog promotes numerous electronic parts, components and products.

3. In the catalog, Radio Shack advertises various television antennae designed to improve a television owner's reception of over-the-air broadcast signals.

4. On page 98 of the catalog, one particular line of roof top antennae is promoted as "provid[ing] outstanding reception at an outstanding value". The antennae of this line range in prices from as low as $27, plus installation costs. On page 104, the catalog promotes various indoor amplified antennas, ranging from a low of about $30 to a high of about $60. On this same page, the cata-

log also promotes other antenna devices as "Affordable Solutions to TV Reception Problems". These devices range in price from about $2 to $16. (True and correct copies of the catalog cover and relevant pages are annexed hereto as Exhibit 1.)

5. Annexed hereto as Exhibit 2 is a true and correct copy of page 7 of Paul Kagan Associates', *Cable TV Investor*, June 23, 1992.

6. Annexed hereto as Exhibit 3 is a true and correct copy of a press release dated February 12, 1993 from the Federal Communications Commission, entitled "FCC Upholds Modified Network-Cable Cross-Ownership Prohibition". (The text of this decision is not yet available.)

/s/ Edward J. Weiss
EDWARD J. WEISS

[Notarization Omitted in Printing]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

PUBLIC BROADCASTERS' RESPONSE TO TURNER'S STATEMENT OF MATERIAL FACTS

Pursuant to Local Rule 108(h) and Rule 56 of the Federal Rules of Civil Procedure, the Association of America's Public Television Stations, the Public Broadcasting Service, and the Corporation for Public Broadcasting Inc. (collectively "the public broadcasters"), submit this Response to Turner's Statement of Material Facts.

The public broadcasters assert that none of the facts asserted by Turner are material to plaintiff's facial challenge to Section 5 of the Cable Television Consumer Protection Act of 1992, 106 Stat. 1460, 1477 (to be codified at 47 U.S.C. § 615) (the "1992 Cable Act"). The relevant facts supporting the legislation have been found by the Congress and are set forth in Section 2 of the Act and in the House and Senate Reports. The only issue before this Court with respect to those facts is the legal question of whether the legislative history reflects that Congress had before it sufficient evidence on which it could reasonably base its findings of fact. This issue has been addressed in the public broadcasters' briefs and the briefs of the other parties, particularly the brief of the United States Senate. If, however, the Court intends to treat the allegations in plaintiffs' affidavits as material facts going to the merits of plaintiffs' motion for summary judgment, the public broadcasters would need to test those allegations through discovery. There has, however, been no time to conduct such discovery under the current briefing schedule, which does not contemplate discovery or

evidentiary proceedings. *See* Fed. R. Civ. P. 56(f). In this regard, the public broadcasters rely on, and incorporate herein, the Rule 56(f) declarations filed by the government and the National Association of Broadcasters.

Each numbered paragraph below corresponds to plaintiffs' averments in its Statement of Material Facts As To Which There Is No Genuine Issue ("Turner Facts").

1. The first sentence of this paragraph contains a legal conclusion, not a statement of fact to which a response is required. As to the second sentence, the public broadcasters would need to conduct discovery to test the truth of the allegations contained therein, but even if true, the allegations are not material to plaintiffs' facial challenge to Section 5 of the 1992 Act.

2. Undisputed.

3. The public broadcasters would need to conduct discovery to test the truth of the allegations contained in this paragraph, but even if true, the allegations are not material to plaintiffs' facial challenge to Section 5 of the 1992 Act. Section 2(a)(3) of the Act does not support the second sentence of this paragraph.

4. The first sentence of this paragraph is a characterization, not a statement of fact to which a response is required. The public broadcasters do not dispute that public television stations transmit their signals over-the-air, both directly to television sets and indirectly to cable systems for subsequent retransmission. The public broadcasters would need to conduct discovery to test the truth of the allegations contained in the final sentence of this paragraph, which are directly contrary to Congress' findings in the 1992 Act. *See, e.g.*, 1992 Act § 2(a)(17). Even if true, these allegations are not material to plaintiffs' facial challenge to Section 5 of the 1992 Act.

5. The public broadcasters would need to conduct discovery to test the truth of the allegations in this paragraph, but refer the Court to other parties' submissions,

which clarify that the number of channels a cable system may offer is not limited. *See, e.g., TWE* Collins Aff. ¶ 12 (TWE's Ithaca system has 150 channel capacity, and TWE "anticipates that other systems will be able to achieve similar channel capacity"); TWE P.I. Mem. at 8 (arguing that regulation based on the physical scarcity of radio and television frequencies is not applicable to the cable industry); *NAB* Rau Aff. at ¶¶ 7-18 (discussing well-publicized advances in video compression and video server technology that are leading to the imminent availability of a 500 channel cable system).

6. The allegations contained in the first sentence of this paragraph are not supported by any citation to the record, and therefore no response is required. The allegations contained in the second sentence of this paragraph are characterizations and legal conclusions, not statements of fact to which a response is required. The public broadcasters respectfully refer the Court to the opinions referenced in this paragraph for an accurate statement of their holdings.

7. The public broadcasters would need to conduct discovery to test the truth of the allegations contained in this paragraph, but even if true, the allegations are not material to plaintiffs' facial challenge to Section 5 of the 1992 Act. Further, these allegations are not based on *record* evidence, as required by Local Rule 108(h).

8. The first sentence of this paragraph mischaracterizes the cited report, which found (at p. 11) that 279 broadcast stations were dropped on 753 occasions under the FCC's 1986 interim must carry rules. The Court is respectfully referred to the cited report. In any event, the public broadcasters would need to conduct discovery to test the truth of the allegations contained in this paragraph, but even if true, the allegations are not material to plaintiffs' facial challenge to Section 5 of the 1992 Act.

9. The public broadcasters would need to conduct discovery to test the truth of the allegations contained in

this paragraph, particularly because the allegation that "the elimination of must carry requirements has produced a substantial increase in the number and diversity of cable programming services" is contrary to Congress' findings in the 1992 Act. *See, e.g.*, 1992 Act § 2(a)(13) & (17).

10-12. The allegations contained in these paragraphs are characterizations and speculation, not statements of fact to which a response is required. In addition, the cited portions of the McGuirk, Davatzes, Kerr, Sherwood, Michaelis, and Robertson affidavits consist of inadmissible hearsay. Further, whenever the Burchill, Hanson, Wyant, Marx, Segel, and Hanson affidavits refer to specific local non-commercial educational television stations, the affidavits do not aver that any of the Turner systems *will* have to add broadcast stations, but only that they *may* have to take such action. In any event, the public broadcasters would need to conduct discovery to test the truth of the allegations contained in these paragraphs.

13. The public broadcasters deny that the "discretion" exercised by cable operators in selecting cable programs for their subscribers can appropriately be considered "editorial discretion" of the kind exercised by newspapers. The statements and affidavits of Turner and other plaintiffs in this action, *see* Gardner Aff. ¶ 5-6, TWE Statement of Facts ¶ 8, *TWE* Collins Aff. ¶¶ 13, 16-17, 60, demonstrate that program selection is based on an overriding concern for "customer satisfaction," and is therefore more entrepenurial than editorial. To the extent that this paragraph contains factual allegations, the public broadcasters would need to conduct discovery to test their truth, but even if true, the allegations are not material to plaintiffs' facial challenge to Section 5 of the 1992 Act.

14. The allegations contained in this paragraph are characterizations and speculation, not statements of fact to which a response is required. The assertion as to the alleged "preferences of the viewing public" is inadmissible

hearsay. To the extent that this paragraph contains factual allegations, the public broadcasters would need to conduct discovery to test their truth, but even if true, the allegations are not material to plaintiffs' facial challenge to Section 5 of the 1992 Act.

Respectfully submitted,

s/ Richard W. Buchanan
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February 25, 1993

[Certificate of Service Omitted in Printing]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

PUBLIC BROADCASTERS' RESPONSE TO TIME WARNER'S STATEMENT OF MATERIAL FACTS (MUST-CARRY)

Pursuant to Local Rule 108(h) and Rule 56 of the Federal Rules of Civil Procedure, the Association of America's Public Television Stations, the Public Broadcasting Service, and the Corporation for Public Broadcasting (collectively "the public broadcasters"), submit this Response to Time Warner's Statement of Material Facts with respect to plaintiff's must carry claims.

The public broadcasters assert that none of the facts asserted by Time Warner are material to plaintiff's facial challenge to Section 5 of the Cable Television Consumer Protection Act of 1992, 106 Stat. 1460, 1477 (to be codified at 47 U.S.C. § 615) (the "1992 Cable Act"). The relevant facts supporting the legislation have been found by the Congress and are set forth in Section 2 of the Act and in the House and Senate Reports. The only issue before this Court with respect to those facts is the legal question of whether the legislative history reflects that Congress had before it sufficient evidence on which it could reasonably base its findings of fact. This issue has been addressed in the public broadcasters' briefs and the briefs of the other parties, particularly the brief of the United States Senate. If, however, the Court intends to treat the allegations in plaintiff's affidavits as material facts going to the merits of plaintiff's motion for summary judgment, the public broadcasters would need to test those allegations through discovery. There has, how-

ever, been no time to conduct such discovery under the current briefing schedule, which does not contemplate discovery or evidentiary proceedings. *See* Fed. R. Civ. P. 56(f). In this regard, the public broadcasters rely on, and incorporate herein, the Rule 56(f) declarations filed by the government and the National Association of Broadcasters.

Each numbered paragraph below corresponds to plaintiff's averments in its Statement of Material Facts As To Which There Is No Genuine Issue ("TWE Facts").

1. This paragraph contains a characterization of the 1992 Act, and the Court is respectfully referred to section 28 of the statute for the precise terms governing its effective date.

2-4. Undisputed.

5. The public broadcasters would need to conduct discovery to test the truth of the allegations contained in this paragraph, but even if true, the allegations are not material to plaintiff's facial challenge to Section 5 of the 1992 Act.

6. The public broadcasters would need to conduct discovery to test the truth of the allegations in this paragraph, but refer the Court to plaintiff's own submissions, which clarify that the number of channels a cable system may offer is not limited. *See, e.g.*, Collins Aff. ¶ 12 (TWE's Ithaca system has 150 channel capacity, and TWE "anticipates that other systems will be able to achieve similar channel capacity"); TWE P.I. Mem. at 8 (arguing that regulation based on the physical scarcity of radio and television frequencies is not applicable to the cable industry); *NAB* Rau Aff. at ¶¶ 7-18 (discussing well-publicized advances in video compression and video server technology that are leading to the imminent availability of a 500 channel cable system).

7-11. The public broadcasters deny that the "discretion" exercised by Time Warner Cable ("TWC") and its local divisions in selecting cable programs for their subscribers can appropriately be considered "editorial discretion" of the kind exercised by newspapers. Plaintiff's Statement (¶ 8) and affidavits (*TWE* Collins Aff. ¶¶ 13, 16-17, 60) demonstrate that program selection is based on an overriding concern for "customer satisfaction," and is therefore more entrepenurial than editorial. *See Turner* Gardner Aff. at ¶ 5-7. To the extent that these paragraphs contain factual allegations, the public broadcasters would need to conduct discovery to test their truth, but even if true, the allegations are not material to plaintiff's facial challenge to Section 5 of the 1992 Act.

12-21. The public broadcasters would need to conduct discovery to test the truth of the allegations contained in these paragraphs, but even if true, the allegations are not material to plaintiff's facial challenge to Section 5 of the 1992 Act.

22-23. The public broadcasters do not dispute that TWC "compete[s]" with over-the-air broadcasting, but the nature of that competition—as Congress found—has become increasingly one-sided. As a result of cable's emergence as the "dominant nationwide video medium," *id.* § 2(a)(4), "the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized." 1992 Cable Act § 2(a)(16). Free local broadcasting cannot now compete on equal terms with vertically integrated operators and programmers like TWC. The public broadcasters do not dispute that the physical limitations on the ability to construct multi-channel video distribution systems are different from the physical scarcity of the broadcast spectrum, but, as Congress found, the physical and economic limitations on constructing cable systems have resulted in virtually no competition between cable systems. 1992 Cable Act § 2(a)(2)(3).

24-26. The public broadcasters would need to conduct discovery to test the truth of the allegations contained in

these paragraphs, but even if true, the allegations are not material to plaintiff's facial challenge to Section 5 of the 1992 Act.

27. This paragraph contains plaintiff's speculation as to the impact of the Cable Act's must carry provisions, not statements of fact to which a response is required. If these assertions are regarded as statements of fact, the public broadcasters would need to conduct discovery to test their truth. Furthermore, some or all of the systems cited in this paragraph may be able to resist requests for carriage on non-constitutional grounds, as Time Warner is doing with respect to its system in Bakersfield, California. See Exhibit A to Public Broadcasters' Opposition To Plaintiffs' Motions For Summary Judgment (2/19/93). Indeed, whenever the cited affidavits refer to specific local non-commercial educational television stations, the affidavits do not aver that any of the TWC systems *will* have to add broadcast stations, but only that they *may* have to take such action. Even if these statements are true, they are not material to plaintiff's facial challenge to Section 5 of the 1992 Act.

28. This paragraph contains plaintiffs' speculation as to the impact of the 1992 Cable Act's must carry provisions, not statements of fact to which a response is required. Indeed, the second sentence of this paragraph only asserts that the TWE systems "may" have to carry certain broadcast stations under the Act. Furthermore, the estimated number of "must carry channels" includes channels already being carried and does not distinguish between commercial stations and non-commercial stations. Accordingly, this statement does not accurately describe the effect that Section 5 of the 1992 Cable Act will have on plaintiff's cable systems. If the assertions in this paragraph are considered allegations of fact, the public broadcasters would need to conduct discovery to test their truth, but even if true, the allegations are not material to plaintiffs' facial challenge to Section 5 of the 1992 Cable

Act. The public broadcasters also deny that the "discretion" exercised by TWC and its local divisions in selecting cable programs for their subscribers can appropriately be considered "editorial discretion" of the kind exercised by newspapers. Plaintiff's Statement (¶ 8) and affidavits (*TWE* Collins Aff. ¶¶ 13, 16-17, 60) demonstrate that program selection is based on an overriding concern for "customer satisfaction," and is therefore more entrepenurial than editorial.

29. This paragraph contains plaintiff's speculation as to the impact of the 1992 Cable Act's must carry provisions, not statements of fact to which a response is required. Indeed, the cited affidavits do not aver that TWC's systems *will* have to drop or reposition any particular cable programming service, but only that they *may* have to take such action. Any implication, however, that the Cable Act has directly caused or will directly cause drops of particular programming services—to the exclusion of all other factors that could cause such drops—is denied. As demonstrated by plaintiff's affidavits, there are many business reasons why cable operators drop or reposition programming services. *See, e.g.*, Collins Aff. ¶ 13, 16-17, 60.

30. The public broadcasters would need to conduct discovery to test the truth of the allegations contained in these paragraphs, but even if true, the allegations are not material to plaintiff's facial challenge to Section 5 of the 1992 Act.

31. The public broadcasters would need discovery to test the truth of the allegations contained in the first sentence of this paragraph, but even if true the allegations are not material to plaintiff's facial challenge to Section 5 of the 1992 Act. The remaining sentences are undisputed, but are not material to plaintiff's facial challenge to Section of the 1992 Act.

32-34. These paragraphs contain plaintiff's speculation as to the impact of the Cable Act's must carry provisions,

not statements of fact to which a response is required. If these assertions are considered allegations of fact, the public broadcasters would need to conduct discovery to test their truth, but even if true, the allegations are not material to plaintiff's facial challenge to Section 5 of the 1992 Act.

Respectfully submitted,

/s/ Richard W. Buchanan
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February 25, 1993

[Certificate of Service Omitted in Printing]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

PUBLIC BROADCASTERS' RESPONSE TO NATIONAL CABLE TELEVISION ASSOCIATION'S STATEMENT OF MATERIAL FACTS

Pursuant to Local Rule 108(h) and Rule 56 of the Federal Rules of Civil Procedure, the Association of America's Public Television Stations, the Public Broadcasting Service, and the Corporation for Public Broadcasting (collectively "the public broadcasters"), submit this Response to National Cable Television Association's (NCTA's) Statement of Material Facts with respect to plaintiff's must carry claims.

The public broadcasters assert that none of the facts asserted by NCTA are material to plaintiff's facial challenge to Section 5 of the Cable Television Consumer Protection Act of 1992, 106 Stat. 1460, 1477 (1992) (to be codified at 47 U.S.C. § 615) (the "1992 Cable Act"). The relevant facts supporting the legislation have been found by the Congress and are set forth in Section 2 of the Act and in the House and Senate Reports. The only issue before this Court with respect to those facts is the legal question of whether the legislative history reflects that Congress had before it sufficient evidence on which it could reasonably base its findings of fact. This issue has been addressed in the public broadcasters' briefs and the briefs of the other parties, particularly the brief of the United States Senate. If, however, the Court intends to treat the allegations in plaintiff's affidavits as material facts going to the merits of plaintiff's motion for summary judgment. the public broadcasters would need

to test those allegations through discovery. There has, however, been no time to conduct such discovery under the current briefing schedule, which does not contemplate discovery or evidentiary proceedings. *See* Fed. R. Civ. P. 56(f). In this regard, the public broadcasters rely on, and incorporate herein, the Rule 56(f) declarations filed by the government and the National Association of Broadcasters.

Each numbered paragraph below corresponds to plaintiff's averments in its Statement of Material Facts As To Which There Is No Genuine Issue ("NCTA Facts").

1. Undisputed.

2-4. The public broadcasters would need to conduct discovery to test the truth of the allegations contained in these paragraphs, but even if true, the allegations are not material to plaintiff's facial challenge to Section 5 of the 1992 Act.

5-8. The public broadcasters would need to conduct discovery to test the truth of the allegations contained in these paragraphs, but even if true, the allegations are not material to plaintiff's facial challenge to Section 5 of the 1992 Act. The public broadcasters refer the Court to the submissions of other parties in this action, which clarify that the number of channels a cable system may offer is not limited. *See, e.g., TWE* Collins Aff. ¶ 12 (TWE's Ithaca system has 150 channel capacity, and TWE "anticipates that other systems will be able to achieve similar channel capacity"); *TWE* P.I. Mem. at 8 (arguing that regulation based on the physical scarcity of radio and television frequencies is not applicable to the cable industry); *NAB* Rau Aff. at ¶¶ 7-18 (discussing well-publicized advances in video compression and video server technology that are leading to the imminent availability of a 500 channel cable system).

9-10. These paragraphs contain characterizations, conclusions of law, or speculation as to the impact of the

1992 Act, not statements of fact to which responses are required. Indeed, whenever the cited affidavits refer to specific local non-commercial educational television stations, the affidavits do not aver that any cable operator *will* have to add broadcast stations, but only that they *may* have to take such action. In addition, the cited portions of the McGuirk, Holloway, Masters, and Robertson affidavits consist of inadmissible hearsay. The public broadcasters respectfully refer the Court to the statute.

11-12. The public broadcasters would need to conduct discovery to test the truth of the allegations contained in these paragraphs, but even if true, the allegations are not material to plaintiff's facial challenge to Section 5 of the 1992 Act.

13. The allegations contained in this paragraph are not supported by affidavits containing admissible evidence, but rather by inadmissible hearsay. Moreover, the cited paragraph of the Klein Affidavit does not purport to set forth the number of qualified non-commerical educations stations as that term is defined by Section 5 of the Act. Even if properly supported, however, the allegations are not material to plaintiff's facial challenge to Section 5 of the 1992 Act.

14-19. The allegations contained in these paragraphs are not supported by affidavits containing admissible evidence, but rather by inadmissible hearsay. In any event, the public broadcasters would need to conduct discovery to test the truth of the allegations contained in these paragraphs, but even if true, the allegations are not material to plaintiff's facial challenge to Section 5 of the 1992 Act.

20. Undisputed.

Respectfully submitted,

/s/ Richard W. Buchanan
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February 25, 1993

[Certificate of Service Omitted in Printing]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

PUBLIC BROADCASTERS' RESPONSE TO DISCOVERY COMMUNICATIONS' STATEMENT OF MATERIAL FACTS (MUST-CARRY)

Pursuant to Local Rule 108(h) and Rule 56 of the Federal Rules of Civil Procedure, the Association of America's Public Television Stations, the Public Broadcasting Service, and the Corporation for Public Broadcasting (collectively "the public broadcasters"), submit this Response to Discovery Communications' Statement of Material Facts with respect to plaintiffs' must carry claims.

The public broadcasters are unable to respond to plaintiffs' Statement because plaintiffs have not complied with the requirement of Local Rule 108(h) that the Statement "shall include references to the parts of the record relied on to support the statement." Local Rule 108(h) (D.D.C.). Because plaintiffs have not identified the portions of the record on which they rely for their averments, the public broadcasters are not obliged to formulate a response to Discovery's allegations. The public broadcasters reserve the right to file a response under Local Rule 108(h) if Discovery in the future complies with the local rules.

Respectfully submitted,

/s/ Richard W. Buchanan
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February 25, 1993

[Certificate of Service Omitted in Printing]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

DEFENDANTS' RESPONSE TO TURNER BROADCASTING SYSTEM, INC.'S STATEMENT OF MATERIAL FACTS

Pursuant to Local Rule 108(h), defendants hereby respond to Turner Broadcasting System, Inc.'s ("Turner") statement of material facts allegedly not in dispute.

Before responding to Turner's specific fact allegations, defendants first object to plaintiff's assertion that these allegations are "material" to the Court's determination of the constitutional validity of the must-carry provisions. *See Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("the substantive law will identify which facts are material"). It is established law that Congress' legislative judgment, especially when based on empirical evidence, is owed great deference, and that it is not for the courts to reweigh the evidence *de novo*.[1] Yet, in contravention of these principles, plaintiffs in each of the above-captioned cases ask the Court to weigh their "evidence" *de novo*, and to draw its own conclusions on the basis of that evidence respecting such issues as the need for the must-carry provisions, and the impact of these provisions on the ability of cable operators and programmers to reach the country's television households. Congress, on the basis of the empirical evidence obtained in the course of legislative hearings, has issued its own judgment on these issues, and it is that legislative judgment to which great deference is owed.

[1] *Walters* v. *National Association of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985) ("When Congress makes findings on essentially factual issues such as these, those findings are of course entitled to a great deal of deference, inasmuch as Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on such an issue"); *Westside Community Bd. Of Ed.* v. *Mergens*, 496 U.S. 226, 251 (1990) ("Given the deference due 'the duly enacted and carefully considered decision of a coequal and representative branch of our Government,' . . . . we do not lightly second-guess such legislative judgments, particularly where the judgments are based in part on empirical evidence."); *Jacobs* v. *Barr*, 959 F.2d 313, 319 (D.C. Cir.), *cert. denied*, 113 S.Ct. 95 (1992) ("we *should* defer—or give 'great weight'—to Congress on empirical questions.") (emphasis in original); *Lamprecht* v. *FCC*, 958 F.2d 382, 392 n.2 (D.C. Cir. 1992) ("we must review Congress' judgment deferentially, without reweighing the evidence de novo.").

Defendants have moved to dismiss plaintiffs' constitutional challenges to the Cable Act's must-carry provisions as a matter of law under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Pursuant to that motion, defendants respectfully submit that plaintiffs' facial challenges must be adjudicated on the basis of the legislative record, and not pursuant to a separate record generated in the course of judicial proceedings. *See Metro Broadcasting, Inc.* v. *FCC*, —— U.S. ——, 110 S.Ct. 2997, 3013 (1990) (" 'Congress, of course, may legislate without compiling the kind of record appropriate with respect to judicial or administrative proceedings' ") (citation omitted). In the alternative, in the event that the Court intends to treat plaintiffs' fact allegations as "material facts" and to judge the constitutionality of the must-carry provisions on the basis of a "trial-type" record, defendants respectfully reserve the opportunity to contest plaintiffs' allegations either through Rule 56(f) discovery or by the submission of affirmative evidence. *See* Declaration of John Tyler, ¶ 6 (attached hereto).

Without waiving the above-stated objections, defendants respond to plaintiff Turner's statement of material facts, identified by reference to specific numbered paragraphs, as follows:

1. The first sentence sets forth a conclusory statement of law, together with plaintiff's stated opinion regarding the type of programming it offers the public, to which no answer is required. Because plaintiff's affiant does not identify the source for the statistic stated in the second sentence of this paragraph, defendants are unable to determine its validity without discovery. Defendants otherwise do not dispute that cable program networks provide a diverse mix of cable programming.

2-3. Not disputed.

4. Defendants deny the first and fourth sentences. *E.g.*, the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act"), § 2(a)(17); H.R. Rep. No. 628, 102d Cong., 2d Sess. 54 (1992) ("House Report"); S. Rep. No. 92, 102d Cong., 2d Sess. 42-46, 59 (1991) ("Senate Report"). Sentences 2 and 3 are not disputed.

5. Defendants deny that plaintiff's "proof" supports its proposition that "many cable systems currently have reached or are close to reaching the limit of their channel capacity." Plaintiffs' affiants, mostly by means of hearsay testimony, identify a very limited number cable systems that have allegedly reached their channel capacity limitations. *See e.g.*, Affidavit of Terrence F. McGuirk, ¶ 25 (identifying 6 cable systems that have "informed" Turner that they have no available channels); Affidavit of Lee Masters, ¶ 6 (4 cable systems); First Affidavit of Douglas Holloway, ¶ 9 (14 cable systems); Affidavit of Sylvia Sycamore, ¶ 3 (1 cable system). There are approximately 11,314 operating cable systems in the United States today. *Broadcasting and Cable Market Place* xxiii (1992).

With respect to the second sentence of this paragraph, defendants assume as true the statement that, for a variety of reasons, there is competition for open channels on cable systems, and that, in certain markets, this competition is great. However, defendants otherwise deny the second

sentence to the extent that plaintiffs suggest that the Cable Act's must-carry requirements will deny cable programmers opportunity to get on cable systems. Congress has determined that the must-carry provisions will leave "ample opportunity" for carriage of cable programs. *E.g.*, House Report at 66. Also, plaintiffs' proof is speculative at best regarding the potential future impact of the must-carry provisions. *See e.g.*, McGuirk Affidavit, ¶ 27 (identifying certain instances "where the must carry statute *would appear* to provide additional broadcast station carriage rights that would displace existing speakers.") (emphasis added).

6. Defendants deny the first sentence. *E.g.*, House Report at 66, 71; Cable Act, §§ 614(b)(1), 615(b)(3). *See* Defendants' memorandum in support of their motion to dismiss at 39-43 (Feb. 12, 1993). The second sentence contains plaintiffs' conclusory interpretation of case law to which no answer is required.

7. Defendants do not dispute the assertion in the first sentence that there has been growth in the number of commercial and noncommercial stations since 1985. Defendants do not dispute the remainder of this paragraph.

8. This paragraph accurately reflects various of the statistics compiled by the FCC pursuant to its 1988 survey. The significance of these statistics, as judged by Congress, is explained in the House and Senate Committee Reports. House Report at 52; Senate Report at 42-43.

9. Defendants deny that plaintiffs' proffered testimony supports their allegation that "[t]he elimination of must carry requirements has produced a substantial increase in the number and diversity of cable programming services." Plaintiffs offer no factual basis to show that they could not have expanded their viewing audiences or have launched new cable networks like TNT and E! Entertainment but for the absence of mandatory requirements.

Defendants would require discovery to determine the truth of the averments in the remainder of this paragraph, but even if true, these allegations are immaterial to plaintiff's challenges to the must-carry provisions.

10. Defendants deny the first sentence. *E.g.*, House Report at 66-67, 71-72; Senate Report at 61-62. Defendants would need to conduct discovery to determine the validity of the assertions made in the second sentence. Defendants note that much of plaintiffs' testimony is speculative. *See e.g.*, Affidavit of Nickolas Davatzes, ¶ 6 ("Cable operators, to comply with the new statutory requirements with respect to preferential carriage and channel position . . . *may be forced to* (i) drop [the Arts & Entertainment Network] entirely from cable systems.") (emphasis added); Affidavit of Thomas F. Burchill, ¶ 10 ("[The Lifetime Television Network] *may* be required to forfeit existing channel positions completely . . . .") (emphasis added).

11. Defendants deny that plaintiffs' proffered testimony establishes the factual validity of the assertion made in this paragraph. This testimony represents, instead, the predictive judgment of plaintiffs' affiants respecting the future impact of the Cable Act's channel repositioning requirements on the ability of cable program networks to reach "their intended audience."

12. Defendants deny that plaintiffs' proffered testimony establishes the factual validity of the assertion made in this paragraph. This testimony represents, instead, the predictive judgment of plaintiffs' affiants respecting the burden that will allegedly be imposed upon cable program networks by the Cable Act's must-carry provisions.

13. Defendants deny the assertion made in this paragraph. *E.g.*, House Report at 66-67, 71-72; Senate Report at 61-62.

14. Because the first sentence of this paragraph assumes the factual validity of plaintiffs' earlier statements,

it must be denied. Without discovery, defendants are unable to admit or deny the assertions made in the second and third sentences of this paragraph respecting the "viewer preference" surveys conducted by plaintiffs' affiants and the alleged results of these surveys.

STUART E. SCHIFFER
Acting Assistant Attorney
General

JAY B. STEPHENS
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Dated: February 25, 1992

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

DEFENDANTS' RESPONSE TO TIME WARNER ENTERTAINMENT CO.'S STATEMENT OF MATERIAL FACTS ALLEGEDLY NOT IN DISPUTE

Pursuant to Local Rule 108(h), defendants hereby respond to plaintiff Time Warner Entertainment Company's ("Time Warner") statement of material facts allegedly not in dispute. Defendants incorporate by reference their objections made this date in response to plaintiff Turner Broadcasting System, Inc.'s statement of material facts. Defendants otherwise respond to plaintiff Time Warner's statement of material facts, identified by reference to specific numbered paragraphs, as follows:

1-4. Not disputed.

5-21. Defendants would need to conduct discovery to determine the truth of these allegations, but even if true, the allegations are immaterial to plaintiff's challenges to the Cable Act's must-carry provisions.

22. Not disputed. *But see*, H.R. Rep. No. 628, 102d Cong., 2d Sess. 43-47 (1992) ("House Report") (competition to cable television in the video market place is negligible).

23. Defendants do not dispute the assertion in the first sentence that cable television is technologically distinct from broadcast television. Defendants do not dispute the assertion in the second sentence that there exist no absolute *physical* limitations to the construction of cable systems equivalent to the physical scarcity of the broadcast spectrum.

24. Not disputed. *But see*, House Report at 43-47 (competition to cable television in the video market place is negligible).

25. Defendants dispute this assertion to the extent that plaintiffs suggest that the traditional print media and radio offer direct competition to cable television in the video market.

26. Defendants do not dispute that plaintiff has received requests for must-carry by the parties identified in this paragraph, although defendants note that the must-carry request addressed to Tri-County Cable (Salem, New Jersey) was subsequently withdrawn. Apfelbaum Affidavit, ¶ 7.

27. Defendants do not dispute that plaintiff might be required to carry broadcast stations on its cable systems that it would otherwise not carry in absence of the must-carry provisions.

28. Defendants do not dispute that, under section 4 of the Cable Act (governing commercial stations), the signal carriage requirements are limited to only approximately one-third of a cable system's usable channels. The remainder of this paragraph does not set forth facts but, instead, plaintiffs' approximations of the possible number of cable channels that might be dedicated to PEG, leased access, or broadcast stations under the Cable Act.

29. Defendants would need to conduct discovery to determine the truth of the allegations in this paragraph. Defendants note that the testimony offered in support of these assertions is largely speculative. *See e.g.*, Affidavit of William C. Carey, ¶ 4 ("To carry WYED, the system would possibly have to drop a satellite delivered programming service . . . ."). Defendants otherwise dispute that plaintiff's proffered testimony substantiates its assertion that a *substantial* number of services that are currently carried on plaintiff's cable systems will have to be dropped or repositioned as a result of the Cable Act's mandatory

carriage requirements. Plaintiff's testimony refers to a very limited number of services being carried on a very limited number of cable systems in the country. *See* Broadcasting and Cable Market Place, xxiii (1992) (there are approximately 11,314 cable systems in the country).

30-31. Defendants do not dispute that plaintiff engaged in litigation with WNYC-TV which resulted in proceedings before the Court. The remainder of these paragraphs contains plaintiff's characterizations of this litigation and plaintiff's alleged purposes for commencing its "realignment process." Even if these characterizations are assumed as true, they are immaterial to plaintiff's challenges to the Cable Act's must-carry provisions.

32. Defendants dispute that plaintiff's proffered testimony substantiates the assertion made in the first sentence. *See e.g.*, Affidavit of Mathew Kasman, ¶¶ 5-6 (testifying that 2 cable systems—out of approximately 11,314 systems in the country: Broadcasting and Cable Market Place, xxiii (1992)—*might* not carry HBO on *multiple* cable channels as a result of must-carry). Defendants further dispute that plaintiff's proffered testimony substantiates the assertion made in the second sentence. *See* Affidavit of Jeffrey Bewkes, ¶ 11 (making a conclusory statement, without supporting proof, that must-carry "will seriously impede HBO's efforts to provide its HBO and Cinemax services in multiplexed format"); Kasman Affidavit, ¶¶ 2-6 (stating that 2 cable operators have represented that they will not negotiate about "multiplexing" HBO and Cinemax until the constitutionality of the must-carry provisions is determined); Affidavit of David Hanson, ¶¶ 2-3 (stating that he was informed by a single cable system that it could not commit to dedicating a channel to Cinemax "due to the impending cable legislation being considered by Congress").

33. Defendants do not dispute that the Cable Act's channel repositioning provisions might possibly allow a

broadcast station to obtain carriage on a cable channel currently occupied by HBO, although plaintiff's testimony in support of this proposition is purely speculative. *See* Bewkes Affidavit, ¶ 12.

34. Defendants do not dispute that cable channels occupied by broadcast stations as a consequence of the must-carry provisions will be unavailable to other services offered by cable programmers.

STUART E. SCHIFFER
Acting Assistant Attorney General

JAY B. STEPHENS
United States Attorney

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THEODORE C. HIRT

/s/ John R. Tyler
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Dated: February 25, 1992

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

DEFENDANTS' RESPONSE TO THE NATIONAL CABLE TELEVISION ASSOCIATION INC.'S STATEMENT OF MATERIAL FACTS

Pursuant to Local Rule 108(h), defendants hereby respond to plaintiff National Cable Television Association Inc.'s ("NCTA") statement of material facts allegedly not in dispute. Defendants incorporate by reference their objections made this date in response to plaintiff Turner Broadcasting System, Inc.'s statement of material facts. Defendants otherwise respond to plaintiff NCTA's statement of material facts, identified by reference to specific numbered paragraphs, as follows:

1. Not disputed.

2. Not disputed.

3. Plaintiff's affiant does not identify his source for the statistics stated in this paragraph, and defendants cannot determine their veracity without discovery.

4. Defendants do not dispute the possibility that the technologies and services described in this paragraph might emerge at some time in the future.

5. The first sentence is not disputed. Plaintiff's affiant does not identify his source for the statistics stated in the remainder of this paragraph, and defendants cannot determine their veracity without discovery.

6. The FCC does not receive the A. C. Nielson Company's service, which is identified as plaintiff's source for the statistics stated in this paragraph, and therefore cannot determine veracity of these statistics without discovery.

7. Plaintiff's affiant relies upon report(s) by Paul Kagan Associates, Inc. as the source for the statistics stated in this paragraph. Due to the voluminous reports issued by this source, and because plaintiff does not provide a specific citation to its source, defendants are unable to determine the veracity of these statistics without discovery.

8. Defendants do not dispute that currently the supply of available programming exceeds the carriage capacity of cable systems. However, how long into the future this excess of supply over capacity will continue is unknown.

9. Defendants do not dispute that some cable operators might be required to carry broadcast stations as part of their basic cable service that would not otherwise be carried absent the must-carry provisions, and that broadcast stations might also be assigned to cable channels that would not be made available to them absent the Cable Act's channel repositioning requirements. Defendants, however, dispute that plaintiff's proffered testimony establishes that these possible occurrences are either imminent or inevitable.

10. Defendants do not dispute the possibility that cable operators might either deny carriage to cable programs, delete cable programs, or reassign cable programs to different cable channels in order to comply with the must-carry provisions.

11. Defendants do not dispute that it is possible that the inclusion of a program on a cable system's basic service and placement of that program on a lower channel might increase viewership.

12-13. Defendants do not dispute that these paragraphs accurately state the statistics reported in the *Television & Cable Factbook*, Warren Publishing, Services Vol. 60 at G-3 (1992).

14. Because plaintiff's affiant does not provide specific citations to his source in support of the statistics stated in this paragraph, defendants have been unable to verify their accuracy without discovery.

15. Because plaintiff's affiant does not identify his source for the statistics stated in this paragraph, defendants are unable to verify their accuracy without discovery.

16. Because plaintiff's affiant does not identify his source for the statistics stated in this paragraph, defendants are unable to verify their accuracy without discovery. Defendants dispute plaintiff's conclusions drawn from these statistics to the extent that NCTA asserts that the market share shift to cable television has been inconsequential. Cable Act, § 2(a)(13) ("As a result of the growth of cable television, there has been a marked shift in market share from broadcast television to cable television").

17-18. Because plaintiff's affiants do not cite their sources for the statistics stated in these paragraphs, defendants are unable to determine their veracity without discovery.

19. Because defendants do not have access to the source cited by plaintiff's affiant for the proposition that "[t]hirty-four of the more than 1500 U.S. cities served by a daily newspaper are served by two or more dailies under separate ownership," the truth of this assertion cannot be determined without discovery. The remainder of this paragraph is not disputed.

20. Not disputed.

STUART E. SCHIFFER
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Dated: February 25, 1992

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

DEFENDANTS' RESPONSE TO DISCOVERY COMMUNICATIONS, INC.'S AND THE LEARNING CHANNEL, INC.'S STATEMENT OF MATERIAL FACTS

Pursuant to Local Rule 108(h), defendants hereby respond to plaintiffs Discovery Communications, Inc.'s and the Learning Channel, Inc.'s ("Discovery") statement of material facts allegedly not in dispute. Defendants incorporate by reference their objections made in response to plaintiff Turner Broadcasting System, Inc.'s statement of material facts.

Defendants are otherwise unable to respond to plaintiffs' fact allegations because they have not complied with Local Rule 108(h), requiring that a party's statement of material facts "shall include reference to the parts of the record relied on to support the statement." *Accord, Tarpley* v. *Greene*, 684 F.2d 1, 6 (D.C. Cir. 1982); *Gardels* v. *CIA*, 637 F.2d 770, 773 (D.C. Cir. 1980) (failure to file proper statement under predecessor to Local Rule 108(h) may be fatal to the delinquent party's position). Because plaintiffs have not stated the bases for their fact allegations, defendants are unable to formulate appropriate responses.

Defendants reserve the right to file a response to Discovery's statement of material facts if plaintiff in the future complies with its obligations under Local Rule 108.

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Dated: February 25, 1992

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

DECLARATION OF JOHN R. TYLER

Pursuant to Rule 56(f) of the Federal Rules of Civil Procedure, I, John R. Tyler, declare as follows:

1. I am the Department of Justice attorney with primary responsibility for the above-captioned cases challenging the "must-carry" provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act").

2. It is defendants' position in this litigation that plaintiffs' constitutional challenges to the Cable Act's must-carry provisions should be dismissed as a matter of law under Rule 12(b)(6). Defendants rely in support of their dispositive motion upon the Cable Act itself and its legislative history.

3. Plaintiffs have moved for summary judgment on their must-carry challenges, and rely, *inter alia*, upon their respective statements of material facts allegedly not in dispute, submitted pursuant to Local Rule 108.

4. Defendants are unable either to dispute or to admit many of plaintiffs' factual assertions in their statements of material facts. Because plaintiffs in the above-captioned cases, with the exception of Daniels Cablevision, Inc., waited until February 12, 1993 to move for summary judgment on their must-carry challenges, defendants were precluded from possibly obtaining any relevant discovery for purposes of determining the truth of many of the factual allegations on which plaintiffs rely.

5. More importantly, it is defendants' position in this litigation that plaintiffs' fact allegations do not constitute "material facts" within the meaning of Rule 56(c) of the Federal Rules of Civil Procedure. *See* Defendants' Response to Turner Broadcasting System, Inc.'s Statement of Material Facts (setting forth defendants' objection to the acceptance of plaintiffs' fact allegations as material facts).[1] Defendants respectfully submit that plaintiffs' facial challenges must be adjudicated on the basis of the legislative record, and not pursuant to a separate record generated during the course of judicial proceedings. *Id.* For this reason, defendants have not sought discovery in order either to rebut plaintiffs' proffered factual allegations or to put into the record affirmative evidence in further support of the Cable Act's must-carry provisions.

6. For the foregoing reasons, in the event that the Court intends to treat plaintiffs' fact allegations as "material facts" and to judge the constitutionality of the must-carry provisions on the basis of a "trial-type" record, defendants respectfully reserve the opportunity to contest plaintiffs' allegations either through Rule 56(f) discovery or by the submission of affirmative evidence on behalf of the government.

I declare under the penalty of perjury that the foregoing is true and correct. Executed this 25th day of February 1993.

/s/ John R. Tyler
JOHN R. TYLER

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[1] *See also*, Defendants' Reply Memorandum in Support of their Motion to Dismiss and in Opposition to Plaintiffs' Motions for Summary Judgment at 16-17.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted in Printing]

PUBLIC BROADCASTERS' RESPONSE TO DISCOVERY COMMUNICATIONS' REVISED STATEMENT OF MATERIAL FACTS (MUST-CARRY)

Pursuant to Local Rule 108(h) and Rule 56 of the Federal Rules of Civil Procedure, the Association of America's Public Television Stations, the Public Broadcasting Service, and the Corporation for Public Broadcasting (collectively "the public broadcasters"), submit this Response to Discovery Communications' Revised Statement of Material Facts with respect to plaintiffs' must carry claims.

The public broadcasters assert that none of the facts asserted by Discovery are material to plaintiffs' facial challenge to Section 5 of the Cable Television Consumer Protection Act of 1992, 106 Stat. 1460, 1477 (1992) (to be codified at 47 U.S.C. § 615) (the "1992 Cable Act"). The relevant facts supporting the legislation have been found by the Congress and are set forth in Section 2 of the Act and in the House and Senate Reports. The only issue before this Court with respect to those facts is the legal question of whether the legislative history reflects that Congress had before it sufficient evidence on which it could reasonably base its findings of fact. This issue has been addressed in the public broadcasters' briefs and the briefs of the other parties, particularly the brief of the United States Senate. If, however, the Court intends to treat the allegations in plaintiffs' affidavits as material facts going to the merits of plaintiffs' motion for summary judgment, the public broadcasters would need to test those allegations through discovery. There has, however, been

no time to conduct such discovery under the current briefing schedule, which does not contemplate discovery or evidentiary proceedings. *See* Fed. R. Civ. P. 56(f). In this regard, the public broadcasters rely on, and incorporate herein, the Rule 56(f) declarations filed by the government and the National Association of Broadcasters.

Each numbered paragraph below corresponds to plaintiffs' averments in its Revised Statement of Material Facts As To Which There Is No Genuine Issue.

1-4. The public broadcasters would need to conduct discovery to test the truth of the allegations contained in these paragraphs, but even if true, the allegations are not material to plaintiffs' facial challenge to Section 5 of the 1992 Act.

5. The public broadcasters do not dispute that the Discovery Channel "competes directly with over-the-air broadcasting," but respectfully refer the Court to the 1992 Cable Act, where Congress found that free local broadcasting cannot now compete on equal terms with cable programmers (like Discovery) that have preferred access to cable systems. *See* 1992 Act § 2(a)(13)-(16).

6. The assertions that (1) "substantial changes" were made to the Learning Channel after October 1991 and (2) that the Learning Channel "usually competes" for channel space are too vague and unsubstantiated to require a response. In any event, the public broadcasters would need to conduct discovery to test the truth of the allegations contained in this paragraph, but even if true, the allegations are not material to plaintiffs' facial challenge to Section 5 of the 1992 Act.

7-9. The public broadcasters would need to conduct discovery to test the truth of the allegations contained in these paragraphs, but even if true, the allegations are not material to plaintiffs' facial challenge to Section 5 of the 1992 Act. The public broadcasters also note that the

assertions contained in paragraph 7 are not supported by the cited portions of the record.

10. The first sentence of this paragraph is too vague to require a response. In any case, the public broadcasters would need to conduct discovery to test the truth of the allegations contained in this sentence and the rest of this paragraph, but even if true, the allegations are not material to plaintiffs' facial challenge to Section 5 of the 1992 Act.

11. The first two sentences of this paragraph contain vague conclusory statements and speculation, not statements of fact to which a response is required. With respect to the third sentence, and to the extent that the first two sentences contain statements of fact, the public broadcasters would need to conduct discovery to test the truth of these allegations, but even if true, they are not material to plaintiffs' facial challenge to Section 5 of the 1992 Act.

12. The first sentence of this paragraph contains a vague characterization, not a statement of fact to which a response is required. The public broadcasters do not dispute the second, third, and fourth sentences of this paragraph. The fifth sentence of this paragraph is a characterization of the law governing broadcast television, to which no response is required.

13. The public broadcasters would need to conduct discovery to test the truth of the allegations contained in the first two sentences of this paragraph, but have no reason to dispute these allegations. With respect to the third sentence of this paragraph, the public broadcasters would need to conduct discovery to test the truth of these allegations, but refer the Court to other parties' submissions, which clarify that the number of channels a cable system may offer is not limited. *See, e.g., TWE* Collins Aff. ¶ 12 (TWE's Ithaca system has 150 channel capacity, and TWE "anticipates that other systems will be able to achieve similar channel capacity"); TWE P.I. Mem. at 8 (arguing that regulation based on the physical

scarcity of radio and television frequencies is not applicable to the cable industry); *NAB* Rau Aff. at ¶¶ 7-18 (discussing well-publicized advances in video compression and video server technology that are leading to the imminent availability of a 500 channel cable system). Further, the third sentence of this paragraph is not based on personal knowledge and is thus inadmissible for summary judgment purposes.

14. This paragraph contains a characterization of the 1992 Cable Act, not a statement of fact to which a response is required. The public broadcasters respectfully refer the Court to the Act for an accurate statement of its provisions.

15. The first and third sentences of this paragraph contain assertions that are not based on personal knowledge, therefore no response is required. The second sentence of this paragraph contains a characterization of the 1992 Cable Act, and the Court is respectfully referred to the statute for an accurate statement of its provisions. To the extent that this paragraph contains statements of fact, the public broadcasters would need to conduct discovery to test the truth of these allegations, but refer the Court to other parties' submissions, which clarify that the number of channels a cable system may offer is not limited. *See, e.g., TWE* Collins Aff. ¶ 12 (TWE's Ithaca system has 150 channel capacity, and TWE "anticipates that other systems will be able to achieve similar channel capacity"); TWE P.I. Mem. at 8 (arguing that regulation based on the physical scarcity of radio and television frequencies is not applicable to the cable industry); *NAB* Rau Aff. at ¶¶ 7-18 (discussing well-publicized advances in video compression and video server technology that are leading to the imminent availability of a 500 channel cable system).

16. The assertions contained in this paragraph are speculative and unsubstantiated contentions about the fu-

ture effect of the 1992 Cable Act, not statements of fact to which a response is required. To the extent that this paragraph contains statements of fact, the public broadcasters would need to conduct discovery to test the truth of these allegations, but even if true, the allegations are not material to plaintiffs' facial challenge to Section 5 of the 1992 Act.

17. The first two sentences of this paragraph contain vague and unsubstantiated allegations, not factual assertions to which a response is required. With respect to the third sentence, and to the extent that the first two sentences contain statements of fact, the public broadcasters would need to conduct discovery to test the truth of these allegations, but even if true, they are not material to plaintiffs' facial challenge to Section 5 of the 1992 Act.

18. The paragraph contains vague, conclusory, and speculative allegations about the effect of the 1992 Cable Act, not assertions of fact to which a response is required. To the extent that this paragraph contain statements of fact, the public broadcasters would need to conduct discovery to test the truth of these allegations, but even if true, they are not material to plaintiffs' facial challenge to Section 5 of the 1992 Act.

19. The first sentence of this paragraph contains a characterization of the effect of the 1992 Cable Act, not a statement of fact to which a response is required. The second and third sentences of this paragraph are not supported by the cited declarations: the cited portions of the Goodwyn Declaration are inadmissible hearsay, and the cited portions of the Caldwell Declaration reflect "recommend[ation]" not to carry The Learning Channel "based on all the usual business considerations," not a final decision directly attributable to the Cable Act. In any event, the public broadcasters would need to conduct discovery to test the truth of these allegations, but even if true, they are not material to plaintiffs' facial challenge to Section 5 of the 1992 Act.

20. The allegations contained in this paragraph are not supported by affidavits containing admissible evidence, but rather by inadmissible hearsay. Further, the second sentence of this paragraph contains only speculative and contingent assertions, not statements of fact to which a response is required. In any event, the public broadcasters would need to conduct discovery to test the truth of these allegations, but even if true, they are not material to plaintiffs' facial challenge to Section 5 of the 1992 Act.

21. This paragraph contains a characterization of the 1992 Cable Act, not a statement of fact to which a response is required. The public broadcasters respectfully refer the Court to the Act for an accurate statement of its provisions.

22. This paragraph contains numerous vague and speculative allegations, not statements of fact to which a response is required. In any event, the public broadcasters would need to conduct discovery to test the truth of these allegations, but even if true, they are not material to plaintiffs' facial challenge to Section 5 of the 1992 Act.

23. This paragraph contains a characterization of the effect of the 1992 Act, not a statement of fact to which a response is required. The public broadcasters also deny that the "discretion" exercised by cable operators in selecting cable programs for their subscribers can appropriately be considered "editorial discretion" of the kind exercised by newspapers. The statements and affidavits of other plaintiffs in this action, *see Turner* Gardner Aff. ¶ 5-6, TWE Statement of Facts ¶ 8, *TWE* Collins Aff. ¶¶ 13, 16-17, 60, demonstrate that program selection is based on an overriding concern for "customer satisfaction," and is therefore more entrepenurial than editorial. To the extent that this paragraph contains factual allegations, the public broadcasters would need to conduct discovery to test their truth, but even if true, the allegations are not

material to plaintiffs' facial challenge to Section 5 of the 1992 Act.

24. This paragraph contains a characterization of the 1992 Cable Act, not a statement of fact to which a response is required. The public broadcasters respectfully refer the Court to the Act for an accurate statement of its provisions.

25. The public broadcasters would need to conduct discovery to test the truth of these allegations, but even if true, the allegations are not material to a plaintiffs' facial challenge to Section 5 of the 1992 Act. The public broadcasters also refer the Court to other parties' submissions, which clarify that the number of channels a cable system may offer is not limited. *See, e.g., TWE* Collins Aff.¶ 12 (TWE's Ithaca system has 150 channel capacity, and TWE "anticipates that other systems will be able to achieve similar channel capacity"); TWE P.I. Mem. at 8 (arguing that regulation based on the physical scarcity of radio and television frequencies is not applicable to the cable industry); *NAB* Rau Aff. at ¶¶ 7-18 (discussing well-publicized advances in video compression and video server technology that are leading to the imminent availability of a 500 channel cable system).

26. The paragraph contains vague, conclusory, and speculative allegations about the effect of the 1992 Cable Act, not assertions of fact to which a response is required. To the extent that this paragraph contain statements of fact, the public broadcasters would need to conduct discovery to test the truth of these allegations, but even if true, they are not material to plaintiffs' facial challenge to Section 5 of the 1992 Act.

Respectfully submitted,

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March 11, 1993

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IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1992

No. 92-A798

TURNER BROADCASTING SYSTEM, INC., *et al.*
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*
Appellees.

DECLARATION OF MARILYN MOHRMAN-GILLIS

I, Marilyn Mohrman-Gillis, state as follows:

1. I am the General Counsel for the Association of America's Public Television Stations (APTS).

2. In my capacity as General Counsel, I have supervised the collection of information regarding attempts of noncommercial educational (NCE) stations throughout the country to exercise their carriage rights under Section 5 of the Cable Television Consumer Protection and Competition Act of 1992 (the 1992 Cable Act or Act).

3. Since December 4, 1992, when Section 5 of the Act became effective, at least 44 NCE stations have requested carriage on 411 cable systems. This figure does not include NCE stations that have not advised APTS of their requests for carriage as well as stations that may be eligible for carriage but have refrained from requesting carriage.

4. To date, no cable system has begun carriage of any of the 44 NCE stations that have requested carriage.

5. The 411 cable systems on which the NCE stations have requested carriage serve at least 5.5 million subscribers. This number is derived from the Television and Cable Fact Book (Warren Publishing, Inc. 1992), which reports the number of subscribers to each cable system.

6. Since December 4, 1992, most of these 5.5 million subscribers have been denied access to the noncommercial educational program services offered by the public television stations that have been denied carriage. While it is technically possible for many (but not all) cable subscribers to receive over-the-air signals, Congress has found that "[m]ost subscribers to cable television systems do not or cannot . . . receive broadcast television services," 1992 Cable Act, § 2(a)(17).

7. The grant of injunctive relief pending appeal requested by the applicants in this proceeding will harm the public interest by:

> (a) continuing to deprive some 5.5 million cable subscribers of access to the noncommercial educational program services offered by the stations that have requested, but been denied carriage; and
>
> (b) frustrating Congress' intent in the 1992 Cable Act of ensuring that cable subscribers have access to noncommercial education program services; *see* 1992 Cable Act, § 2(a)(7).

8. The denial of carriage also has an adverse effect on the financial viability of NCE stations. Twenty-three percent of the income of public television stations is from contributions by individual supporters. Public television stations obtain individual contributions from viewers through pledge drives that are generally broadcast three times annually (December, March and August). Denial of carriage on cable systems diminishes the ability of NCE stations to reach potential contributors during the stations' pledge drives.

9. An additional twenty-one percent of the income of public television stations is from underwriting contributions from foundations and businesses for educational programs. The ability of NCE stations to maintain this funding and attract additional foundation and business support is related to the breadth of reach of the stations' educational program services. The denial of access to additional cable subscribers reduces the stations' ability to maintain and increase foundation and business support.

10. The injunctive relief pending appeal requested by the applicants in this proceeding will harm NCE stations that are not carried by cable systems by:

(a) depriving them of the opportunity to obtain support from viewers who subscribe to the cable systems that have declined to carry NCE stations, resulting in loss of additional income through private contributions; and

(b) depriving them of the opportunity to maintain and attract additional foundation and business support by virtue of the expanded reach of their educational services.

11. Since December 4, 1992, the effective date of Section 5 of the 1992 Cable Act, at least 9 NCE stations carried by cable systems have been repositioned, against their will, from one channel to another. This figure does not include NCE stations that have not advised APTS of their repositioning. Under the terms of the injunction sought by applicants, these repositioned stations would be unable to exercise their rights under Section 5(j) to challenge the repositioning.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 26th day of April 1993.

/s/ Marilyn Mohrman-Gillis
MARILYN MOHRMAN-GILLIS

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No. 93-44

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLANT NATIONAL CABLE TELEVISION ASSOCIATION, INC.

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QUESTION PRESENTED

Whether Congress, consistent with the First Amendment, may require that operators of cable television systems devote channels to programmers favored by Congress—*i.e.*, local broadcast stations—regardless of the preferences of the operators and regardless of the effects on other, unfavored programmers.

PARTIES TO THE PROCEEDINGS

Plaintiffs:

Atlanta Interfaith Broadcasters, Inc.
Arts & Entertainment Network
Black Entertainment Television, Inc.
Daniels Cablevision, Inc.
Discovery Communications, Inc.
E! Entertainment Television, Inc.
Hearst/ABC-Viacom Entertainment Services
International Family Entertainment, Inc.
The Learning Channel, Inc.
National Cable Satellite Corporation
National Cable Television Association, Inc.
National Interfaith Cable Coalition, Inc.
QVC Network
Time Warner Entertainment Company, L.P.
The Travel Channel, Inc.
Turner Broadcasting System, Inc.
USA Network

Defendants:

Association of America's Public Television Stations
Association of Independent Television Stations, Inc.
Community Broadcasters Association
Consumer Federation of America
The Corporation for Public Broadcasting
Sandra Engle
Federal Communications Commission
The International Association of Machinists and Aerospace Workers, AFL-CIO
International Broadcasting Network
The International Television Broadcasting, Inc.
Morningstar Communications
National Association of Broadcasters
National Council of Senior Citizens
National Rural Telecommunications Cooperative

Office of Communication of the United Church of Christ
Paging Associates, Inc.
The Public Broadcasting Service
Sherjan Broadcasting Co., Inc.
Triplett & Associates, Inc.
TV 14, Inc.
TV 58 St. Louis, Inc.
United States of America
Zantech, Inc.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-44

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLANT NATIONAL CABLE TELEVISION ASSOCIATION, INC.

OPINION BELOW

The opinion of the three-judge United States District Court for the District of Columbia is reported at 819 F. Supp. 32. It is reprinted in the Appendix to the Jurisdictional Statement at 1a-72a.

JURISDICTION

The judgment of the district court was entered on April 8, 1993. Timely notices of appeal were filed in the district court on May 3, 1993. *See* J.S. App. 73a-81a. Appellants filed a Jurisdictional Statement in this Court on July 2, 1993. This Court noted probable jurisdiction on September 28, 1993.

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1253, which provides that "[e]xcept as otherwise

provided by law, any party may appeal to the Supreme Court from an order granting or denying . . . an interlocutory or permanent injunction in any civil action . . . required by any Act of Congress to be heard and determined by a district court of three judges." Section 23 of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. § 555(c)(1), requires that challenges to sections 4 and 5 of the Act "be heard by a district court of three judges convened pursuant to [28 U.S.C. § 2284]."

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

Relevant provisions of the Cable Television Consumer Protection and Competition Act of 1992 are reprinted in the Joint Appendix at pages 3 through 33.

STATEMENT

Appellants brought this action before a three-judge district court seeking to enjoin enforcement of various provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Cable Act"), 47 U.S.C. §§ 531 *et seq.*[1] Appellants' principal challenge was directed at the so-called "must-carry" provisions, 47 U.S.C. §§ 534, 535, which require that cable operators carry the programming of commercial and noncommercial broadcast stations. Appellants contended that the provisions violated appellants' right to freedom of speech and of the press under the First Amendment. The district court, by a 2-1 vote, upheld the provisions.

[1] The district court consolidated five separate actions, including one filed by appellant National Cable Television Association, Inc., challenging provisions of the Act. The claims with respect to the must-carry provisions of the Act were assigned, as required by Section 23 of the Act, to a three-judge district court. *See* 47 U.S.C. § 555(c)(1).

1. a. Cable television is a medium for providing programming to television viewers. As one court of appeals has explained, a cable system, in addition to original programming, "offers local over-the-air broadcast signals captured by a strategically located master antenna, distant broadcast signals, which are often imported via satellite, and non-broadcast signals transmitted exclusively to cable systems by satellite or microwave relay. The cable operator converts the signal received from these or other sources into an electronic impulse and delivers it to subscribers' homes over a coaxial cable." *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1438-39 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

Cable television is not subject to the physical limitations that have placed a finite upper limit on the number of broadcast stations possible in each local community: most, if not virtually all, communities have the room—on utility poles or below ground—to accommodate the construction of additional cable systems. *See Home Box Office, Inc. v. FCC*, 567 F.2d 9, 45 (D.C. Cir.) (per curiam), *cert. denied*, 434 U.S. 829 (1977) (cable operators not subject to physical scarcity as are broadcasters). Each cable operator, however, has limited capacity within its own system. For this and other reasons, cable operators must select what programming to include on their systems and what programming to leave out, tailoring their program mix to meet viewer interests. In addition, cable operators must choose the channel position to be assigned to each programmer carried on the system and the terms on which that programmer will be offered to subscribers in an attempt to create the most attractive package of news, information, and entertainment.[2]

[2] Cable operators typically offer a "basic" tier of program services that all subscribers receive. Additional tiers and services are then available on an optional basis. A decision to place programming within the basic tier thus directly controls whether all subscribers will view the programming for the minimum monthly charge or whether they must elect to add the programming at additional cost.

Cable programmers, in turn, must compete for a place on each cable system. At present, for example, there are more than 75 nonbroadcast providers of programming on a national basis to cable television operators, as well as numerous regional nonbroadcast providers of cable programming.[3] While television stations can, through use of the government-granted spectrum, reach most or all of the homes in their service areas through over-the-air transmission, cable programming networks have no access to the airwaves. It is, therefore, of vital importance to cable programmers that they be selected for placement on one of the limited number of channels provided to viewers by each cable system and other multichannel providers. Indeed, given the need for a critical mass of viewers, a cable programmer cannot survive if it fails to gain access to a significant number of cable systems.

b. Beginning more than 30 years ago, the federal government has repeatedly sought to dictate the choices made by cable operators with respect to programming, requiring them to carry local broadcast stations in preference to competing programming. *See Quincy Cable TV, Inc. v. FCC*, *supra*. In 1985, the Court of Appeals for the District of Columbia Circuit held that must-carry rules promulgated by the Federal Communications Commission violated the First Amendment rights of both cable programmers and cable operators. Pointing out that "the rules are explicitly designed to 'favor[] certain classes of speakers over others,' " 768 F.2d at 1451 (quoting *Home*

[3] This number has risen sharply as the subscribership to cable television has increased. (In 1976, for example, there were four national cable program networks. Cable Television Developments, October 1992, at 7-A.) These programming sources include such well-recognized offerings as HBO, C-SPAN, ESPN, CNN, and the Discovery Channel, as well as recently-developed sources such as the Cartoon Network and the Sci-Fi Channel. In addition, cable operators increasingly are developing their own programming for distribution to their subscribers, as Time Warner Cable has done with New York 1, a 24-hour local news service produced and offered by its cable systems in the New York City area.

Box Office, Inc. v. FCC, 567 F.2d at 48), and that "[t]he rules coerce speech," *id.* at 1452, the court determined that the asserted justifications for the rules did not justify the degree of intrusion on First Amendment interests. The court found insufficient evidence that "an unregulated cable industry presents a serious threat to local broadcasting," *id.* at 1459, and concluded that, in any event, the rules were " 'grossly' overinclusive." *Id.* at 1460. Although the purported basis for the rules was "to protect local broadcast*ing* and not local broadcast*ers*," *id.*, the court observed that "[t]he rules indiscriminately protect each and every broadcaster regardless of the quantity of local service available in the community and irrespective of the number of local outlets already carried by the cable operator." *Id.*

The Commission thereafter redrafted the must-carry rules, and the court of appeals once more invalidated them, again emphasizing a lack of factual support. *See Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988). Noting that "[t]he Commission relies heavily on its assumption that in the absence of must-carry rules, cable companies would drop local broadcasts," *id.* at 303, the court found that "[e]xperience belies that assertion." *Id.* Rather, the court stated, "during the 16 months that elapsed between *Quincy Cable TV* and the reimposition of the modified must-carry rules, cable companies generally did not drop the local broadcast signals that they had been carrying prior to *Quincy Cable TV*." *Id.* The court also pointed to separate reports by the Federal Trade Commission and the Justice Department concluding "that the absence of must-carry would not harm local broadcasting." *Id.*

2. The statute here at issue was enacted by Congress in 1992. In terms even more sweeping than the earlier rules, it compels cable operators to carry a specific number of local broadcast stations—depending upon the number of channels on the cable system—regardless of the

preferences of operators and viewers and regardless of the effects on other programmers. Although Congress made findings with respect to economic factors such as a "shift in market share" from broadcast to cable television (*see* Findings ¶ 13), it made clear, as well, that the must-carry provisions were intended to promote "unique noncommercial, educational programming" (*id.* ¶ 7), assure "programming that is responsive to the needs and interests of the local community" (*id.* ¶ 8(B)), support "local origination of programming" (*id.* ¶ 10), and preserve local broadcast stations as "an important source of local news and public affairs programming" (*id.* ¶ 11).[4]

The principal must-carry provisions are contained in two sections of the Act: Section 4, which deals with carriage of commercial stations, and Section 5, which deals with carriage of noncommercial stations. Section 4(b) of the Act requires that cable systems with more than 12 usable activated channels—the vast majority of cable systems throughout the country—allocate up to one-third of their channels for the carriage of local commercial television stations. *See* 47 U.S.C. § 534(b)(1)(B); *see also id.* § 534(c) (requirements for carriage of low power television stations). Systems with 12 or fewer channels but with more than 300 subscribers must carry at least three local commercial television stations. *Id.* § 534(b)(1)(A).

Additional channels—over and above the one-third cap of Section 4(b)—must be devoted to carriage of educational television stations under Section 5(b) of the Act. That section requires that, subject to certain limitations, a

[4] These findings appear in numbered paragraphs in Section 2(a) of the 1992 Act, reprinted in 47 U.S.C. § 521 Historical and Statutory Notes and in the Joint Appendix at pages 3 through 8.

The committee reports confirm the focus on the content of programming, asserting that if broadcasters are not carried the result will be "reductions in local news, public affairs, and other public interest programs . . . ." H.R. Rep. No. 628, 102d Cong., 2d Sess. 51-52 (1992). *See also id.* at 69 (naming with approval several specific programs offered on public television stations).

cable operator shall carry "any qualified local noncommercial educational television station requesting carriage." In particular, cable systems with more than 36 channels must show the programming of *all* noncommercial broadcast stations requesting carriage, unless the programming of a station "substantially duplicates" the programming of another station carried by the system. *See In the Matter of the Implementation of the Cable Television Consumer Protection and Competition Act of 1992* (Broadcast Signal Carriage Issues) Docket No. 92-259, released March 29, 1993, ¶ 19 (defining "substantially duplicates" to mean a 50% overlap in programming). Moreover, the Act mandates carriage of any qualified educational station carried as of March 29, 1990, regardless of the channel capacity of the system.

The effect of these provisions, taken together, is significant. For a cable system of 36 channels, the Act requires carriage of up to 12 local broadcast stations and three educational stations—in essence asserting government control over more than 40 percent of its channels.[5] Furthermore, the Act interferes directly with decisions of the cable operator about the channels on which to place the stations (*see* Sections 4(b) and 5(a)) and mandates their inclusion in the basic tier (Section 3(b)(7)(i))—which must, by law, be provided to all subscribers before they can purchase any other tier of programming (§ 3(b)(7)(A)). As a result, the broadcast stations not only benefit from mandatory carriage, regardless of interest in the community, but from mandatory carriage to all subscribers in a preferred position.

[5] These requirements are in addition to those of the Cable Communications Policy Act of 1984 ("the 1984 Cable Act"), which requires cable operators to relinquish editorial and business control over (1) an unlimited number of channels (to be determined by franchising authorities) for public, educational and governmental access channels (Section 611(b)) and (2) up to 15% of capacity for leased access by persons unaffiliated with the operator (Section 612(b)(1)).

The must-carry provisions also are linked to an additional set of provisions: the retransmission consent provisions, set forth in section 6 of the Act. *See* 47 U.S.C. § 325(b). Having mandated carriage of signals by cable operators, the Act nonetheless allows commercial broadcasters the alternative of refusing to allow carriage without payment. Under the Act, local commercial broadcast stations may elect either to assert their rights of mandatory carriage *or* to bar cable reception of their signals absent consideration satisfactory to the station.

3. A divided three-judge district court, convened pursuant to Section 23 of the 1992 Cable Act (47 U.S.C. § 555(c)(1)), upheld the must-carry requirements against appellants' First Amendment challenge.[6] The majority first took the view that Congress was regulating "a market in a commercial commodity . . . ; not a market in 'speech.'" J.S. App. 12a. Regarding the law as "simply industry-specific antitrust and fair trade practice regulatory legislation," *id.* at 13a, the court said that "to the extent First Amendment speech is affected at all, it is simply a byproduct of the fact that video signals have no other function than to convey information." *Id.* Indeed, despite the fact that the must-carry provisions dictate what programming cable operators must place on their systems, the court concluded that the provisions are "unrelated (in all but the most recondite sense) to the content of any messages that these embattled cable operators, broadcasters, and programmers have in contemplation to deliver." *Id.*

[6] The court also rejected, without comment, appellants' challenges to the tiering and channel positioning requirements and, with brief comment (J.S. App. 7a n.10), appellants' challenge to the retransmission consent provisions. In the event that this Court holds that the must-carry provisions are unconstitutional, we believe that the tiering and channel positioning requirements, which expressly apply to carriage of signals pursuant to the must-carry obligations, must fall as well. We believe that issues relating to the retransmission consent provisions should be remanded to the district court for further consideration.

The district court did acknowledge that it was too late to reconsider the proposition "[t]hat the First Amendment is to some extent implicated whenever a government endeavors to regulate a cable industry component." J.S. App. 13a. In keeping with its belief that the must-carry requirements were "essentially, economic regulation" (*id.* at 15a), however, the court refused to subject them to strict judicial scrutiny. *See id.* at 15a-16a (provisions must only "satisfy the criteria established in [*United States v.*] *O'Brien* [, 391 U.S. 367 (1968)] and its progeny"). Rejecting the argument of cable operators that strict scrutiny is required for laws compelling speech, the court held that "[a] compulsory speech requirement, or one imposing upon the discretion of a speaker to say only what he wishes, it appears, is to be strictly scrutinized *only* if it appears that the government has prescribed the content—either the message or the subject matter—of the speech to be spoken." J.S. App. 16a (emphasis added). The court similarly rejected the argument, advanced by cable programmers, that strict scrutiny was necessary for laws impeding some speakers in order to advance other speakers, stating that "[s]peaker partiality alone . . . , absent evidence that the government's distinction between groups of speakers is related to what the speakers are saying, is insufficient to trigger strict scrutiny." *Id.* at 18a. Finally, although not entirely clear on the point, the court appeared to conclude that, because of "certain characteristics unique to the way the industry has evolved and is presently structured," *id.* at 20a, it was appropriate to have "relaxed First Amendment scrutiny of the must-carry provisions even if marginally content-related . . . ." *Id.* at 22a n.25.

The court then determined that, under its more lenient standard of review, the requirements were adequately jus-

tified. Even though appellants had pointed out that local broadcast stations had *increased* in number since invalidation of the prior must-carry rules—indicating that the system of local broadcasting was still not in any jeopardy (*see Century Communications Corp. v. FCC*, 835 F.2d at 303)—the district court responded that "Congress . . . did not agree." J.S. App. 24a. Because Congress had assembled evidence "demonstrating, to its [own] satisfaction" that cable operators posed a threat to local broadcast stations, *id.* at 24a-25a, the court believed that "the deference [it] should accord to the factfinding abilities of the nation's legislature" required it to "conclude that the danger perceived by Congress is real and substantial." *Id.* at 26a (citations omitted). The court extended a comparable degree of deference with respect to the need for "prophylactic measures," *id.* at 27a, saying that it was "unwilling to second-guess Congress' determination that the must-carry provisions are necessary to accomplish its objective." *Id.*[7]

Judge Williams dissented. He noted that the must-carry provisions (unlike the leased access provisions enacted in 1984) "extend the privilege of access only to a special class of unaffiliated programmers—local commercial and non-commercial television stations," J.S. App. 51a, and that "Congress rested its decision to promote these stations in part, but quite explicitly, on a finding about their content." *Id.*; *see also id.* at 53a ("Here . . . the beneficiaries are local stations that are required by government to include specific content that the government has deemed especially worthy"). Turning to the proper standard of judicial review, Judge Williams concluded that

[7] In a concurring opinion, Judge Sporkin termed appellants' attempts to invoke First Amendment rights "mischievous," J.S. App. 47a. Judge Sporkin stated that "[i]t is inconceivable that our forefathers at any time contemplated that the First Amendment would be used to regulate an industry that came into existence over 150 years after the Bill of Rights was adopted." *Id.*

the "proper test is strict scrutiny." *Id.* at 57a. He reasoned that "the statute is content-based under controlling precedent. The must-carry provisions mandate speech: they require cablecasters to carry the speech of local broadcast stations." *Id.* at 54a. Although Judge Williams noted that less exacting scrutiny was given to general laws regulating conduct and having only an "incidental" effect on speech, J.S. App. 54a, he concluded: "The treatment of First Amendment values as irrelevant cannot be transported to the context of a burden imposed on one set of speakers for the direct and explicit advantage of a limited class of their competitors—a class whose programming must, as a matter of law, include content of a type specified by the government." *Id.* at 57a.

Judge Williams then determined that the interests advanced in support of the law were inadequate to justify it. With respect to the asserted interest in "promoting diversity of views," J.S. App. 58a, Judge Williams found that "the fit between the interest and the regulation is extremely weak," *id.*, saying, *inter alia*, that "[b]ecause cablecasters now carry the vast majority of local stations . . . , the must-carry rules may have little effect, but where they have any, it will be only to replace the mix chosen by cablecasters—whose livelihoods depend largely on satisfying audience demand—with a mix derived from congressional dictate." J.S. App. 58a. With respect to the asserted interest in "the preservation of local broadcasting," *id.*, at 60a, Judge Williams expressed doubt that the goal of promoting local programming would qualify as a legitimate compelling interest, given that government typically cannot select the issues to be communicated to the public and given that less restrictive means (like direct subsidies) are available to Congress. And, while he "assume[d] . . . as an abstract matter" that the interest in preserving access to free television is compelling, he found "no evidence that this access is in jeopardy." J.S. App. 61a-62a; *see also id.* at 65a ("we have *nothing* to

connect the limited evidence of cable operators' actual conduct with any inference that a threat to broadcast is imminent or serious").[8]

SUMMARY OF ARGUMENT

1. This case involves a direct regulation of the content of fully protected speech: specifically, an order by government to a private entity (here, in fact, an arm of the press) to distribute speech selected by the government. Except in the unique circumstances involving regulation of broadcast licensees—circumstances that, as we later discuss, do not apply to cable television (*see Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1449-50 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986))—the Court has given exacting scrutiny to laws that seek to control the choices made by the press, or members of the public, about whether to speak and what to say. *See, e.g., Riley v. National Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 795-801 (1988); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 254-58 (1974); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633-34 (1943). Thus, "[c]ontent-based regulations are presumptively invalid." *R.A.V. v. City of St. Paul, Minnesota*, 112 S. Ct. 2538, 2542 (1992).

Although the district court thought strict scrutiny inappropriate unless "the government has prescribed the content—either the message or the subject matter—of the speech to be spoken," J.S. App. 16a, there is no such exception to the presumption against laws telling individuals or members of the press what they must say. "[T]he First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say." *Riley v. National Fed'n of the Blind*, 487 U.S. at 796-97. Just as a law dictating the message or subject matter of speech interferes with that freedom, so does a law requiring one speaker to utter the speech of another. "The constitutional right of free expression is . . . intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us." *Leathers v. Medlock*, 111 S. Ct. 1438, 1444 (1991) (internal quotation marks omitted).

The law also discriminates between classes of private speakers, forcing cable operators to give preference to the speech of broadcast stations over the speech of competing cable programmers. This discrimination, likewise, is subject to strict scrutiny. *Burson v. Freeman*, 112 S. Ct. 1846, 1855 (1992). Although Congress may at times have no choice but to favor particular speakers, in the process of administering public funds or public property, here it is distorting the *private* marketplace for speech, commanding that favored speakers be given a preferred position, regardless of the effect on other unfavored speakers. Whatever Congress may believe about the importance of "local news and public affairs programming and other local broadcast services critical to an informed electorate," Findings ¶ 11, it may not advance that speech by insisting that cable operators relegate other programmers to second-class status. "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

2. None of the attempts to justify more lenient scrutiny for the must-carry law withstands analysis. It is

[8] Judge Williams also considered, and rejected, the notion that cable television should be given the lesser degree of protection afforded to broadcasters, which make use of the scarce electromagnetic spectrum (*see National Broadcasting Co. v. United States*, 319 U.S. 190 (1943)). In light of less restrictive alternatives like leased access channels, Judge Williams saw no basis on which "Congress can constitutionally deny cable operators the ordinary rights of any First Amendment speaker." J.S. App. 71a.

well-established, of course, that Congress can subject members of the press to "generally applicable economic regulations" (*Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 581 (1983))—for example, tax laws and labor laws applicable to businesses generally, whether part of the press or not—without having to demonstrate a compelling interest. But it is equally clear that a law applicable *only* to the press, and one that directly controls the content of speech offered by the press, is not such a law. Nor is the must-carry law subject to relaxed scrutiny on the ground that it can be "*justified* without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (internal quotation marks omitted). That test—which serves to identify laws that, while not overtly interfering with the content of speech, are nonetheless enacted for that purpose—does not apply to laws that on their face directly and explicitly alter the content of speech. And, even if the test did apply, the must-carry law would fail it: because Congress has made specific findings about the value of the speech it favors, it cannot be said that the justification "ha[s] nothing to do with content." *Boos v. Barry*, 485 U.S. 312, 320 (1988); *see Forsyth County, Ga. v. Nationalist Movement*, 112 S. Ct. 2395, 2403 (1992).

There is also no reason to accord cable operators and programmers the lesser First Amendment rights attributed to holders of broadcast licenses. As this Court has recognized, the government plays a unique role in assigning the scarce electromagnetic frequencies to broadcast stations. *See, e.g., FCC v. League of Women Voters*, 468 U.S. 364, 376 n.11 (1984). Because there are more willing users of the spectrum than frequencies to accommodate them, and because no speech at all would be heard absent allocation of the spectrum, the government *must* decide who will speak and who will not. That rationale does not apply to the franchising of cable television systems: the physical capacity for additional cable

systems exists but willing users do not. While cable operators typically do make use of public rights-of-way, that usage by itself does not permit government to dictate the content of speech carried on the cable systems, any more than licensing laws allow government to control the content of newspapers sold in newsboxes on public streets. *See City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988). And, as this Court made clear in *Miami Herald Publishing Co. v. Tornillo*, the fact that a locality may have only one cable system—as, indeed, most localities have only one newspaper—does not mean that government can require access to that system for speech that it deems worthy of wider circulation.

3. Although the must-carry law is properly subject to strict scrutiny, it could not pass muster even under the more forgiving standard applied by the court below. The first interest asserted in defense of the statute—that Congress wishes to assure greater diversity in the marketplace for speech—is merely another version of the interest asserted in every case of compelled speech: that Congress wishes particular speech (or particular speakers) to receive a wider audience. Even if that interest is legitimate, and thus could be served by subsidies or other direct assistance, it is not sufficient, by itself, to justify the means of telling private speakers that they must carry the speech. The second asserted interest—that Congress wants to preserve a system of free television—does little to support an across-the-board command to carry individual stations, given that cable systems already carry most stations in their local communities. Even leaving aside the deference accorded to Congress by the district court—a deference that is unwarranted in the context of heightened judicial scrutiny—it is absolutely clear that *voluntary* carriage of broadcast stations has been enough to assure that local broadcasting is in no imminent danger. This fact is confirmed by the decision of Congress, contemporaneous with imposition of the must-carry requirements, to grant local

commercial broadcast stations the right to *refuse* carriage by cable systems in their local communities.

ARGUMENT

I. THE MUST-CARRY LAW IS SUBJECT TO STRICT SCRUTINY

The must-carry law, on its face, is a direct, purposeful regulation of the content of fully protected speech. The law tells a cable operator that its programming *must* include the stations specified by Congress, even though the operator would not voluntarily carry such programming and even though its forced inclusion may lead to the exclusion of programming unfavored by Congress. This sort of compelled speech—along with its opposite, prohibited speech—has traditionally received the most exacting scrutiny under the First Amendment. *See, e.g., Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989) ("[t]he government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest"). Notwithstanding appellees' efforts to say otherwise, that exacting scrutiny must be applied here.

A. The First Amendment, Absent Extraordinary Circumstances, Bars Laws Prohibiting Speech or Mandating Speech or Discriminating on the Basis of Content

1. "The constitutional right of free expression is . . . intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely in the hands of each of us . . . ." *Leathers v. Medlock*, 111 S. Ct. 1438, 1444-45 (1991) (quoting *Cohen v. California*, 403 U.S. 15, 24 (1971)). As this Court said in *Riley v. National Fed'n of the Blind*, 487 U.S. at 790-91, "[t]he First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it." For

that reason, it has long been established that "[c]ontent-based regulations are presumptively invalid." *R.A.V. v. City of St. Paul, Minnesota*, 112 S. Ct. 2538, 2542 (1992); *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 112 S. Ct. 501, 508 (1991).

The most familiar form of content-based regulation, of course, is censorship, efforts by government to *suppress* speech. *See, e.g., Texas v. Johnson*, 491 U.S. 397 (1989). But this Court has recognized that attempts to compel speech carry the same presumption of invalidity. While noting that "[t]here is certainly some difference between compelled speech and compelled silence," the Court nonetheless has observed that, "in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say." *Riley v. National Fed'n of the Blind*, 487 U.S. at 796-97.[9] This freedom, by its very terms, is not limited to particular speakers or particular speech: "*all* speech inherently involves choices of what to say and what to leave unsaid." *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 11 (1986) (plurality opinion).[10] Because "[m]andating speech that a

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[9] The Court has made clear, on numerous occasions, that "freedom of thought and expression 'includes both the right to speak freely and the right to refrain from speaking at all.'" *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985) (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)). Along with the right not to be silenced, "'[t]here is necessarily, and within suitably defined areas, a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.'" *Id.* at 559 (quoting *Estate of Hemingway v. Random House, Inc.*, 23 N.Y.2d 341, 348, 296 N.Y.S.2d 771, 776, 244 N.E.2d 250, 255 (1968)).

[10] The Court has allowed somewhat greater latitude for laws compelling statements in the area of commercial speech. *See, e.g., Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626 (1985). It is clear, however, that the programming on cable television may not generally be treated as commercial speech. *See*

speaker would not otherwise make necessarily alters the content of the speech." *Riley v. National Fed'n of the Blind*, 487 U.S. at 785, laws that do so are regarded as "content-based." *Id.*

The Court has found the same right to be inherent in freedom of the press.[11] Pointing to its longstanding concern about any "compulsion exerted by government on a newspaper to print that which it would not otherwise print," *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. at 256, the Court has said that "[t]he clear implication" of its prior cases was "that any such compulsion to publish that which '"reason" tells them should not be published' is unconstitutional." *Ibid.* (quoting *Associated Press v. United States*, 326 U.S. 1, 20 n.18 (1945)). Although the Court in *Tornillo* recognized that the law at issue (a statute requiring newspapers to print replies by political candidates to criticism in their pages) might provide newspaper readers with a greater diversity of views—one of the justifications offered here for the must-carry law—it nonetheless concluded that "[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time." *Id.* at 258.[12]

Leathers v. Medlock, 111 S. Ct. at 1442 ("[c]able television provides to its subscribers news, information, and entertainment").

[11] The Court has said that a cable operator "is engaged in 'speech' under the First Amendment, and is, in much of its operation, part of the 'press.'" *Leathers v. Medlock*, 111 S. Ct. at 1442.

[12] The exercise of editorial discretion, of course, is not unique to newspapers. As the Court has recognized, "through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, [a cable operator] seeks to communicate messages on a wide variety of topics and in a wide variety of formats." *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986). *See also FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979) (cable operators must exercise "a significant amount of editorial discretion regarding what their programming will include").

The must-carry law, however, deliberately and explicitly seeks to set aside this freedom of choice in favor of making cable operators the bearers of speech that the government wishes to advance. The law, in purpose and effect, is no different from a law providing that, with respect to the designated channels, "local broadcast stations shall have an absolute right to determine the news, entertainment, and information that may be shown to the public." Like speakers subject to a board of censorship, the right of cable operators to select their own programming has been made secondary to the preferences of entities designated by the government. Whether looked at as an abrogation of their editorial discretion, or as an infringement of their right to speak only as they voluntarily would choose, the law pays little respect to longstanding principles of freedom of speech and of the press.

The district court determined, however, that "[a] compulsory speech requirement, or one imposing upon the discretion of a speaker to say only what he wishes, it appears, is to be strictly scrutinized *only* if it appears that the government has prescribed the content—either the message or the subject matter—of the speech to be spoken." J.S. App. 16a (emphasis added). But there is no support for the notion that government may coerce speech so long as it specifies the content in general, rather than specific, terms. Indeed, if full protection under the First Amendment depended upon whether "the government has prescribed the content—either the message or the subject matter—of the speech to be spoken," *id.*, then it would follow that the government, without strict judicial review, could direct every newspaper to commit a section of its pages to material submitted by particular writers, or compel bookstores to carry works published by "local" authors, or movie theatres to show films produced by

designated movie studios. Under the theory adopted by the district court, none of those mandates would dictate the "message or subject matter" of the speech, yet each would cut deeply into the traditional right of newspapers, booksellers, and movie theatres to choose what they will offer to the public. The freedom not to speak under "compulsion exerted by government" (*Miami Herald Publishing Co. v. Tornillo*, 418 U.S. at 256) is a freedom from the compulsion itself: it does not vary according to how precisely the government defines the particular speech to be compelled. *See Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 124-25 (1973) ("[f]or better or for worse, editing is what editors are for; and editing is selection and choice of material").[13]

The only authority cited by the district court to support its novel theory, *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), provides no support at all. There, the Court simply held that the owner of a shopping center—property generally open to the public for a variety of uses—could not exclude members of the public wishing to use the premises to distribute speech. But that situation was very different: the owner of the shopping center was not itself distributing speech, and the state law at issue thus did not alter the content of its speech. Here, by contrast, Congress has mandated access to a *medium of speech* and, further, has mandated that access for specific programming. The channels of a cable system are not premises on which people come and go but—like the pages of a newspaper, or the stage of a theatre—are the

[13] The Court has held that even indirect compulsion of speech violates the First Amendment. *See Keller v. State Bar*, 110 S. Ct. 2228 (1990); *Lehnert v. Ferris Faculty Ass'n*, 111 S. Ct. 1950 (1991); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). The Court said in *Abood*—quoting Thomas Jefferson—that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." 431 U.S. at 234 n.31 (quoting I. Brant, *James Madison: The Nationalist* 354 (1948)).

very means by which the cable operator conveys its chosen speech to the public. *See* J.S. App. 13a ("video signals have no other function than to convey information.") Those means being central to the act of speaking itself, the government cannot appropriate them, directly or indirectly, for the benefit of speech that it prefers.

2. This Court has also held that government cannot discriminate against certain topics or speakers, simply because it finds the speech or the speakers less worthy of public attention. *See, e.g., Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 112 S. Ct. at 508-09; *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972). By its terms, however, the must-carry law creates two distinct classes of speech—speech carried on local broadcast stations and all other speech available to cable operators—and grants the first class a preference at the expense of the second. That preference not only erects significant obstacles between cable programmers and their intended viewers, forcing them to compete for carriage on a restricted number of channels, but it inevitably will cause some programmers to be denied carriage entirely.[14] A law that "distinguish[es] among types of speech" is itself subject to strict scrutiny. *Burson v. Freeman*, 112 S. Ct. at 1855.

The district court nevertheless declined to give strict scrutiny to this discrimination, saying that such scrutiny was triggered only by "evidence that the government's distinction between groups of speakers is related to what

[14] In *Miami Herald Publishing Co. v. Tornillo*, the Court acknowledged that "since the amount of space a newspaper can devote to 'live news' is finite, if a newspaper is forced to publish a particular item, it must as a practical matter, omit something else." 418 U.S. at 257 n.22 (internal footnote and quotation omitted). Given the number of programming choices potentially available to cable operators, both now and in the future, the same displacement necessarily will occur with respect to cable systems as well. *See* NCTA's Statement of Material Facts as to Which There Is No Genuine Issue ¶ 8. J.A. 214-18.

the speakers are saying . . . ." J.S. App. 18a. But the presumption against discrimination does not turn on whether the government prefers the speakers, rather than their speech. The infirmity in either case is that government ultimately controls what speech is made available to the public—making it easier for some speech, and harder for other speech, to be heard—and does so on the basis of its views about what is important, or not important, for the public to hear. As this Court has said, however, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . ." *Buckley v. Valeo*, 424 U.S. at 48-49. Furthermore, in practical terms, it is almost always the case that the preference of government for one speaker over another *will* be "related to what the speakers are saying." That is especially so here: Congress is favoring that class of speakers subject to federal oversight by virtue of their receipt of broadcast licenses, an oversight that justifies a unique level of federal involvement with programming. And Congress gave explicit approval to the general nature of broadcast speech in explaining its mandatory preferences. *See* pages 29-30 *infra*.[15]

It is true, of course, that the government, in order to administer government funds or government property, sometimes *must* discriminate among various speakers: for example, the federal government could not select among competing applicants for government grants, or provide support for the Corporation for Public Broadcasting,

[15] Appellee NAB, in its Motion to Affirm, argued that Congress is free to discriminate "[s]o long as [it] does not aim at the suppression of dangerous ideas . . . ." NAB Motion to Affirm at 22 (internal quotation marks omitted). But, as the Court stated last Term in *City of Cincinnati*, "we [have] expressly rejected the argument that 'discriminatory . . . treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas.'" 113 S. Ct. at 1516 (quoting *Simon & Schuster*, 112 S. Ct. at 509).

without some capacity to make distinctions among different speakers. But the power asserted here is very different. Congress is not making an unavoidable choice in its role as overseer of public funds or property; instead, it is reaching out to alter the choices made by *private* entities in the *private* marketplace for speech. That kind of discrimination is what this Court has rightly condemned as intolerable under the First Amendment. *See Buckley v. Valeo*, 424 U.S. at 48-49.

Our position, therefore, is that the must-carry law—as a direct regulation of the content of speech—must be held unconstitutional on its face "'absent a need to further a state interest of the highest order.'" *Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989) (quoting *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979)). Before turning to the justifications asserted here—the promotion of diversity and the protection of local broadcasting—we address various arguments that a lesser First Amendment standard, or no standard at all, should apply.

B. There Is No Basis for Giving Less Than Exacting Scrutiny to Direct Regulation of the Content of Protected Speech

1. The district court regarded the must-carry law as "essentially economic regulation," J.S. App. 13a, characterizing it as "simply industry-specific antitrust and fair trade practice regulatory legislation." J.S. App. 13a. It is well-established, of course, that legislatures have broad power to regulate businesses generally and that economic regulation is typically subjected to minimal judicial scrutiny. But it is likewise the case that legislative efforts to regulate the press have traditionally been viewed with great suspicion under the First Amendment. This Court has reasonably accommodated both of these principles by holding, on the one hand, that it will usually engage in deferential review when "generally applicable economic regulations" are applied to the press but, on the other hand, that it will undertake strict scrutiny when legisla-

tures "single out" the press for targeted, industry-specific legislation. *Compare Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) *with Cohen v. Cowles Media Co.*, 111 S. Ct. 2513 (1991).[16]

The must-carry law plainly falls on the suspect side of that line: it is *not* a neutral law of general application but a law directly regulating cable operators in their selection of speech. Reviewing "decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news," *Cohen v. Cowles Media Co.*, 111 S. Ct. at 2518, the Court has provided an illustrative list of what is meant by "generally applicable laws": laws providing for grand jury subpoenas (*Branzburg v. Hayes*, 408 U.S. 665 (1972)); copyright laws (*Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977)); the National Labor Relations Act (*Associated Press v. NLRB*, 301 U.S. 103 (1937)); the Fair Labor Standards Act (*Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946)); the antitrust laws (*Associated Press v. United States*, 326 U.S. 1 (1945)); and non-discriminatory tax laws (*Murdock v. Pennsylvania*, 319 U.S. 105 (1943)).[17] All of those laws, without exception, apply to a broad category of businesses as

[16] The Court has likewise upheld laws of general applicability against claims that the laws violate rights under the Free Exercise Clause. *See Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990). At the same time, however, it has emphasized that "[a] law burdening religious practices that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217, 2233 (1993).

[17] Finding the Minnesota law of promissory estoppel to be a general law, the Court in *Cohen v. Cowles Media Co.* stated: "It does not target or single out the press. Rather . . . the doctrine is generally applicable to the daily transactions of all the citizens of Minnesota." 111 S. Ct. at 2518-19.

businesses, and none singles out the press in ways that control the content of its speech. *See Minneapolis Star & Tribune Co.*, 460 U.S. at 583 ("[t]he cases approving such economic regulation . . . emphasized the general applicability of the challenged regulation *to all businesses*") (emphasis added). *See also Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2465 n.3 (1991) (Scalia, J., concurring in judgment) ("[a] law is 'general' for the present purposes if it regulates conduct without regard to whether that conduct is expressive"). Here, by contrast, the unmistakable object of the must-carry law is to control the choice of programming by cable operators.[18]

The line drawn between general and specific laws serves an important function: it reflects the very different degrees to which the two types of law threaten freedom of speech and of the press. Because a general law applies broadly to entities other than the press, and thus typically to activities other than speech, it is usually too blunt a tool for compelling, prohibiting, or otherwise interfering with the content of speech itself. As the Court noted in *Minneapolis Star & Tribune*, "[w]e need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency." 460 U.S. at 585 (citing *Railway Express Agency, Inc. v. New York*, 336 U.S.

[18] The Court has held that a law requiring professional fundraisers to charge no more than a reasonable fee—a considerably less intrusive regulation than one actually dictating the content of speech—was not "merely economic, having only an indirect effect on protected speech." *See Riley v. National Fed'n of the Blind*, 487 U.S. at 789 n.5. In so doing, the Court observed that "[f]ar from the completely incidental impact of, for example, a minimum wage law, a statute regulating how a speaker may speak directly affects that speech . . . . Here, the desired and intended effect of the statute is to encourage some forms of solicitation and discourage others." *Id. See also Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. at 581; *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 112 S. Ct. at 509.

106, 112-13 (1949) (Jackson, J., concurring)). Even with respect to general prohibitory laws—laws, like the antitrust laws, that are applied on a discretionary basis to individual cases—the necessary application of the statute to other activities will provide a benchmark by which to identify any arbitrary application to activities involving speech. *See City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 761 (1988) ("the general application of the statute to areas unrelated to expression will provide the courts a yardstick with which to measure the [officials'] occasional speech-related decision"); *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. at 2464 (Scalia, J., concurring in judgment). These safeguards are wholly absent when legislatures enact laws that mark out the press, or activities involving speech, in ways that directly or indirectly control the content of what may be said.[19]

The decision to subject those "in the business of expression" (*see City of Lakewood*, 486 U.S. at 761) to targeted legislation also undermines the presumption, reasonably followed in the case of generally applicable laws, that the legislature is engaged in neutral economic regulation. In the vast majority of industries, any concerns about concentrations of economic power—whether in the form of "bottlenecks" or otherwise—are simply addressed under the general antitrust laws, not through unique legislation aimed at the industry as a whole. When Congress departs from the usual pattern, and does so in an industry

[19] The Court has held that, in some circumstances, even laws of general applicability may impose an impermissible burden on First Amendment rights. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). *See also Associated Press v. United States*, 326 U.S. at 20 n.18 (emphasizing that antitrust decree "does not compel AP or its members to permit publication of anything which their 'reason' tells them should not be published"); *Branzburg v. Hayes*, 408 U.S. at 681 (making clear that subpoenas to testify "involve no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold").

involving speech alone, it is necessary to question whether Congress is seeking to impose more onerous standards on the press, or to advance interests related to the speech itself and not just to the economic playing field. Thus, although there conceivably may be sufficient reasons for singling out the press, the explanations put forward for laws of that nature should be subject to the most rigorous form of judicial scrutiny.

The decision in *Leathers v. Medlock* is not to the contrary. The law at issue there—one imposing the Arkansas state sales tax—*was* a general law, not a law imposed only on the press, *see* 111 S. Ct. at 1444 ("[t]he Arkansas sales tax is a tax of general applicability"); it was thus plain that the State could not use the sales tax itself to regulate the content of speech. This Court nonetheless conducted a further inquiry into whether the legislature, by a series of exemptions, had turned a neutral law into one posing improper risks of interference with the content of speech, ultimately concluding that it had not. *See id.* at 1447 (nothing in record "indicate[s] that Arkansas' broad-based content-neutral sales tax is likely to stifle the free exchange of ideas"). The must-carry law is different from the Arkansas law in at least two decisive respects: it is not a law "of general applicability," and, far from imposing little or no risk of interference with freedom of speech, it interferes directly and overtly with that freedom. That kind of law remains subject to the highest, not the lowest, standard of scrutiny.

2. The district court acknowledged that "content-based" laws are subject to strict scrutiny, J.S. App. 16a, but it then concluded that the must-carry law was not content-based because, according to the court, it can be "*justified* without reference to the content of the regulated speech." *See Ward v. Rock Against Racism*, 491 U.S. at 791 (internal quotation marks omitted). This analysis puts the cart before the horse. The purpose of the test relied on by the district court is to determine whether

laws ostensibly regulating conduct (*e.g.*, the burning of a draft card [20] or sleeping in a public park [21]) or the time, place, and manner of speech (*e.g.*, the noise level at public concerts [22]) are entitled to lenient scrutiny or whether —because, though seemingly neutral, their aim is to control the content of speech—they must be reviewed according to the traditional, more exacting standard. The test thus serves to identify laws that are permissible in form, but impermissible in object.[23] But where a law on its face directly and explicitly alters the content of speech, as the must-carry law unmistakably does, the nature of the regulation itself is enough to establish that strict scrutiny is necessary, regardless of the non-speech justifications that the government may advance. *See Riley v. National Fed'n of the Blind*, 487 U.S. at 795 ("mandating speech that a speaker would not otherwise make necessarily alters the content of the speech. We therefore consider the Act as a content-based regulation of speech.").[24]

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[20] *See United States v. O'Brien*, 391 U.S. 367 (1968).

[21] *See Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984).

[22] *See Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

[23] In *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the Court did look to the justification for a zoning ordinance restricting the location of theatres showing indecent films in order to see whether its aim was to control the effects associated with those theatres or to inhibit the speech itself. But the Court has observed that the ordinance, unlike the must-carry law here, "did not fall neatly into the 'content-based' or 'content-neutral' category . . . ." *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. at 1517. Moreover, the law on its face merely assigned adult theatres to designated areas—a time, place and manner regulation—and did not dictate what the content of the films was to be.

[24] In *Riley*, while assessing the requirement that professional fundraisers disclose the percentage of collected funds actually remitted to charity, the Court looked first to the nature of the

In any event, the terms of the law itself make it impossible to justify "without reference to the content of the regulated speech." The very purpose of the law is to assure that particular speech (that of local broadcast stations) is widely available to the public, and the means used are mandatory directives to cable operators to carry that speech in addition to, or instead of, other speech. Even Congress' asserted interest "in promoting the continued availability of . . . free television programming, especially for viewers who are unable to afford other means of receiving programming," Findings ¶ 12, rests upon a legislative judgment that the content of broadcast programming merits governmental support. Through Section 5 of the 1992 Act—the provisions requiring carriage of noncommercial stations—Congress expressly sought to ensure dissemination of speech that "educat[es]" citizens in a manner endorsed by the government, *id.* ¶ 8(A); similarly, Congress found commercial broadcasting worthy of support because broadcasters present "local news and public affairs programming and other local broadcast services critical to an informed electorate," *id.* ¶ 11. *See also* S. Rep. No. 92, 102d Cong., 1st Sess. 59 (1991) (expressing concern that failure of broadcasters will reduce "local public service programming" and "lead to diminished diversity of opinion"); H.R. Rep. No. 628, 102d Cong., 2d Sess. 64 (1992) (same). Against this background of express findings with respect to the values of broadcast programming, it is impossible to conclude that the justifications for the law "have nothing to do with content." *Boos v. Barry*, 485 U.S. at 320; *see*

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regulation (mandated speech) and concluded that it was "content-based." 487 U.S. at 795; *see id.* at 798 ("North Carolina's content-based regulation is subject to exacting First Amendment scrutiny"). Only *after* reaching this conclusion did the Court turn to the justification for the statute: assuring that donors made informed contributions. *Id.* at 798-801; *see also Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 112 S. Ct. at 508 (law on its face deemed "content-based statute").

Forsyth County, Ga. v. Nationalist Movement, 112 S. Ct. at 2403.

It should also be noted that the speech favored by Congress is the speech over which the federal government exerts the most direct and indirect control. *See, e.g.*, 47 U.S.C. § 303b(a)(2) (children's programming); Pub. L. No. 102-356, § 16(a), 106 Stat. 954, Aug. 26, 1992, to be codified at 47 U.S.C. § 303 (Indecent Programming Restrictions). This mixture of favoritism and control raises concerns for several reasons. At the very least, it means that Congress has reserved to itself the power to regulate programming shown on a significant percentage of channels on cable television, a power that it would be denied if the channels were given over to programming from sources other than broadcast licensees. In addition, because it is well-understood that Congress can revoke its favor at any time, the grant of preferences to broadcast licensees assures that those licensees must continually be sensitive to their political standing among members of Congress. This attention on self-interest, however natural, cannot help but reduce the traditional independence of the press, even the broadcast press, with respect to government.

3. The district court also indicated that certain "local" factors, including the use of public rights-of-way, might justify greater regulation of the content of cable operators' speech. J.S. App. 20a-22a. To the extent that the court believed that cable operators' use of rights-of-way was equivalent to broadcast licensees' use of the electromagnetic spectrum, its belief was mistaken. The federal government has been permitted broad regulatory authority over holders of broadcast licenses because the number of applicants far exceeds the limited capacity of the electromagnetic spectrum: given that unregulated speech by all would amount to speech by none, the government *must* pick and choose among potential speakers to make speech possible over that medium of communication. *See National Broadcasting Co. v. United States*, 319 U.S. 190, 212-13 (1943); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388 (1969); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 566-67 (1990). The situation with respect to the use of public rights-of-way by cable systems is just the reverse: the physical capacity to accommodate additional cable systems exists, but willing users do not. *See* NCTA's Statement of Material Facts as to Which There Is No Genuine Issue ¶ 20, J.A. 211; *see Quincy Cable TV, Inc. v. FCC*, 768 F.2d at 1448-50. The federal government is not acting here as an arbiter of last resort but, rather, is reaching out to impose its preferences for particular speakers in the marketplace at large.

The fact that cable operators commonly use rights-of-way does not, by itself, give Congress broad leeway to prescribe the content of speech. Even if local governments may refuse to allow use of public rights-of-way for speech—a proposition open to serious question (*see City of Los Angeles v. Preferred Communications, Inc.*)—it would not follow that they (or the federal government) could turn consent to the laying of cable wires into a basis for dictating the speech carried over those wires.[25] Indeed, recent decisions make it quite clear that the power to ban use of public rights-of-way for speech is not a license for officials to grant or withhold permission based on the content of the speech to be provided. *See City of Cincinnati v. Discovery Network, Inc.; City of Lakewood v. Plain Dealer Publishing Co.* To the contrary, the Court in those cases has recognized that the legitimate interests in con-

[25] Local governments clearly have some power to regulate use of public rights-of-way: whether or not they have an important interest in prohibiting use of public rights-of-way in the first place, they clearly may impose reasonable restraints on the time, place, and manner of use. But, as we discuss in the text, the Court recognized in *City of Lakewood* and *City of Cincinnati* that those possible interests do not relieve government of the responsibility to apply its regulations impartially, without interference with the content of speech.

trolling use of public rights-of-way typically do not vary with the speech at issue. *See also Forsyth County, Ga. v. Nationalist Party*. Likewise, there is no basis for a city to say that it will allow cable operators to lay cable lines but only on condition that they are willing to carry programming selected by the government.[26]

The district court also noted, in its catalogue of "local" factors, that there is "little competition among 'local' cable operators themselves." J.S. App. 20a. But a lack of local competition is not a basis for giving relaxed scrutiny to laws aimed at the content of speech: it is, in fact, common for local communities to have only one newspaper, or one bookstore, or one movie theatre, yet the Court has never suggested that the extent of First Amendment protection is thereby disminished. At most, the absence of other outlets would be an added ground in support of the argument that the chosen means (compelled speech) are necessary to serve the asserted interest (wider dissemination of particular speech). In a "one-newspaper" town, for example, local officials would still have to meet a compelling-interest standard to justify a law requiring the newspaper to print the minutes of town meetings; but, in seeking to meet that standard, the officials could point to the absence of other newspapers to explain why their "must-carry" rule was needed to have an informed citizenry. The lack of other comparable means for distributing the speech might affect the result

[26] This Court has recognized that governments may limit use of government resources to the purpose for which they were granted. *See Rust v. Sullivan*, 111 S. Ct. 1759 (1991); *Regan v. Taxation with Representation*, 461 U.S. 540 (1983). But the franchises provided to cable operators are not—and, indeed, could not be—granted for the purpose of conveying speech designated by the government. A must-carry requirement, therefore, does not prevent cable operators from taking property provided for one purpose and converting it to a second purpose; rather, it allows government to leverage a legitimate power (over public property) into an illegitimate one (over private speech).

of the test—although we think that it generally would not—but it would not change the test itself.

This distinction is well-illustrated by the decision in *Miami Herald Publishing Co. v. Tornillo*. There, the Court, while recognizing that many localities have only one newspaper, 418 U.S. at 249 & n.13, made clear that laws ordering publication of designated material must be reviewed according to the most exacting First Amendment standard. The proponents of an enforced right of access in *Tornillo* pointed to "dominant features of a press that has become noncompetitive and enormously powerful," manifested by such characteristics as "[c]hains of newspapers, national newspapers, national wire and news services, and one-newspaper towns" and a "monopoly controlled by the owner of the market" (*id.* at 249, 251). But the Court nonetheless gave strict scrutiny to the law mandating access, holding that indicia of economic concentration were insufficient to uphold that access or to justify governmental intrusion upon the editorial function. *Id.* at 256, 258.

Finally, the district court pointed out that the federal government has allowed cable systems to retransmit broadcast signals without consent pursuant to a program of compulsory copyright licensing. Again, however, that fact does not justify a departure from strict review of the must-carry law. Even if the right to retransmit broadcast signals were regarded as a government benefit,[27] and

[27] Prior to enactment of the Copyright Revision Act of 1976, the retransmission of broadcast signals, local or distant, was not considered a public performance under the general copyright law. *See Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968); *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 709-10 (1984) (discussing Copyright Revision Act of 1976). Thus, the revised law providing the compulsory license to cable operators left them no better off with respect to retransmission of local broadcast signals, and worse off with respect to distant signals, than they had been before.

even if the must-carry obligation were regarded as an (unexpressed) "condition" on that benefit, the condition would be invalid. Whatever power the government may have to attach new conditions to a *continuing* benefit—giving the recipient the choice of refusing the benefit and thus avoiding the condition—it cannot impose requirements on the basis of a benefit that is no longer being received. Yet, in the same legislation that imposed the must-carry obligation, Congress revised the law to require that, with respect to commercial broadcast stations not exercising their must-carry rights, cable operators must obtain consent to carry their signals. Thus, any after-the-fact effort to tie must-carry requirements to a right to carry local commercial stations without consent comes too late.[28]

II. THE ASSERTED INTERESTS IN PROMOTING DIVERSITY OF SPEECH AND IN PRESERVING LOCAL BROADCASTING ARE NOT SUFFICIENT, IN LAW OR IN FACT, TO JUSTIFY THE MUST-CARRY REQUIREMENTS

A law directly regulating the content of protected speech carries a strong presumption of unconstitutionality, *see R.A.V. v. City of St. Paul, Minnesota*, 112 S. Ct. at 2542, and, to sustain it, the government "must show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'" *Burson v. Freeman*, 112 S. Ct. at 1851 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)). *See also Sable Communica-*

[28] Although the Court, in *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), recognized that the retransmission of broadcast signals was a sufficient basis for the FCC to exert regulatory authority over cable television, that decision sheds no light on the issues here. The Court did not address "the validity of the specific rules promulgated by the Commission for the regulation of CATV," 392 U.S. at 167, and did not consider any question regarding whether particular restrictions were compatible with the First Amendment.

tions, 492 U.S. at 126. The government cannot come close to making that demanding showing here. But, even if the proper standard were the more lenient standard applied by the district court, the defense of the statute would fail. At the very least, the government would need to demonstrate that the law furthers a significant interest and is narrowly tailored to serve that interest. *See* J.S. App. 23a (citing *United States v. O'Brien*, 391 U.S. 367 (1968)). Here, however, there is no real evidence that the system of local broadcasting has been put in serious jeopardy, and, if it had been, Congress could address the problem through the far less intrusive means of providing direct financial subsidies rather than compelling cable operators to support speech that they do not wish to carry. *See generally Texas v. Johnson*, 491 U.S. at 418 (noting that "[i]t is not the State's ends, but its means, to which we object").

A. The Interest in Promoting Diversity of Speech Does Not Justify the Extraordinary Means of Compelling Speech

There is nothing unusual about the government defending a law that compels speech on the grounds that it regards the compelled speech as important and that, absent regulation, the speech will not be heard by a sufficiently broad audience. At some level, the notion that favored speech is of particular importance, and will not otherwise be adequately heard, lies behind *every* instance of compelled speech, or the government would not bother to compel it. *See, e.g., Riley v. National Fed'n of the Blind*, 487 U.S. at 798 (noting state argument about "the importance of informing donors how the money they contribute is spent"). Were that interest regarded as sufficient, therefore, little would be left of the First Amendment protection against compelled speech.

This kind of justification also has a dubious foundation: the very reason that compelled speech is subject to

a high level of scrutiny is the conviction that it is fundamentally improper for government to insist that private parties utter speech favored by the government. As we have said (*see* pages 17-18 *supra*), that kind of compulsion is just the mirror-image of laws prohibiting speakers from saying what they wish to say. In both instances—censorship and compelled speech—the government is insisting that its preferences, not those of private parties, should be transcendent in the marketplace for speech. If that purpose is not enough to justify censorship of speech, as it plainly is not, it should fare no better as a basis for compelling speech. *See Riley v. National Fed'n of the Blind*, 487 U.S. at 797 (noting "[t]he constitutional equivalence of compelled speech and compelled silence in the context of fully protected expression").

To prevail under the compelling-interest test, therefore, the government must do more than express its views about the prohibited or compelled speech *as speech*: it must show that the speech to be compelled, or the speech to be silenced, is tied to some interest *other than* an interest in favoring or disfavoring the speech. The Court, for example, has upheld regulation of protected speech that threatens the exercise of "the right to vote freely and effectively." *See Burson v. Freeman*, 112 S. Ct. at 1856. Likewise, the Court has indicated that courts may prohibit speech that poses a clear and present danger to the fair conduct of judicial proceedings. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976). But while Congress did include among its findings that local broadcast stations provide "local news and public affairs programming and other local broadcast services critical to an informed electorate," Findings ¶ 11, that general statement falls well short of a showing that, in the absence of mandatory carriage, the right to vote will be seriously threatened. The asserted interest in promoting diversity of speech is thus properly treated as an interest in the advancement of the speech itself, not in the protection of other constitutional rights.

Congress has also failed to show that the compulsion of the must-carry law will actually promote diversity of speech in any meaningful way. While the law guarantees that the speech of certain speakers will be available to cable subscribers, it assures that the speech of other speakers (those displaced by broadcast stations) will not. It hardly seems obvious that the forced carriage of little-watched broadcast stations—the programming most likely to be advanced by the must-carry law—adds to diversity of speech when the price of its carriage is the silencing of, for example, newer, less established cable channels. This is particularly so given the fact that the programming of broadcast stations is available to viewers through over-the-air transmission, while the programming of cable networks is not. *See also* J.S. App. 58a (Williams, J., dissenting) (expressing doubt that must-carry law "will increase program diversity *at all*").

It is, likewise, hard to reconcile the notion that carriage of broadcast stations is essential to diversity of speech with the decision by Congress to grant local commercial broadcast stations the newly-established right to *refuse* carriage on cable systems. As we have noted, *see* pages 8, 34 *supra*, the law prior to enactment of the 1992 Cable Act assured that any cable system wishing to carry a local broadcast station could do so without obtaining consent. Now, however, Congress has provided each local commercial station with a veto—exercisable solely at its own discretion—over carriage of the station in the local market. Thus, for all its claimed interest in diversity of speech, Congress has fashioned a law that, looked at in its entirety, makes that interest wholly subordinate to the unilateral preferences of the stations themselves.

B. The Must-Carry Law Does Not Protect Against Any Genuine Threat to the System of Local Broadcasting

The second justification for the must-carry law—that carriage of local broadcast stations is necessary to preserve a strong system of local broadcasting—is inade-

quate to justify it for at least two reasons. First, even if we assume *arguendo* that the interest is of sufficient magnitude, the record does not support the necessary predicate: that the system of local broadcasting is in genuine peril. *See, e.g., Burson v. Freeman,* 112 S. Ct. at 1851 (rules must be "necessary to serve [asserted] interest") (internal quotation marks omitted); *see Century Communications Corp. v. FCC,* 835 F.2d at 300 ("speculative fears alone have never been held sufficient to justify trenching on first amendment liberties"). Second, even if the economic concerns were less speculative, Congress could address them by providing direct financial assistance, as it does for other speech that it wishes to advance.

1. Before turning to the congressional findings, we note that the district court gave them a wholly unwarranted degree of deference. This Court has stressed that "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Communications, Inc. v. Virginia,* 435 U.S. 829, 843 (1978); *see also Sable Communications,* 492 U.S. at 129; *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 915 (1982). Indeed, were the courts barred from going behind the surface of congressional findings, "the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified." 435 U.S. at 844; *see also Lamprecht v. FCC,* 958 F.2d 382, 392 n.2 (D.C. Cir. 1992). The Court has thus made clear that "whatever deference is due legislative findings would not foreclose [this Court's] independent judgment of the facts bearing on an issue of constitutional law . . . ." *Sable Communications,* 492 U.S. at 129. That independent judgment is particularly necessary here, given that prior must-carry rules have twice been found to have little grounding in fact, *see* pages 4-5 *supra,* and that, with respect to any concern about the future of local broadcasting, the current rules are prophylactic, not corrective, in nature. *See NAACP v. Button,* 371 U.S. 415, 438 (1963) (citations omitted) ("[b]road

prophylactic rules in the area of free expression are suspect").

Although the Court has at times spoken of giving deference to Congress' factual findings, *see Walters v. National Ass'n of Radiation Survivors,* 473 U.S. 305, 331 n.12 (1985); *Metro Broadcasting, Inc. v. FCC,* 497 U.S. at 569, and done so even where the law was subject to elevated standards of review, we think that the proper level of deference given to Congress varies inversely with the level of judicial scrutiny given to its actions. The usual reason for heightened scrutiny of any sort is that legislation with respect to particular subjects (*e.g.,* speech), or based on particular grounds (*e.g.,* race or gender), is especially likely to cross constitutional boundaries. It seems inconsistent with the need for heightened scrutiny of legislative action to say, at the same time, that the justifications offered to support the legislation are to be treated with great deference. As judicial concern about the nature of legislation increases, judicial deference to legislative findings should decrease.

2. At the very least, however, the Court should not foreclose "independent judgment" of the grounds for the asserted interest. If that review is given here, it is readily apparent that the need to protect local broadcasting has not been even remotely established. Congress itself found that "the most popular programming on cable systems, and a substantial portion of the benefits for which consumers pay cable systems is derived from carriage of [broadcast signals]." Findings ¶ 19. Not surprisingly, therefore, following the invalidation of the original must-carry rules in *Quincy Cable,* cable operators did not elect to drop local broadcasters to any significant degree. Indeed, the FCC survey said by Congress to show "a serious problem," S. Rep. No. 92, 102d Cong., 1st Sess. 43 (1991), actually found that only one in five cable operators had refused carriage to even one broadcast station within the scope of the survey. *See* FCC Mass Media Bureau, *Cable Sys-*

tem Broadcast Signal Carriage Survey Report 10 (Sept. 1, 1988) (filed by NAB as Attachment B to Affirmation of Jack N. Goodman).[29] As the House Report acknowledges, "[t]he Committee has not found that cable systems are engaging in a widespread pattern of denying carriage of local television stations . . . ." H.R. Rep. No. 628 at 52. *See also* J.S. App. 63a; NCTA's Statement of Material Facts as to Which There Is No Genuine Issue ¶ 8, JA. 215 (the average U.S. cable system actually carried *more* local broadcast signals in 1990 than in 1986).

The system of local broadcasting, in fact, has flourished in the years since invalidation of the must-carry rules in *Quincy*: "the number of commercial broadcast stations has increased by 22% (from 919 to 1118), the number of educational broadcast stations by 15% (from 316 to 363), and the number of cities receiving broadcast television by 16% (from 514 to 594)." *See* J.S. App. 62a (Williams, J., dissenting) (citing NCTA's Statement of Material Facts ¶¶ 12-14, J.A. 216.)[30] This significant expansion took place at least partially *because of* the growth of cable television, and despite the purported "economic incentive" of cable operators "to delete, reposition, or not carry local broadcast signals." Findings ¶ 16. That incentive, to the extent that it exists at all, is thus clearly

[29] Overall, as Congress observed, the survey indicated a nationwide total of "3,600 instances" of noncarriage of a local station, S. Rep. No. 92 at 43, but that number actually amounts to a noncarriage rate of 5% (approximately 8500 cable systems were then carrying an average of eight broadcast stations each). *See* J.S. App. 64a (Williams, J., dissenting); *Cable System Broadcast Signal Carriage Survey Report* 4; NCTA's Statement of Material Facts as to Which There is No Genuine Issue ¶ 18, J.A. 217.

[30] The fact that broadcast stations are increasing in number would seem fatal to the theory that cable operators maintain, and will exploit, a "bottleneck" over transmission of video programming. The proliferation of broadcast stations indicates either that transmission by cable systems is not essential to their success or that cable systems are willingly carrying the great majority of them. *See generally* P. Areeda & H. Hovenkamp, *Antitrust Law* § 736.2, at 847 (1992 Supp.).

overcome by the economic incentive to carry the vast majority of broadcast signals.

It is also highly likely that, if a significant segment of broadcast television were not available on local cable systems, consumers would then return to use of antennas (along with inexpensive switching devices), which would make available both cable programming and over-the-air broadcast programming. While it is true, as Congress found, that this technology is not used when the overwhelming majority of broadcast stations *are* voluntarily carried on cable systems, it hardly follows that it would not be used if broadcasting—"the most popular programming on cable systems" (Findings ¶ 19)—were otherwise massively unavailable. *See* J.S. App. 66a (Williams, J., dissenting). To the contrary, "[c]ommon sense suggests that consumers who want to receive an off-the-air channel will quickly observe that they may need to purchase (or reconnect) antennas should their cable system cease offering their favorite broadcast stations." *Century Communications*, 835 F.2d at 301 (internal quotation marks omitted).

The district court also gave little consideration to the availability of other means of preserving the system of local broadcasting. For example, if local broadcasters ever faced genuine financial hardship, Congress could provide subsidies to the stations, as it does in partial form now through the grant of free broadcast licenses. *See* J.S. App. 66a (Williams, J., dissenting). That is the course followed by Congress with respect to the Corporation for Public Broadcasting, and, were local stations faced with a shortfall in advertising revenues resulting from a reduced audience, Congress could similarly give direct grants to the stations themselves. The must-carry law, however, requires *cable operators* to provide the subsidy for broadcast stations—and to provide it for *all* broadcast stations, whether in jeopardy or not. That approach imposes a far less tailored, and far more invasive, solution to this as-

serted problem. *See, e.g., Keller v. State Bar,* 110 S. Ct. 2228 (1990) (striking down requirement that members involuntarily subsidize speech of organization).

The must carry provisions thus cannot be upheld on the basis of Congress' repeated, but quite implausible, finding that, without them, the system of free local broadcasting "will be seriously jeopardized." Findings ¶ 16. That system has thrived, and there is no reason to think that it will not continue to thrive under a regime of voluntary carriage. And if that situation should change, then cable subscribers wanting those programs can certainly find alternative, readily available, means of getting them. *See Century Communications,* 835 F.2d at 303 ("both the Federal Trade Commission and the Department of Justice have concluded, in separate reports, that the absence of must-carry would not harm local broadcasting") (citations omitted). Congress has simply elected a highly intrusive—and, ultimately, unconstitutional—solution to a problem that does not exist.

CONCLUSION

The judgment of the three-judge district court should be reversed.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1993

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Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal From The United States District Court For The District Of Columbia

---

BRIEF FOR APPELLANTS DISCOVERY COMMUNICATIONS, INC. AND THE LEARNING CHANNEL, INC.

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QUESTION PRESENTED

This case is a constitutional challenge to the "must-carry" provisions of the Cable Television Consumer Protection and Competition Act of 1992, §§ 4 & 5, Pub. L. No. 102-385, 106 Stat. 1471-1481. The question presented is whether Congress, consistent with the First Amendment, may require that operators of cable television systems devote a specified portion of their channels to programmers favored by Congress—*i.e.*, local broadcast stations—regardless of the preferences of the operators and regardless of the effects on other, unfavored, programmers.

PARTIES TO THE PROCEEDING

A list of the parties to the proceeding in the district court is set forth at J.S. ii-iii. Appellants' Rule 29.1 disclosure statements are set forth at J.S. App. 111a-117a.

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Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems, 1 FCC Rcd. 864 (1986), *on reconsideration*, 2 FCC Rcd. 3593 (1987) 9,10,11,12,33,46,49

Cable Television Service; Cable Carriage of Home Shopping Broadcast Stations, 58 Fed. Reg. 39156 (1993) 46

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Must Carry Second Further Notice of Proposed Rulemaking, 6 FCC Rcd. 4545 (1991)	15,43
Report and Order, MM Docket No. 83-670, 98 FCC 2d 1076 (1984)	27
Second Report and Order, Docket No. 14895, 2 FCC 2d 725 (1966)	4
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Hearing Before the Subcomm. on Communications of the Senate Commerce Comm., 101st Cong., 1st Sess. (Oct. 25, 1989)	29
Office of Communications of the United Church of Christ, *The Public Cost of TV Deregulation: A Study of the Decline of Informational Programming on Commercial* (June 17, 1991)	45
S. Rep. 102-92, 102d Cong., 1st Sess. (1991)	28,40,41,47,48,49,50

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Standard & Poor's, *Daily Stock Quotations, NYSE*, vol. 3 (1986)	39
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BRIEF FOR APPELLANTS DISCOVERY COMMUNICATIONS, INC. AND THE LEARNING CHANNEL, INC.

OPINION BELOW

The opinion of the district court (J.S. App. 1a-72a) is reported at 819 F. Supp. 32.

JURISDICTION

These consolidated cases were heard by a three-judge district court under 28 U.S.C. § 2284 and section 23 of the Cable Television Consumer Protection and Competition Act of 1992 ("the Act"), Pub. L. No. 102-385, 106 Stat. 1500, 47 U.S.C. § 555(c)(1). The district court's judgment was entered on April 8, 1993. Notices of appeal to this Court (J.S. App. 73a-81a) were timely filed on May 3, 1993; the juris-

dictional statement was timely filed on July 2, 1993; and this Court noted probable jurisdiction on September 28, 1993. Its jurisdiction rests on 28 U.S.C. § 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law * * * abridging the freedom of speech, or of the press." Relevant provisions of the Act are reprinted at J.S. App. 82a-110a.

STATEMENT

A. Parties to the Proceeding

Discovery Communications, Inc. ("Discovery") is a cable programmer: it creates video programming and distributes that material through cable systems nationwide. It operates The Discovery Channel and, through a subsidiary, The Learning Channel. Both are dedicated to the provision of high-quality documentary and educational programming aimed at people who watch television to broaden their understanding and appreciation of the world. J.A. 285.

Discovery was founded in 1985 and, in the climate of cable deregulation, it flourished. As of February 1993, it had grown to become the fifth largest cable network on a viewership basis, with about 59 million viewing subscribers, or 96% of all televisions wired for cable. J.A. 284-285. The Discovery Channel provides 18 hours of programming daily, featuring nonfiction documentaries about nature, science, human events, and history. Its award-winning programs include "In the Company of Whales" (hosted by a prominent cetacean biologist), "Portrait of a People" (examining endangered cultures like the Wodaabe tribe), and "Invention" (an investigation of scientific ingenuity produced jointly with the Smithsonian Institution). J.A. 285.

Discovery also dedicates programming to social issues and public affairs. A weekly feature called "Discovery Journal"

has covered such topics as capital punishment, overpopulation, famine in Africa, and AIDS. "Assignment Discovery" consists of teaching materials and a commercial-free documentary library that is made available to schools free of charge. In February 1992, to counterbalance conventional broadcasters' sound-bite coverage of the presidential primaries, Discovery provided a block of 20 minutes free time to each major candidate; more than 1.5 million people watched the candidates in a forum anchored by Walter Cronkite. J.A. 285.

Discovery acquired The Learning Channel ("TLC") in early 1991. TLC was relaunched in October 1991 following a $43 million investment made to upgrade its programming. J.A. 149. In February 1993, TLC was carried on 15% of U.S. cable systems and had about 18 million subscribers. J.A. 150. As a start-up channel, it usually competes for one of the last available spaces on a cable operator's system. J.A. 152, 208.

TLC produces educational programs for viewers of all ages. Each weekday, its schedule includes six hours of commercial-free programming for pre-school children called "Ready, Set, Learn." For older children, TLC offers "Mad Math" and "The Learning Channel Elementary School"; the latter provides teachers with copyright-cleared material that may be taped for classroom use. Weekly programs such as "A Practical Guide to the Universe" and "Ten Great Writers" are keyed to high-school students. J.A. 150-151. Following consultations with the Library of Congress, TLC in September 1993 launched its "Great Books" series, with Walter Cronkite serving as executive editor.

TLC also offers educational programming for adults. A weekly series called "No Problem" helps Spanish-speaking people improve their English. "Learn to Read" gives adults the opportunity to achieve greater literacy in the privacy of their homes. "Teacher TV" is produced by, for, and about teachers; it covers such topics as school reform, educational innovation, and teacher training. TLC's prime-time programming features documentaries about history, science, an-

thropology, and culture, such as "Archaeology," "Ancient Journeys," "Civilization," and "Science Frontiers." J.A. 151, 208-209.

B. Background of the Must-Carry Regime

As the district court observed, "[t]he concept of governmentally ordained mandatory carriage of broadcast signals is not a novel threat to the cable industry" (J.S. App. 8a). Since 1962, "[m]ust-carry rules in various forms have been major tools in [the government's] campaign to protect local broadcasting from cable." *Century Communications Corp. v. FCC*, 835 F.2d 292, 294 (D.C. Cir. 1987), *clarified*, 837 F.2d 517 (D.C. Cir.), *cert. denied*, 486 U.S. 1032 (1988). A review of these previous regulatory schemes provides a useful backdrop for analyzing the must-carry provisions of the 1992 Act.

1. *Original Must-Carry Rules.* The FCC first experimented with must-carry rules in the early 1960s and made them applicable to all cable operators in 1966. *Second Report and Order, Docket No. 14895*, 2 FCC 2d 725 (1966). These rules required cable systems to transmit to their subscribers, upon request and without compensation, every over-the-air television broadcast signal that was "significantly viewed in the community" or otherwise considered "local" under FCC rules. *See* 47 CFR §§ 76.57-76.61 (1984). There was originally no limit (apart from the system's channel capacity) on the number of broadcasters that had to be carried.

However offensive in principle, the must-carry rules in their earliest incarnation were not very onerous in practice to "community antenna television" (CATV), as the cable industry was then called. No cable program networks existed at that time, and cable operators virtually never originated their own programming. J.A. 61. Because the only video programming available for carriage on cable systems was then supplied by broadcast stations, the practical effect of the earliest must-carry rules was nondiscriminatory. They required cable operators to transmit the signals of all then-existing video programmers—*viz.*, broadcast TV stations—on an even-handed basis.

When first issuing must-carry rules, the FCC perceived cable as a passive retransmitter of signals—a supplementary system for delivering broadcast television in hard-to-reach areas. But during the 1970s its approach changed, and it gradually came to recognize cable's potential as an independent medium for providing the public with a wide range of alternative video choices. *Inquiry Into the Economic Relationship Between Television Broadcasting and Cable Television* ("*Economic Inquiry Report*"), 71 FCC 2d 632, 645-646 (1979). The FCC accordingly embarked on a deregulatory process that eliminated many artificial constraints on the cable industry's growth. Congress continued and expanded this process in the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779.

In this deregulatory environment, cable programming networks began to flourish; with their growth, the must-carry rules became concomitantly more oppressive. Unlike broadcasters, cable programmers have no access to the airwaves; a cable programmer cannot survive if it fails to gain access to a significant number of cable systems. Depending on the channel capacity of particular systems, the must-carry rules made it difficult or impossible for many fledgling programmers to secure an audience. With the growth of cable program networks, in short, the must-carry rules lost their "equal access" character and became a regime of preferential access, systematically discriminating against cable networks in favor of their broadcast competitors.

In 1980, Turner Broadcasting System, a pioneer in cable programming, challenged the must-carry rules by filing a rulemaking petition with the FCC. The Commission temporized for four years; finally, under threat of litigation, it issued in 1984 a brief memorandum refusing to modify the rules. Turner sought review in the D.C. Circuit, which consolidated the case with that of a cable operator from Quincy, Washington. In 1985, the D.C. Circuit thus became the first court to consider the constitutionality of the must-carry rules. *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).[1]

[1] This Court had previously encountered the FCC's must-carry rules

2. *The Quincy Decision.* In an opinion written by Judge Wright and joined by Judge (now Justice) Ginsburg and Judge Bork, the D.C. Circuit in *Quincy* unanimously held that the FCC must-carry rules violated the First Amendment. The court found no need to decide whether the rules should be examined under traditional "strict scrutiny" or under the test for "incidental" burdens on speech set forth in *United States v. O'Brien*, 391 U.S. 367, 377 (1968). While expressing "serious doubts about the appropriateness of invoking *O'Brien*'s interest balancing formulation," the court concluded that "the rules so clearly fail under that standard that we need not resolve whether they warrant a more exacting level of First Amendment scrutiny." *Quincy*, 768 F.2d at 1448.

At the outset, the court declined to extend to cable "the First Amendment jurisprudence that has developed around challenges to FCC regulation of broadcast television and radio" (768 F.2d at 1448). "[T]he First Amendment tolerates far more intrusive regulation of broadcasters than of other media," the court stated, "precisely because of the inescapable physical limitations on the number of voices that can simultaneously be carried over the electromagnetic spectrum" (*ibid.*). The broadcast analogy, Judge Wright concluded, "has no place in evaluating government regulation of cable" because the " 'essential precondition of that theory—physical interference and scarcity requiring an umpiring role for government—is absent.' " *Id.* at 1449, quoting *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 44-45 (D.C. Cir.) (*per curiam*), *cert. denied*, 434 U.S. 829 (1977).

In deciding whether to apply "strict scrutiny" or the less demanding *O'Brien* test, the court characterized the must-carry restrictions as "a far cry from [those] that typically

(among others) in a series of cases concerning the breadth of the Commission's jurisdiction to regulate cable. But the Court expressly declined to address questions concerning those rules' constitutionality, while observing that such questions were "not frivolous." *FCC v. Midwest Video Corp.*, 440 U.S. 689, 709 n.19 (1979) ("*Midwest II*"); *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972) ("*Midwest I*"); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 167 (1968).

have been viewed as imposing a merely 'incidental' burden on speech" (768 F.2d at 1451). "Although not intended to suppress or protect any particular viewpoint, the rules [were] explicitly designed to 'favor certain classes of speakers over others.' " *Ibid.*, quoting *Home Box Office*, 567 F.2d at 48. The rules' "very purpose," the court observed, was "to bolster the fortunes of local broadcasters" by guaranteeing them "the right to convey their messages over the cable system while cable programmers must vie for a proportionately diminished number of channels." *Quincy*, 768 F.2d at 1451. The discriminatory character of the must-carry rules, as well as their invasion of operators' "editorial discretion," left the court with "serious doubts about the propriety of applying the standard of review reserved for incidental burdens on speech" (*id.* at 1453).

But the court ultimately found no need to decide whether strict scrutiny should apply, since it found the must-carry rules "clearly impermissible" even under the *O'Brien* test (768 F.2d at 1454). The "substantial governmental interest" urged by the FCC in support of the rules was "the interest of preserving free, locally-oriented television." The court assumed without deciding that this interest, "taken as an abstract proposition," was "sufficiently weighty to warrant the rules' interference with First Amendment rights." *Ibid.* But the court held that the government "must do something more than merely posit the existence of the disease sought to be cured." Rather, it was required to produce evidence that " 'convincingly shows a problem to exist,' " *i.e.*, "that without the protection afforded by the must-carry rules the economic health of local broadcast television is threatened by cable." *Id.* at 1455, quoting *Home Box Office*, 567 F.2d at 50.

The court concluded that the FCC had failed to carry "its heavy burden of justification" in this respect (768 F.2d at 1457). The FCC itself in its *Economic Inquiry Report* had found that " 'competition from cable television does not pose a significant threat to conventional television or to [the FCC's] overall broadcasting policies.' " *Id.* at 1456 (quoting 71 FCC 2d at 661). "[T]he approximate doubling of the

number of broadcast stations across the country since 1965" also provided circumstantial evidence of broadcast industry health (768 F.2d at 1461 n.53). And the FCC acknowledged the availability of an "inexpensive switch"—generally called an input-selector or "A/B switch"—that "would enable a viewer to alternate between cable and off-the-air VHF signals" (*id.* at 1441). The court thus observed that, "in principle, a cable subscriber with little or no effort could still view local broadcasts even without the benefit of the must-carry rules," in which case "the Commission's reasoning would be deprived of its major premise" (*ibid.*).

When first promulgating must-carry rules in 1965, the FCC had cited impediments to successful use of A/B switches, such as consumer inconvenience and the necessity of maintaining indoor or outdoor antennas. *See* 768 F.2d at 1441 (citations omitted). But "[i]n the two decades since the rules' original promulgation," the FCC had never reexamined what the court described as "the admittedly speculative links in [its] chain of reasoning" (*id.* at 1457). The court accordingly held that the FCC could demonstrate a "substantial governmental interest" only by providing support for the two assumptions that were "the linchpins of its analysis" (*ibid.*):

> (1) that without protective regulations cable subscribers would cease to view locally available over-the-air television either because they would disconnect their antennas or because the inconvenience of a switching device would deter them; and (2) that even if some cable subscribers did abandon local television, they would do so in sufficient numbers to affect the economic vitality of local broadcasting.

Lastly, the court held that the must-carry rules as then drafted would be invalid even if the FCC had demonstrated the substantiality of its interest, since the rules were not "narrowly tailored to the evil sought to be corrected" (768 F.2d at 1459). The FCC's asserted interest, the court observed, was "to protect local broadcast*ing* and not local broadcast*ers*" (*id.* at 1460 (emphasis original)). "But if the goal is to preserve 'localism' and not 'local broadcasters,' "

the must-carry rules were "grossly overinclusive" because they "indiscriminately protect[ed] each and every broadcaster regardless of the quantity of local service available in the community and irrespective of the number of local outlets already carried by the cable operator" (*ibid.*). To show that its rules were "narrowly tailored" for *O'Brien* purposes, the court held that the Commission must establish a "baseline" for ascertaining whether regulatory intervention is actually necessary to preserve free community-oriented television. Such a "baseline" of localism could be "measured by the number of local broadcast stations in the community, the amount of local programming, or any other criterion within [the FCC's] discretion to choose." 768 F.2d at 1461.[2]

3. *The FCC's Response to Quincy.* The FCC suspended the must-carry rules and, after some pressure from Congress, announced its intent to reconsider the signal carriage question. 50 Fed. Reg. 48232 (1985). Following receipt of public comments, it adopted a "two-part regulatory program that eventually will eliminate the need for cable television mandatory signal carriage regulation." *Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems*, 1 FCC Rcd. 864, ¶ 1 (1986) ("1986 Report"). The first part of this program "require[d] cable systems to offer subscribers input selector switches for use with antennas and to conduct a consumer education program concerning the purpose of, and need for, maintaining off-the-air reception capability" (¶ 1). The second part consisted of an interim set of must-carry rules, to expire at the end of a five-year transition period, which were designed "to provide an orderly transition to a new environment" (*ibid.*).

In its report, the Commission substantially revised its 1965 assessment of the threat posed by cable to local television. It noted that "many cable systems are now pro-

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[2] The National Association of Broadcasters (NAB) sought certiorari from the *Quincy* decision, which was denied. 476 U.S. 1169 (1986). The Solicitor General did not seek certiorari.

viding locally originated programming" (¶ 114), whereas some broadcasters covered by the former must-carry rules offered little programming of genuine local interest (¶ 34). An FTC staff study indicated that, "absent must-carry rules, cable systems can be expected to carry many or most local broadcast stations" (¶ 54), since those stations were very popular with subscribers (¶ 52). Most cable systems in fact "continued to carry those stations that are available in their communities in the period since the *Quincy* decision" (¶ 131). Although there were some instances where cable systems had chosen to drop or decline carriage to certain broadcasters (and to certain cable programmers), the FCC found no evidence that these decisions betrayed anticompetitive animus (¶ 128). Rather, it found that isolated refusals to carry "do[ ] not necessarily indicate a public harm, but may simply reflect the fact that there is not sufficient demand for the station by the system's subscribers to warrant carriage" (*ibid.*).

The FCC concluded that use of A/B switches, coupled with antennas, offered the best long-term method of ensuring viewers' access to those few local broadcasters that cable systems did not voluntarily carry. It found that an A/B switch is a "low-cost item" whose "installation costs will be minimal" (¶ 215). It also noted the "relatively low cost and simple installation of indoor antennas," available both in set-top and attic designs; such antennas permit consumers "to receive signals of acceptable quality" even in locations where outdoor antennas are too costly or prohibited (¶ 166). Although the NAB alleged minor technical problems with A/B switches, the Commission found its concerns "overstated" and concluded that such problems could easily be handled by equipment redesigns pursuant to FCC-mandated standards (¶¶ 142, 165).

While judging A/B switches the best long-term solution, the Commission found that "most cable subscribers now are unaware of the need to receive broadcast signals off-the-air and are unprepared to do so" (¶ 135). A 1986 study commissioned by NAB showed that many cable subscribers disconnected their antennas and rarely used A/B switches—

behavior the FCC found to be "a direct result of the former must carry rules" (¶¶ 46, 122-125, 121). Because those rules "required cable systems to carry all available off-the-air broadcast television signals," cable subscribers previously "had no reason to be familiar with an input selector device for choosing between cable and off-the-air" reception (¶¶ 121, 122).

The FCC concluded, in short, that its former must-carry rules had created a "misperception" on the part of consumers that "broadcast signals will always be available as part of their basic cable service" (¶¶ 121, 122). To correct this misapprehension, the FCC required cable systems to provide their customers with "input selector switches that will enable reception of broadcast signals by means of antenna," thereby "leaving the subscriber in the same position to receive off-the-air signals as before cable installation" (¶¶ 136, 140). Cable systems were also required to "implement a consumer education program to inform their subscribers of the purpose, and need for, maintaining off-the-air reception capability" (¶ 136). The Commission noted that consumers had already "become familiar with switching between alternative program sources through the use of VCRs," and it concluded that they "will accept cable/broadcast input switching as simply another program source option" (¶ 164).

To provide an "orderly transition" during the period of consumer acclimatization, the FCC promulgated interim must-carry rules, to remain in effect for a five-year period (¶ 1). Unlike the prior rules, the interim rules generally required a cable system to devote no more than 25% of its channel capacity to must-carry stations (¶ 151). Only full-power stations qualified for mandatory carriage (¶ 144), and all commercial stations had to meet a "minimum viewership" standard in order to qualify (¶ 145). A cable system was free to carry qualified stations "on any channel or frequency," so long as carriage was provided on the basic tier (¶ 155). The FCC found "no need or justification • • • for imposing must carry requirements for more than a five year

period," concluding that "must carry regulations are neither desirable nor sustainable as long-term solutions to the problem of cable subscribers' access to broadcast signals" (¶ 138).[3]

4. *The Century Decision.* Upon petitions for review, the D.C. Circuit again declared the Commission's must-carry rules unconstitutional. *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987), *clarified*, 837 F.2d 517 (D.C. Cir.), *cert. denied*, 486 U.S. 1032 (1988). In an opinion written by Judge Wald and joined by Judges Mikva and McGowan, the court once more saw no need to decide "[t]he precise level of First Amendment protection" enjoyed by the cable industry (835 F.2d at 298). The FCC urged that *O'Brien* supplied "the correct test," and its arguments left the court "unconvinced that the new must-carry rules are necessary to advance any substantial governmental interest, so as to justify an incidental infringement of speech" (*id.* at 298, 293).

In assessing the "substantial interest" prong of *O'Brien*, Judge Wald observed that the FCC had abandoned any contention that must-carry rules "were needed for the indefinite future to ensure viewer access to local broadcast stations" (835 F.2d at 296). Rather, the government made the more modest contention that such rules were necessary

[3] In response to petitions for reconsideration filed by broadcast and cable interests, the FCC adhered to its basic two-part regulatory program. *See* 2 FCC Rcd. 3593 (1987). The Commission exhaustively considered various objections to the workability of the A/B switch proposal (¶¶ 50-56), concluding that "the information currently before us with respect to switch costs, technical performance, consumer convenience, switch compatibility with other equipment, and use of antennas for off-the-air reception is more than sufficient to support" the practicality of A/B switches (¶ 54). However, the Commission agreed to conduct a separate rulemaking "limited to issues associated with technical standards for cable/broadcast input selector switches" (¶ 94). The FCC also modified its proposed switch-installation and consumer education rules to make them less burdensome for cable operators (¶¶ 81-84, 95-101). The FCC's current technical standards for A/B switches are codified at 47 CFR §§ 15.115 and 15.117; the consumer education rules appear at 47 CFR § 76.66.

only for "a shorter-term transition period during which viewers could become accustomed" to the switch-and-antenna technology (*ibid.*). For two distinct reasons, the court determined that the government had not carried even this more limited burden of proof.

First, the court discerned no support for the FCC's assumption that "in the absence of must-carry rules, cable companies would drop local broadcasts" during the five-year transition period (835 F.2d at 303). The court found that "[e]xperience belies that assertion," noting the FCC's findings that "cable companies generally did not drop local broadcast signals that they had been carrying prior to *Quincy*" (835 F.2d at 303). Moreover, both the FTC and the Justice Department had "concluded, in separate reports, that the absence of must-carry would not harm local broadcasting" (*ibid.*).

Second, even if the FCC had demonstrated cable systems' propensity to drop broadcasters, the court found no support for a transition period "to keep local broadcasts accessible to viewers while the new switch-and-antenna technology takes hold" (835 F.2d at 300). The "lone item of 'hard' record evidence on which the FCC relie[d]" was a 1986 study commissioned by NAB (*id.* at 300-301). The court found various flaws in the study (*id.* at 301-302) and questioned the FCC's wisdom in placing sole reliance on data supplied by an interested party. As the court observed, "NAB's members have long benefited from the existence of must-carry rules," and its rulemaking comments "strongly criticized alternative proposed regulations that it perceived as inadequately protective of broadcasters, such as reliance on the A/B switch" (*id.* at 301).

Even if the NAB study were taken at face value, the court found that it "provide[d] only the spongiest of foundations" for the interim must-carry rules (835 F.2d at 302). The gist of the study's findings was that most cable subscribers either lacked A/B switches or disconnected their antennas, so that "only about 10% of cable subscribers presently switch back and forth between cable and antennas"

(*id.* at 301). But the court concluded that this pattern of consumer behavior "can most reasonably be accounted for by the fact that, in a must-carry world, the need to [switch] is slight" (*ibid.*). "Common sense suggests," the court noted, "that consumers who want to receive an off-the-air channel will quickly observe that they may need to purchase (or reconnect) antennas should their cable system cease offering their favorite broadcast stations" (*ibid.*).

The court also considered whether the "indelibility of consumer ignorance" postulated by the government was "so obvious or common sensical that it needs no empirical support." The court concluded that it was not (835 F.2d at 302):

> In a culture in which even costly items like the videocassette recorder, the cordless telephone, the compact disc-player and the home computer have spread like wildfire, it begs incredulity to simply assume that consumers are so unresponsive that within the span of five years they would not manage to purchase an inexpensive hardware-store switch upon learning that it could provide access to a considerable storehouse of new television stations and shows.

Finally, even if the FCC had demonstrated more than a "fanciful threat" to local broadcasting, the court held that the must-carry rules' "lengthy duration" would cause them to fail the second prong of the *O'Brien* test (835 F.2d at 303-304). "It is wholly unclear to us," the court stated, "why it should take five years to inform consumers that with the installation of a $7.50 switch and a television antenna they can view more local channels" (*id.* at 304). The court also expressed skepticism that "any consumer education campaign will have much impact so long as viewers can continue to rely on must-carry to get their fix of local broadcasts" (*ibid.*). "Opting for a five-year interim period," in the court's view, "merely delays the inevitable, but almost certainly brief, period during which TV owners will learn of, purchase,

and install the necessary equipment" (*ibid.*, footnote omitted).[4]

C. The 1992 Cable Act

Since *Century*, the FCC has considered and resisted broadcast industry appeals for new must-carry rules. *See Must Carry Second Notice of Proposed Rulemaking*, 6 FCC Rcd. 4545, ¶ 111 (1991) (requesting comments on "whether, in today's video marketplace, must carry rules are needed"). But the FCC's deliberations were overtaken by legislative developments. Spurred largely by concern over increases in basic cable rates, Congress in 1992 enacted legislation reinstituting comprehensive cable rate regulation. Cable Television Consumer Protection and Competition Act of 1992 ("the Act"), Pub. L. No. 102-385, 106 Stat. 1500. In this climate, the broadcast industry had little difficulty persuading Congress, notwithstanding the FCC's prior findings, to include in the law a new generation of must-carry rules.

Section 2(a) of the Act sets forth legislative "findings" designed to cure the flaws discerned by the D.C. Circuit in the government's prior justifications for must-carry. These include statements that, without must-carry protection, "the economic viability of free local broadcast television * * * will be seriously jeopardized" (§ 2(a)(16)), and that "alternative distribution systems for cable subscribers, such as the 'A/B' input selector antenna system, [are] not in the public interest" (§ 2(a)(18)).

The must-carry provisions, set forth in sections 4 and 5 of the Act, discriminate in favor of broadcasters, and against cable programmers, in three distinct ways. First, the Act grants preferential carriage rights to broadcasters at cable programmers' expense (§§ 4(b) & 5(b)). Second, the Act ensures broadcasters carriage on the system's basic tier, which must be received by all subscribers (Act §§ 4(b)(7) & 5(h);

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[4] The court later clarified its opinion, stating that it had invalidated only the interim must-carry rules, and not the separate requirements concerning input-selector switches and consumer education. 837 F.2d 517 (D.C. Cir. 1988). The NAB sought certiorari, which was denied. 486 U.S. 1032 (1988). The Solicitor General did not seek certiorari.

see id. § 3(b)(7)(A)). This guarantees broadcasters access to the largest possible audience. Third, the Act grants broadcasters preferential "channel positioning" rights, enabling a broadcaster to demand cable carriage on its current broadcast channel or "on the channel on which it was carried on July 19, 1985," the date of the *Quincy* decision (Act §§ 4(b)(6) & 5(g)(5)).[5] Many cable programmers were not in existence in July 1985, and the Act thus entitles broadcasters to bump them from lower (and hence more favorable) channel positions. *See* J.A. 153-154. Moreover, consumer confusion occasioned by channel repositioning can cause cable programmers to lose viewership.

Section 6 of the Act, governing "retransmission consent," is an interrelated component of the regulatory scheme. This provision, which became effective October 6, 1993, prohibits cable systems from retransmitting the signal of any commercial broadcaster without obtaining that station's consent. The Act thus gives each broadcaster an option: it may request mandatory (but uncompensated) carriage under § 4; or it may waive its must-carry rights and demand payment for carriage under § 6.

In a variety of respects, the Act's must-carry provisions are more intrusive of cable speakers' First Amendment rights than the FCC rules invalidated in *Century*:

> (1) Under the 1986 FCC rules, larger cable systems were required to devote no more than 25% of their channels to must-carry obligations. The 1992 Act raises this percentage to about 40%—33% for commercial stations under § 4(b), and additional channels for noncommercial stations under § 5(b).
>
> (2) Under the 1986 FCC rules, cable systems with fewer than 21 channels had no obligation to carry any commercial stations. The Act imposes the full panoply of commercial carriage obligations on virtually all cable systems, except those with fewer than 300 subscribers (§ 4(b)).

[5] A commercial station has a third channel-position option: "the channel on which it was carried on January 1, 1992" (Act § 4(b)(6)).

> (3) Under the 1986 FCC rules, no cable system was required to carry more than two noncommercial stations. The Act requires larger systems to carry all noncommercial stations carried as of March 1990, plus any other nonduplicating stations that request carriage (§ 5(b) & (c)).
>
> (4) Under the 1986 FCC rules, cable systems had no obligation to carry any low-power stations. The Act requires larger systems to carry up to two low-power commercial stations if there are not enough full-power commercial stations to fill the 33% quota (§ 4(c)).
>
> (5) Under the 1986 FCC rules, cable systems had the discretion to determine the channel position of all broadcasters subject to mandatory carriage. The Act confers on both commercial and noncommercial broadcasters unilateral channel-positioning rights.
>
> (6) The 1986 FCC rules required commercial stations to meet a "minimum viewing standard" in order to qualify for mandatory carriage. The Act has no such provision; all commercial stations must be carried regardless of programming quality or viewer preferences.
>
> (7) Under the 1986 FCC rules, a broadcaster had to be situated within 50 miles of the cable community to qualify for mandatory carriage as a "local" broadcaster. By defining "local" with reference to "television market," the Act enlarges this geographic area and expands the pool of broadcasters who may demand carriage on a cable system (§ 4(h)(1)).
>
> (8) The 1986 FCC rules were to expire after a five-year transition period. The Act's must-carry regime is to remain in effect indefinitely.

D. The Decision Below

Appellants' First Amendment challenges to the Act's must-carry regime were heard by a three-judge district court

(J.S. App. 3a, 7a),[6] which sustained the provisions by a 2-1 vote. The majority first held that strict scrutiny does not apply (J.S. App. 12a-19a). It concluded that the must-carry provisions do not regulate "speech," but "a market in a commercial commodity," namely, "the means of delivery of video signals to individual receivers" (*id.* at 12a). The fact that "the video signals can only be used to convey a message," according to the majority, "is of no particular significance" (*id.* at 12a-13a). The court acknowledged that the Act discriminates against cable programmers in favor of broadcasters; but it held that " '[s]peaker-partial' regulations * * * are not subject to strict scrutiny unless they are content-based" (*id.* at 17a).

The court concluded that a law is "content-based" only if government has prescribed "either the message or the subject matter" of the speech to be spoken, *i.e.*, has "t[old] the speaker *what* to say or at least what to talk about" (J.S. App. 16a-17a (emphasis original)). The majority seemed to acknowledge that Congress' rationale for must-carry implied some preference for the content of "local" broadcasting; but it concluded that "if the must-carry provisions are content-related at all, they are only marginally so, to the point of *de minimis*" (*id.* at 20a). In any event, the majority held that "contextual factors unique to cable require relaxed First Amendment scrutiny of the must-carry provisions even if marginally content-related" (*id.* at 22a n.25).

The majority next held that the must-carry provisions "satisfy the criteria established in *O'Brien* and its progeny" (J.S. App. 15a), which it thought supplied the appropriate standard of review. As to the substantiality of the governmental interest, the court refused to evaluate independently

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[6] The three-judge court declined jurisdiction over appellants' challenges to other provisions of the Act (J.S. App. 7a). Those other challenges were heard by a single-judge court which, by opinion dated Sept. 16, 1993, and final judgment dated Sept. 27, 1993, upheld certain provisions and invalidated others. *Daniels Cablevision, Inc., et al. v. United States*, Nos. 92-2292, 92-2494 & 92-2558 (D.D.C. 1993).

"the factual premise on which the must-carry provisions are based, *viz.*, that local broadcasting is in peril" (*id.* at 24a). "Federal courts," it stated, "do not ordinarily review the adequacy of the record before Congress to support the laws it enacts" (*id.* at 15a). Here, "Congress received evidence demonstrating, to its satisfaction," that "local broadcast television * * * is in serious jeopardy" (*id.* at 24a-25a). Deference to legislative findings thus induced the court to conclude "that the danger perceived by Congress is real and substantial" (*id.* at 26a).

Finally, the court held that the must-carry provisions "are sufficiently, if not surgically, tailored to Congress' larger economic market-adjusting objective" (J.S. App. 26a). It acknowledged that "there are less restrictive alternatives that Congress could have employed in its attempt to preserve the vitality of local broadcasting" (*ibid.*). Once again, however, it was "unwilling to second-guess Congress' determination that the must-carry provisions are necessary to accomplish its objective" (*id.* at 27a).

Circuit Judge Williams dissented. He concluded that strict scrutiny applies because the must-carry rules invade cable operators' "editorial discretion" and are "content-based under controlling precedent" (J.S. App. 54a, 55a). He noted that Congress "rested its decision to promote [broadcast] stations in part, but quite explicitly, on a finding about their content—that they were 'an important source of local news and public affairs programming' " (*id.* at 51a (quoting Act § 2(a)(11)). Under FCC licensing requirements, Congress' class of chosen beneficiaries was "a class whose programming must, as a matter of law, include content of a type specified by the government" (J.S. App. 57a). Application of the *O'Brien* test "for 'incidental' burdens on speech," Judge Williams said, "seems highly artificial here" (*id.* at 54a-55a):

> Given the finite number of cable channels, replacement of the cablecaster's choice of programs with those of local broadcasters suppresses the alternative programs as completely as if Congress had ordered them shut down; there is nothing 'incidental' about the burden.

In assessing the government's interest, Judge Williams found "no evidence" that the public's access to free local television is in jeopardy (J.S. App. 62a). Despite the absence of must-carry rules during the past eight years, broadcast television has grown substantially, with new entrepreneurs both "deepening and spreading the coverage of over-the-air TV" (*ibid.*). Although there was "evidence of some cable operators' dropping broadcast channels," Judge Williams noted that such drops were extremely infrequent: cable systems voluntarily carried about 95% of the broadcast signals available to them. *See id.* at 63a-64a. Moreover, because the data before Congress did not reveal "the characteristics of the broadcasters actually dropped"—such as their relative popularity—Judge Williams concluded that "we have *nothing* to connect the limited evidence of cable operators' actual conduct with any inference that a threat to broadcast is imminent or serious" (*id.* at 64a-65a).

Finally, "even if local broadcasters were in perceptible peril," Judge Williams stated that "less intrusive alternatives are obvious" (J.S. App. 66a). To the extent Congress views cable systems as posing a "bottleneck" problem, he cited "well-developed regulatory responses to this sort of situation" that are "entirely consistent with the First Amendment" (*id.* at 50a). Under an equal-access model, for example, "[t]he 'bottleneck' holder [might] be ordered to serve all parties that meet neutral criteria for service" (*ibid.*) In short, even conceding the need for *some* regulation of cable systems, Judge Williams saw no justification for adopting a regime that discriminates against "one set of speakers for the direct and explicit advantage of a limited class of their competitors" (*id.* at 57a).

INTRODUCTION AND SUMMARY OF ARGUMENT

On two prior occasions, the D.C. Circuit has evaluated earlier incarnations of the must-carry regime and held, in each case unanimously, that this scheme of speaker-partial

regulation violates the First Amendment. The governmental interests asserted in support of the 1992 Act's must-carry provisions are the same ones that the D.C. Circuit twice found to be of questionable weight and evidentiary support. And while the 1992 regime is similar in rough outline to its predecessors, it is indisputably *more intrusive* on appellants' First Amendment rights than the must-carry scheme invalidated in *Century*.

In urging a different result here, appellees rely in essence on a single fact: the 1992 must-carry regime is embodied in an Act of Congress, which includes "findings" purporting to cure the various defects that the D.C. Circuit previously discerned in findings compiled by the FCC. But as we shall show, the actual evidence before Congress—as distinguished from the jeremiads of the broadcast industry, upon which the Act's conclusory findings are based—reveals that the system of local broadcasting has thrived during the past eight years in the absence of must-carry rules. Thus, not only is the 1992 must-carry regime more oppressive than its predecessor; the proof of its necessity is far more attenuated.

At bottom, appellees' argument is reduced to a plea for deference. It is their submission, in effect, that the deference owed to legislative findings is of a transcendentally higher order than the deference owed findings of an expert administrative agency, such that the outcome here should be different than it was in *Quincy* and *Century*. This submission—dubious at best were the Court interpreting a statute—should be rejected out of hand when it is adjudicating the requirements of the Constitution.

Whether the Court applies traditional, exacting First Amendment scrutiny, or some less rigorous standard of review along the lines of *O'Brien*, the must-carry scheme embodied in the 1992 Act should be invalidated. The governmental interests asserted in its support are so speculative, and the scope of its restrictions so overbroad in view of those purported goals, that the law must fall under any applicable standard of review.

ARGUMENT

I. THE MUST-CARRY PROVISIONS ARE SUBJECT TO EXACTING FIRST AMENDMENT SCRUTINY

This Court has not yet comprehensively addressed the implications of government actions infringing cable speakers' First Amendment rights. *See Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 495 (1986). Addressing must-carry rules in particular, the D.C. Circuit in *Quincy* and *Century* found no need to decide the appropriate standard of review, while expressing "serious doubts about the propriety of applying the standard of review reserved for incidental burdens on speech" (*Quincy*, 768 F.2d at 1453).

The *Quincy* court's doubts were judicious. The burdens that the must-carry law inflicts on cable programmers' speech are by no means "incidental." By reserving up to 40% of cable systems' channel capacity for commercial and noncommercial broadcasters, the statute will inevitably cause many cable programmers to be dropped from cable systems in order to make room for Congress' preferred speakers. New or fledgling cable programmers, which currently enjoy carriage on few or no cable systems, will find it difficult or impossible to obtain carriage given the reduced number of channels for which they may compete. By diminishing or obliterating the audience reachable by cable programmers—who, unlike broadcasters, have no alternative means of communicating their messages to the public—the must-carry law burdens their speech not incidentally, but directly. As a discriminatory and content-based restriction on speech, the statute deserves strict scrutiny.

In urging more lenient review, the government defends the must-carry regime as economic legislation aimed to redress "bottleneck" problems arising from cable systems' "natural monopoly characteristics" (Mot. to Aff. 13, 20). This argument is unpersuasive as applied to cable operators. But it is wholly inapposite as applied to cable *programmers*. Programmers engage in pure speech: they have none of the

public-utility or "common carrier" attributes that appellees impute to cable systems as justification for regulatory intervention (NAB Mot. to Aff. 25, 30 & n.28).

For First Amendment purposes, cable programmers are indistinguishable from authors of books and makers of movies. If a "bottleneck" problem exists in the cable distribution system, cable programmers, no less than broadcasters, may be the victims. Thus, whatever standard of review might apply if Congress had legislated a level playing field for all suppliers of video programming, the discriminatory regime it actually enacted dictates the necessity of strict scrutiny.

A. The Must-Carry Restrictions Are Content-Based

1. This Court has repeatedly held that content-based laws trigger exacting First Amendment review. *E.g.*, *Texas v. Johnson*, 491 U.S. 397, 412 (1989). As the district court recognized, "a law need not be viewpoint-based to be • • • considered content-based" (J.S. App. 16a). Strict scrutiny applies to viewpoint-neutral laws that burden discussion of a particular topic, such as "crime." *Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 112 S.Ct. 501 (1991). And a law is deemed content-based, even if neutral as to the ideas expressed, if it discriminates among different "categories" or "types of speech." *Burson v. Freeman*, 112 S.Ct. 1846, 1850, 1855 (1992) (statute discriminating against political campaign speech); *City of Cincinnati v. Discovery Network, Inc.*, 113 S.Ct. 1505 (1993) (newsrack ordinance discriminating against commercial publications).[7]

The Court has also applied strict scrutiny to laws that discriminate against particular groups of speakers, irrespective of their viewpoints or the subjects they plan to discuss. For example, in *Riley v. National Fed. of the Blind*, 487 U.S. 781, 794 (1988), the Court invalidated a state law that placed percentage limitations on charitable fundraising expenses, thereby imposing "a restriction on the charities' ability to speak." Given the vast number of this Nation's

[7] There is no relationship between Discovery Communications, Inc., appellant here, and the respondent in *Discovery Network*.

charities and their virtually limitless range of interests, there was no contention in *Riley* that the law inhibited the discussion of any particular topic. The Court nevertheless applied strict scrutiny because the law burdened the speech of particular speakers, especially charities that were smaller or less-established (*id.* at 789 & n.5):

> Far from the completely incidental impact of, for example, a minimum wage law, a statute regulating how a speaker may speak directly affects that speech. • • • Here, the desired and intended effect of the statute is to encourage some forms of solicitation and discourage others.

Similarly, in *Buckley v. Valeo*, 424 U.S. 1, 39-51 (1976), the Court invalidated a federal statute that imposed a $1,000 limitation on independent expenditures by any person "relative to a clearly identified candidate" in a political campaign. This limitation was "neutral as to the ideas expressed" (*id.* at 39) and was designed to equalize voters' electoral participation by "restricting the voices of people and interest groups who have money to spend" (*id.* at 17). The Court distinguished the law from "reasonable time, place, and manner regulations, which do not discriminate among speakers or ideas" (*id.* at 18). And the Court was unpersuaded by Congress' objective of "equalizing the relative ability of individuals and groups to influence the outcome of elections" (*id.* at 48). "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others," the Court stated, "is wholly foreign to the First Amendment." *Id.* at 48-49; *see Madison Joint School Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 176 (1976) (public board may not "discriminate between speakers at its meetings").[8]

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[8] In an effort to reconcile *Buckley* with its assertion that "[s]peaker-partiality alone • • • is insufficient to trigger strict scrutiny," the district court characterized that case as one "in which the government sought, in effect, to suppress the expression of a meretricious idea" (J.S. App. 18a). According to the majority below, this Court in *Buckley* found "[i]mplicit" in the legislative scheme "a Congressional judgment that the speech of those spending over $1,000 was not only 'louder' than those spending less than $1,000, but was also different and • • • more sinister." J.S. App. 18a (citing 424 U.S. at 16-17). This characterization is baseless: the *Buckley* Court treated the expenditure limitations as "neutral as to the ideas expressed" and invalidated them because (among other things) they imposed "direct and substantial restraints on the quantity of political speech" (424 U.S. at 39). In the pages cited by the district court (*id.* at 16-17), this Court explained why the expenditure limitations were not "comparable to the restrictions on conduct upheld in *O'Brien*," but instead constituted pure restrictions on speech. This passage contains not the slightest suggestion that the Court regarded the law as designed to suppress "sinister" ideas or, indeed, speech of any particular sort.

2. Judge Williams correctly concluded that the must-carry provisions are "content-based under controlling precedent" (J.S. App. 55a). First, these provisions are explicitly designed to "favor certain classes of speakers over others." *Home Box Office*, 567 F.2d at 48. "Their very purpose is to bolster the fortunes of local broadcasters even if the inevitable consequence • • • is to create an overwhelming competitive advantage over cable programmers." *Quincy*, 768 F.2d at 1451. As a direct result of the must-carry law, cable programmers like Discovery and TLC will be forced off some cable systems and precluded from securing new carriage on others, even though viewers would rather see their programming than the broadcast programming Congress has preferred.

The must-carry regime is no different from a law that orders newsstands to carry a quota of "local" newspapers; that forces bookstores to allocate half their shelf space to books by "local" authors; or that requires movie theatres to devote half their showtimes to made-for-TV movies. In each case, the government puts itself in the business of selecting which "programming" the public will see. And each law is intentionally discriminatory: by conferring preferential access on one group of speakers, the government makes it concomitantly more difficult—and in some cases impossible—for competing speakers to secure an audience.[9]

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[9] Appellee NAB errs (Mot. to Aff. 20) in relying on this Court's statement in *Leathers v. Medlock*, 111 S.Ct. 1438, 1443 (1991), that

This discriminatory regime, moreover, is expressly rationalized by reference to the superior value Congress placed on the programming it thought local broadcasters would offer. The Act's findings state that Congress aimed to promote "the local origination of programming" (§ 2(a)(10)); "programming that is responsive to the needs and interests of the local community" (§ 2(a)(8)(B)); and "local news and public affairs programming and other local broadcast services critical to an informed electorate" (§ 2(a)(11)). In justifying the preference embodied in § 5 of the Act, Congress specifically cited the "unique noncommercial" nature of public stations' programming—the very sort of discrimination in favor of noncommercial speech that was involved in *Discovery Network*, 113 S.Ct. at 1516-1517. Congress explicitly preferred local broadcasters' speech, in short, because of a belief that it is "especially worthy" (J.S. App. 53a (Williams, J., dissenting)). That is a content-based judgment, no less than Cincinnati's judgment that "commercial speech has only a low value." *Discovery Network*, 113 S.Ct. at 1511.

Even more important, the speakers that the must-carry law prefers—local broadcasters—are precisely those over

"differential taxation of First Amendment speakers is constitutionally suspect [only] when it threatens to suppress the expression of particular ideas." That case involved a generally applicable gross receipts tax that granted an exemption to newspapers, magazines, and certain satellite services, but not to cable television systems (*id.* at 1444). The Court sustained this tax scheme, noting that "[l]egislatures have especially broad latitude in creating classifications and distinctions in tax statutes," and that "a legislature is not required to subsidize First Amendment rights through a tax exemption or tax deduction." *Id.* at 1445-1446 (citing *Regan v. Taxation with Representation*, 461 U.S. 540 (1983), and *Cammarano v. United States*, 358 U.S. 498 (1959)). The outcome in *Leathers* thus reflects a distinction long established in this Court's First Amendment tax cases—the distinction between a legislature's imposition of a tax targeted specifically at members of the press, and a legislature's decision not to grant particular speakers an *exemption* from a tax that businesses generally must pay. *Compare Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983). The instant case does not involve a tax law, nor does it involve the grant of an exemption from a generally applicable burden.

whose content the government exercises maximum control. Under the "spectrum scarcity" rationale, Congress has conditioned the award of free broadcast licenses on broadcasters' compliance with a variety of government dictates. Of special relevance here, FCC licensing rules require each broadcaster to "provide programming responsive to issues of concern to its community." *Report and Order, MM Docket No. 83-670*, 98 FCC 2d 1075, 1091-1092 (1984). The beneficiaries of the must-carry law are thus "persons *bound* to include some minimum level of local programming content" (J.S. App. 55a (Williams, J., dissenting) (emphasis original)).

Wholly apart from the obligation to further "localism," broadcasters are subject to numerous *substantive* requirements regarding program content. These include provisions concerning children's programming (47 U.S.C. § 303b); limitations on the broadcast of so-called "indecent programming" (Public Telecommunications Act of 1992, Pub. L. No. 102-356, 106 Stat. 949, § 16(a)); required access to broadcast facilities by candidates for federal elective office (47 U.S.C. § 312(a)(7), 47 CFR § 73.1944); and the general obligation "to afford reasonable opportunity for the discussion of conflicting views on issues of public importance" (47 U.S.C. § 315(a)). Unlike cable programmers, broadcast licensees are also subject to restrictions regarding "political editorials" (47 CFR § 73.1930) and personal attacks made "during the presentation of views on a controversial issue" (47 CFR § 73.1920(a)). In short, "by virtue of provisions of law outside the 1992 Act, the term used by the Act to define the benefitted class *automatically* entails content requirements." J.S. App. 52a (Williams, J., dissenting).

The must-carry provisions thus embody a preference for *regulated* speech, in effect exporting to cable systems the broadcast regulatory regime that Congress, in the absence of "spectrum scarcity," could not impose on cable speakers directly. The district court itself acknowledged the likelihood of a congressional assumption "that there would be some content differences between the subject matter" supplied by local broadcasters and cable programmers (J.S. App. 20a).

But whereas the court believed that this assumption arose "on a very non-specific (and unarticulated) level" (*ibid.*), the actual legislative evidence shows that the assumption was neither unspoken nor vague.

Congress described local broadcasters as "public trustee[s]" who are "accountable to the public interest" and have "statutory obligations to serve their communities." S. Rep. 102-92, 102d Cong., 1st Sess. 42, 40, 44 (1991). It specifically justified must-carry on the ground that "cable systems are not subject to the wide range of public service obligations imposed on local broadcast stations." *Id.* at 59; H.R. Rep. 102-628, 102d Cong., 2d Sess. 64 (1992). It quoted with approval the observation that "cable, * * * unlike broadcasting, [has] little or no program accountability to any public or government authority." S. Rep. 102-92, at 40. And the Act itself, in defining "qualified low power stations" entitled to must-carry protection (§ 4(h)(2)(B)), provides that a qualifying station must satisfy

> all obligations and requirements applicable to television broadcast stations * * * with respect to the broadcast of nonentertainment programming; programming and rates involving political candidates, election issues, controversial issues of public importance, editorials, and personal attacks; programming for children; and equal employment opportunity.

Congress also cited the types of programming it believed local broadcasters would offer. It found must-carry protection justified for noncommercial stations because they "provide a variety of special services to their communities, including local news and public affairs programs, programs offering outlets for local cultural and artistic groups, and coverage of local and state government activities and personalities." H.R. Rep. 102-628, at 69. It expressed concern about the "quality and quantity of sports programming available on free television" (*id.* at 125), and made a station's "local" status depend in part on whether it provides "coverage of sporting and other events of interest to the community" (Act § 4(h)(1)(C)(ii)(III)). Broadcast industry

witnesses urged that broadcasters deserved must-carry protection because "television stations have statutory and regulatory obligations to their local communities," including the obligation to "provide access and equal opportunities for federal candidates and equal opportunities for local candidates." *Hearing Before the Subcomm. on Communications of the Senate Commerce Comm.*, 101st Cong., 1st Sess. 38 (Oct. 25, 1989). And Chairman Hollings praised local broadcasters' role in informing voters about "candidates' positions on issues in local elections." *Id.* at 4.

In sum, the legislative evidence shows that Congress' preference for local broadcasters was directly linked to its perceptions about the content of their programming. Congress deemed broadcast speech "especially worthy" (J.S. App. 53a) not only because it was thought to cover topics and events "local" in nature, but also because its regulated character ensured compliance with norms that Congress has otherwise established. These content-related features demand strict scrutiny.

3. While conceding that "the must-carry provisions * * * alter the content of programming" (Mot. to Aff. 23), the government contends that they "are not content-related for First Amendment purposes" under the standards of *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Appellee NAB similarly cites *Ward* for the proposition that "[g]overnment regulation of expressive activity is content neutral so long as it is '*justified* without reference to the content of the regulated speech.' " Mot. to Aff. 9 (citing *Ward*, 491 U.S. at 791, and *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986)).

Appellees' reliance on *Ward* and *Renton* is misplaced for two reasons. First, as shown above, Congress justified the must-carry law in part by reference to the content—both the local focus and the regulated character—of local broadcasters' speech. The possible existence of other, content-neutral justifications does not change this fact. Because the must-carry regime thus is not "justified without reference

to * * * content," the analysis set forth in *Ward* and *Renton*, if applicable here, would not permit these provisions to escape strict scrutiny.

More fundamentally, the aspect of *Renton* and *Ward* on which appellees rely has no application where, as here, the challenged law unabashedly alters the content of speech itself. This Court has used the "justified without reference" formula in cases involving "time, place or manner" restrictions on expressive conduct. As the Court stated in *Ward*, "Our cases make clear * * * that even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are 'justified without reference to the content of the regulated speech * * *.'" 491 U.S. at 791, quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). *Ward* itself involved a "time, place, or manner" restriction—a regulation of sound-amplification at outdoor public concerts. *Renton* concerned a zoning ordinance affecting the location of adult movie theatres—a restriction that the Court said was "properly analyzed as a form of time, place, or manner regulation" (475 U.S. at 48, 46). And each of the three cases cited in *Renton* and *Ward* as sources for the "justified without reference" analysis concerned time, place, or manner restrictions.[10]

Where a speech restriction is defended on "time, place or manner" grounds, it is necessary to ascertain whether

[10] *See Renton*, 475 U.S. at 48, and *Ward*, 491 U.S. at 791, citing *Clark*, 468 U.S. at 293 (time, place, or manner restriction on sleeping in public parks); *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 648 (1981) (time, place, or manner restriction on sale of religious literature); and *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) ("There is no claim * * * that the prohibition on prescription drug price advertising is a mere time, place or manner restriction. We have often approved restrictions of that kind provided that they are justified without reference to the content of the regulated speech * * * "). *See Burson v. Freeman*, 112 S.Ct. at 1858 (Kennedy, J., concurring) ("As the Court has recognized in the context of regulations of the time, place, or manner of speech, '[g]overnment regulation of expressive activity is content neutral so long as it is "justified without reference to the content of the regulated speech." ' ") (citations omitted).

the government is neutrally regulating the circumstances in which expression will occur—*viz.*, the time, place or manner of its presentation—or is covertly aiming to disadvantage or suppress particular speech or speakers. An inquiry into the government's "justification" for such a rule aids in determining whether it is really a "time, place or manner" restriction or is, in fact, something else. But that inquiry is unnecessary where, as here, a law on its face directly and explicitly discriminates against certain speech because of its content. Here, the nature of the regulation itself is enough to establish that strict scrutiny is required, regardless of the non-speech justifications the government may advance.

As the *Quincy* court observed, it "is invariably the case [that] the government can frame the interest served by [a restriction] in essentially speech-neutral terms" (768 F.2d at 1451). Were that enough to make speech restrictions "content-neutral," strict scrutiny would go the way of pterodactyls. This Court's decision in *Discovery Network* shows that this is not the law. The Court there agreed that the city's newsrack ordinance was " 'justified' by its interest in safety and aesthetics." But the Court nonetheless labeled the ordinance "content-based" and invalidated it, since it enacted an explicit preference for noncommercial publications at the expense of commercial competitors. 113 S.Ct. at 1517.

In sum, the passages appellees cite from *Renton* and *Ward* would not confer content neutrality on the must-carry law, even if that law were "justified without reference" to content, which it is not. True "time, place, or manner" restrictions do not affect who will speak or whom they will speak to; such laws leave the same speakers free to make the same speech to the same audience. The must-carry provisions cannot be so described: they have the inevitable consequence of making it difficult or impossible for certain cable programmers to speak at all. Because appellees do not defend, and could not plausibly defend, the must-carry regime as a reasonable "time, place or manner" restriction, the

"justified without reference" analysis is inapposite here. Nor, as we show below, is there any other basis for excepting the must-carry provisions from strict scrutiny.

B. The Must-Carry Provisions Fall Within No Category Of Speech Restriction That Is Exempt From Strict Scrutiny

This Court has accorded lenient review to laws regulating speech carried on the broadcast spectrum (*Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969)), and to laws of general applicability, like antitrust laws, that cover (among other businesses) the press. *Associated Press v. United States*, 326 U.S. 1 (1945). And the Court has applied heightened, but not strict, scrutiny to "time, place or manner" restrictions; to laws regulating commercial speech (*Central Hudson Gas & Elec. Co. v. Public Service Comm'n*, 447 U.S. 557 (1980)); and to restrictions on expressive conduct. *United States v. O'Brien*, 391 U.S. 367 (1968). The must-carry rules fit within none of these categories.

Judge Williams observed that this case presents "no issue of commercial speech" (J.S. App. 54a), and appellees could not plausibly contend otherwise. The *Associated Press* line of cases, much relied on by the government (Mot. to Aff. 10-11, 22), is likewise inapposite here. The must-carry provisions are the antithesis of a generally applicable antitrust law: they apply only to members of the press, and they regulate speech, not conduct.

Nor do the broadcast cases apply. "Spectrum scarcity" is "[t]he prevailing rationale for broadcast regulation." *FCC v. League of Women Voters*, 468 U.S. 364, 376 n.11 (1984). Because coaxial and fiber-optic cable can accommodate many voices, and because utility poles and conduit can accommodate many cable systems, "the 'scarcity rationale' has no place in evaluating government regulation of cable television." *Quincy*, 768 F.2d at 1449.[11] The government's novel

[11] *Accord, e.g., Home Box Office*, 567 F.2d at 45; *Preferred Communications, Inc. v. Los Angeles*, 754 F.2d 1396, 1404 (9th Cir. 1985), *aff'd on other grounds*, 476 U.S. 488 (1986); *Chesapeake & Potomac Tel. Co. v. United States*, No. 92-1751-A (E.D. Va. Aug. 24, 1993) (invalidating on First Amendment grounds statute prohibiting telephone companies from supplying video programming to subscribers in their service areas).

argument to the contrary—that spectrum scarcity is just one type of "market dysfunction," and that dysfunctional markets are universally subject to pervasive regulatory correction (Mot. to Aff. 20-22)—is both unprincipled and unlimited in its scope. Moreover, the Court's decision in *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974), shows that the government's argument is wrong. Because most cities have become "one-newspaper towns" (*id.* at 249 n.13), they would presumably be "dysfunctional markets" in the government's eyes; yet the Court forbade precisely the sort of "diversity-enhancing" regulation that Congress enacted here. The FCC itself has held that the broadcast analogy does not apply to regulation of cable television (1986 Report ¶ 184). And the Solicitor General has previously urged this Court that the *Red Lion* analysis is limited to situations involving "scarcity of the electromagnetic spectrum" and "has no application" to cable television. Brief for the United States in *Los Angeles v. Preferred Communications*, at 20 n.13.

Nor can the must-carry rules be characterized as restrictions of "expressive conduct" or "symbolic speech" within the meaning of *O'Brien* and its progeny. The law challenged in *O'Brien*—a prohibition against the knowing destruction of draft cards—"on its face deal[t] with conduct having no connection with speech" (391 U.S. at 375). It was only because O'Brien chose to express himself by engaging in the forbidden conduct that the law had the "incidental"—*i.e.*, accidental, casual, or unanticipated—effect of limiting his "speech" (*id.* at 376). "[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct," the Court ruled, "a sufficiently important government interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms" (*ibid.*).

As Judge Williams said with some understatement, application of the *O'Brien* test "seems highly artificial here"

(J.S. App. 54a). The must-carry law regulates speech, not conduct; and its impact on speech is intentional and direct, not "incidental." Certain goals that Congress posited for the law—such as preventing anticompetitive practices—might be described as "economic" and conduct-related in some sense. But Congress opted to achieve those goals *by means of* a restriction on *speech*.

The must-carry law regulates speech and nothing but speech: it orders cable systems to grant preferential carriage to the programming of those persons (local broadcasters) whose speech Congress most wants the public to hear. The district court's riposte that Congress has regulated only "the means of delivery of video signals to individual receivers" (J.S. App. 12a) is altogether specious. This is not a law regulating (for example) the price of coaxial cable; it is a law that determines *whose speech* shall be carried over such cables. One might as well rationalize a law that dictated what films movie theatres must show as a law regulating the means of delivery of pulses of light to the eyes of individual theatre-goers.

The awkwardness of applying the *O'Brien* test here also demonstrates its inappositeness. The government in *O'Brien* "condemn[ed] only the independent noncommunicative impact of conduct within its reach" (391 U.S. at 382). Here, neither the alleged government interests nor the law's actual operation are confined to the "noncommunicative impact" of conduct. Indeed, it is impossible to differentiate separate " 'speech' and 'nonspeech' elements" that have been combined in a "course of conduct" properly subject to government regulation (*id.* at 376).

Laws typically evaluated under *O'Brien* are facially valid conduct regulations alleged to be unconstitutional as applied to particular expressive activity. *See O'Brien*, 391 U.S. at 375-376; *Clark*, 468 U.S. at 294, 298 (facially valid prohibition against overnight camping in parks); *Wooley v. Maynard*, 430 U.S. 705 (1977) (facially valid prohibition against obscuring characters on license plates). That is not the case here. Appellants challenge the must-carry law as a facially

unconstitutional infringement on speech; there are no distinct instances of "conduct" to which it could validly be applied.

Finally, even if cable operators were thought to engage in a distinct and regulable course of conduct—with must-carry's effects deemed "incidental" as to them—that conclusion would not apply to cable programmers like Discovery and TLC. In expressive-conduct cases generally, as in *O'Brien*, the person whose speech is "incidentally" affected is the person who *engages in* the conduct. These cases do not hold that a governmental interest in regulating one person's conduct justifies restricting someone else's speech. There is no contention here—Congress surely advanced none—that cable programmers engage in any "conduct" warranting diminution of their First Amendment rights. Cable programmers are innocent bystanders in the must-carry war; bullets that hit them deal a direct, not an incidental, blow.

In sum, the must-carry provisions cannot escape strict scrutiny as incidental restrictions on conduct properly reviewable under *O'Brien*. Nor do they resemble any other type of speech restriction traditionally accorded more lenient review. This confirms the correctness of our basic position: that the must-carry provisions are subject to exacting scrutiny as direct and discriminatory infringements of speech.

II. THE MUST-CARRY PROVISIONS ARE UNCONSTITUTIONAL UNDER THE *O'BRIEN* TEST

Declining to apply strict scrutiny, the district court (J.S. App. 22a-23a) tested the constitutionality of the must-carry regime under the standards for restrictions on expressive conduct set forth in *O'Brien*. Under those standards, the government must first prove that the challenged law "furthers an important or substantial governmental interest • • • unrelated to the suppression of free expression" (391 U.S.

at 377). Second, the government must show that the law's "incidental restriction on alleged First Amendment freedoms is no greater than is essential" to further its non-speech goals, *i.e.*, is "narrowly tailored to serve the government's legitimate • • • interests" (*O'Brien*, 391 U.S. at 377; *Ward*, 491 U.S. at 798). Contrary to the district court's conclusion, the government has borne its burden of justification on neither branch of this test. The must-carry provisions are thus unconstitutional even if *O'Brien* is thought to supply the proper standard of review.

A. The Government Has Not Demonstrated A Substantial Interest

1. The *Quincy* court properly held that "the mere abstract assertion of a substantial governmental interest, standing alone," is insufficient to justify the must-carry regime under the *O'Brien* test (768 F.2d at 1454). The government "must do something more than merely posit the existence of the disease sought to be cured"; rather, it must produce " 'a record that convincingly shows a problem to exist.' " *Id.* at 1455 (quoting *Home Box Office*, 567 F.2d at 50). The court characterized this as a "heavy burden of justification" that "the government must affirmatively bear to prove the substantiality of the interest served by the rules" (*Quincy*, 768 F.2d at 1457).

This Court has used similar language to describe the government's burden when it regulates commercial speech, which likewise requires proof of a "substantial state interest." *See Board of Trustees, SUNY v. Fox*, 492 U.S. 469, 478 (1989) (stating that commercial speech doctrine imposes no "more rigid standard" than is applicable to regulation of expressive conduct under *O'Brien*). For example, in *Edenfield v. Fane*, 113 S.Ct. 1792, 1800 (1993), the Court held that the government's burden "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." It is not enough that the government's "asserted interests are substantial in the abstract"; it must "demonstrate that

it is regulating speech in order to address what is in fact a serious problem" (*id.* at 1800, 1803).

2. The overriding governmental interest asserted in support of the must-carry law is preserving "the economic viability of free local broadcast television." Act § 2(a)(16). As the district court observed, this interest comprises two related, but distinct, goals. The first is to preserve "a free source of over-the-air programming [for] television viewers unwilling or unable to obtain a cable connection" (J.S. App. 9a). The second is "to ensure the continuing availability of programming with a 'local' flavor" for all television viewers (*ibid.*).[12]

The *Quincy* court assumed without deciding that, "as an abstract proposition, the preservation of free, local television service qualifies as a substantial and important governmental interest" (768 F.2d at 1454, 1459). While we have doubts that preservation of *free* television, considered in isolation, constitutes a substantial interest,[13] we will make the same

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[12] Besides stressing preservation of free local broadcasting, the Act posits the goal of promoting a "diversity of views" in the video marketplace (Act § 2(b)(1)). This latter interest seems wholly derivative of the former. Congress expressed no doubt that the range of views now available in the video market is amply diverse; indeed, Congress could scarcely have doubted its diversity, given the recent growth of broadcast TV programming (*see* page 39, *infra*) and the existence of some 130 national and regional cable programming networks (J.A. 303). Thus, unless Congress was correct in assuming that broadcast television is "seriously jeopardized" by cable (Act § 2(a)(16)), the existence of a "diversity of views" on television is not jeopardized either. Because the factual predicate needed to support the substantiality of this latter goal is the same as that required to support the interest of preserving free local broadcasting, we will not address "diversity of views" as a distinct governmental interest.

[13] People must pay to receive telephone, gas, and electric service, as well as medical care, and it is not clear that television service is more essential than these. Indeed, "free" television is something of a historical accident, if not a misnomer. In part because scrambling devices capable of interdicting signals did not exist in the early days of television, broadcasters have always financed their programming 100% with advertising revenues as opposed to subscription fees; for cable systems,

assumption that the *Quincy* court made. Thus, assuming arguendo that preserving the system of local broadcasting represents a "substantial governmental interest" in the abstract, the question is whether the government has "convincingly show[n] a problem to exist," *i.e.*, has shown that the system of local broadcasting is "seriously jeopardized" by cable (Act § 2(a)(16)).

The *Quincy* court found no evidence, as of 1985, that "the economic health of local broadcast television is threatened by cable" (768 F.2d at 1455). And the *Century* court found no evidence, as of 1987, of any threat to local broadcasting sufficient to support must-carry rules even for a five-year transition period. The key issue, therefore, is whether broadcasters' fortunes have declined so precipitously since *Quincy* and *Century* as to warrant a different conclusion now.

As Judge Williams pointed out, there was literally *no* evidence before Congress that would justify "any inference that a threat to broadcast is imminent or serious" (J.S. App. 65a, 67a). Quite the contrary: all available evidence indicates that the broadcast industry is healthier now than it was

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by contrast, the ratio between subscription fees and advertising revenues is 25:1 (J.S. App. 66a). But broadcast television is not really free: viewers pay for it both psychically (by having to endure commercials) and economically (by paying higher prices for the advertised products). Congress' fondness for "free television" is therefore just a preference for an advertiser-financed as opposed to a subscriber-financed system; an inevitable consequence of this preference is lower-quality programming, as the need to maximize advertising revenues drives broadcast fare to the lowest common denominator. In fact, the Act's retransmission-consent provision (§ 6) impugns Congress' commitment to "free" television of any sort. That provision enables broadcasters, for the first time, to demand negotiated payments from cable systems for the right to retransmit their signals; it is logical to expect that cable systems would pass such increased costs on to their subscribers. Thus, while professing to preserve "free broadcast television" for the 40% of households that do not receive cable, Congress was willing to make broadcast television more expensive for the 60% of households that do receive cable. Rather than keeping television "free," therefore, Congress is requiring the latter group to subsidize the former.

eight years ago. Since 1985, the number of cities receiving broadcast television has increased by 16% (J.S. App. 62a). According to FCC data, the total number of broadcast stations has nearly doubled during the past eight years: commercial stations have increased in number by 25%, noncommercial stations by 21%, and low-power stations by 282%.[14] Congress itself found that broadcast programming "remains the most popular programming on cable systems" (Act § 2(a)(19)).

Broadcast stations are also extremely profitable. CBS recently reported a 177% increase in third-quarter earnings, attributable in part to "a substantial increase in operating profits at the CBS Television Network"; since July 1986, the price of CBS common stock has risen 130% (from $135 to $310).[15] Capital Cities/ABC recently reported a 27% increase in third-quarter earnings, with the ABC Television Network "largely responsible for the improvement."[16] Since July 1986, the price of its common stock has risen 142% (from $256 to $619); it recently announced an offer to buy back $1 billion of its stock.[17] Among independent stations, average profits grew 366% from 1989 to 1990, continuing a positive trend since 1988. *Electronic Media*, Sept. 2, 1991, at 22. "An independent station earned average pre-tax profits of $2 million in 1992," a 133% increase from 1991. *Cable World*, Nov. 1, 1993, at 10. The consensus of investors, in short, is that broadcast television is a great place to make

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[14] *Compare* FCC News Release: Broadcast Station Totals as of December 31, 1992 (Jan. 13 1993), *with* FCC News Release: Broadcast Station Totals for July 1985 (Aug. 9, 1985).

[15] *See* Wall St. J., Oct. 14, 1993, at B10; *Electronic Media*, Oct. 18, 1993, at 14. *Compare* Standard & Poor's, *Daily Stock Quotations, NYSE*, vol. 3 (1986), *with* Wall St. J., Nov. 3, 1993, at C3.

[16] *See* Financial Times, Oct. 19, 1993, at 27.

[17] *Compare* Standard & Poor's, *Daily Stock Quotations, NYSE*, vol. 3 (1986), *with* Wall St. J., Nov. 3, 1993, at C3; *see* Wall St. J., Nov. 2, 1993, at A3. The NBC Television Network, which is owned by General Electric Co., also reported a "double digit increase" in profits for the third quarter. *Electronic Media*, Oct. 18, 1993, at 14.

money. "[N]ot only are licenses not being turned in for want of profitable opportunities, but evidently entrepreneurs continue to seek the additional licenses that the FCC makes available" (J.S. App. 62a (Williams, J., dissenting)).

Nor is it just entrepreneurs who are jumping on the bandwagon. The Fox television network was launched in 1986—one year after *Quincy* invalidated the original must-carry rules—and its annual advertising revenues have since grown to $600 million. Wall St. J., Nov. 1, 1993, at B5. And several major corporations, including Paramount Communications and Time-Warner, recently announced their intention to launch a fifth and possibly a *sixth* national broadcast network, to compete with ABC, CBS, NBC, and Fox. Wall St. J., Nov. 3, 1993, at B8.

In supposing that broadcast television is at risk, Congress noted that some cable systems on occasion have denied carriage to some broadcasters. In particular, Congress relied on a FCC survey showing that, of 4,303 cable systems studied in 1988—about half the total number—"869 systems admitted denying carriage to 704 television stations in 1,820 instances." S. Rep. 102-92, at 42 & n.102. Congress extrapolated from these data to posit 3,600 instances of non-carriage by cable systems nationwide (*id.* at 43).

This survey provides absolutely no support for an inference that local broadcasting is endangered. In 1988, there were approximately 8,500 cable systems carrying an average of eight broadcast stations each (J.A. 305). Thus, of the 68,000 broadcast signals that had been carried, 95% continued to be carried. And of those few stations that were dropped, 60%—or 425 out of 704—would not have qualified for mandatory carriage under the FCC's 1986 rules. S. Rep. 102-92, at 42-43. This translates into a 98% carriage rate for broadcast signals previously thought to deserve must-carry protection. *See* J.A. 305; J.S. App. 64a (Williams, J., dissenting). Faced with these numbers, even Congress had to admit that it "ha[d] not found that cable systems are engaging in a widespread pattern of denying carriage of local television stations." H.R. Rep. 102-628, at 52.

Even on its face, the FCC survey provides no evidence that the system of local broadcasting—as opposed to a handful of marginal broadcasters—is in peril. But the survey is equally notable for what it does not say. It contains no data, for example, about broadcast stations that were *added* to cable systems following upgrades to channel capacity. In fact, the number of broadcast stations carried by cable systems rose by 7% between 1985 and 1990 (J.A. 305). For all the FCC survey shows, therefore, the aggregate quantity of local broadcasting available on cable has increased.

More importantly, Congress provided "no information about the characteristics of the broadcasters actually dropped" or the reasons why they were dropped (J.S. App. 64a) (Williams, J., dissenting)). The most obvious reason why a cable operator would decline carriage to a supplier of video programming is that the supplier's material is unpopular with its audience. Cable viewers may find programming unattractive because it is of poor quality; because it duplicates programming offered by another station on the system (*e.g.*, where there are two network affiliates in the same market); or because the programming concerns local events in another city. *See* S. Rep. 102-92, at 43 (22% of local independent stations dropped were located more than 50 miles from the cable community). Without information on the character of the stations dropped, there is no basis for inferring a threat to the viability of local broadcasting generally. Indeed, cable operators regularly deny carriage to cable programmers, especially new ones with minimal or unproven popularity. There is no evidence—Congress certainly cited none—that broadcast programmers are treated worse than cable programmers in this respect.

3. Absent any hard evidence of an actual threat to local broadcasting, Congress resorted to speculation. Because of competition for advertising revenues, it surmised, cable systems have an "economic incentive" to drop or deny carriage to broadcast stations (Act § 2(a)(14),(15),(16)). By dropping such stations, cable operators might hope "to reduce broadcast viewership, thereby attracting advertising dollars that otherwise would go to broadcasters" (J.S. App. 12a).

This line of argument is inapt, for two distinct reasons. First, this Court has made clear that the government's burden of proving a "substantial interest" for First Amendment purposes "is not satisfied by mere speculation or conjecture"; rather, it "must demonstrate that the harms it recites are real." *Edenfield*, 113 S.Ct. at 1800. Thus, in discerning no governmental interest sufficiently substantial to justify the original must-carry rules, the *Quincy* court found the government's case to rest on "wholly speculative and unsubstantiated assumptions," including assumptions about broadcasters' loss of viewership and "advertising revenues" (768 F.2d at 1459, 1441). And the *Century* court declined to defer to what the FCC called its "sound predictive judgment" about the need for interim must-carry rules, holding that "speculative fears alone have never been held sufficient to justify trenching on First Amendment liberties" (835 F.2d at 304, 300).

In any event, Congress' speculation makes no sense even on a conjectural level. About 92% of all television advertising revenues go to broadcast stations; for cable systems, the ratio between subscription fees and advertising revenues is 25:1. *See* J.S. App. 65a, 66a (Williams, J., dissenting). Cable operators' overwhelming incentive is thus to attract subscribers, not advertisers. As Congress found, "broadcast programming * * * remains the most popular programming on cable systems, and a substantial portion of the benefits for which consumers pay cable systems is derived from carriage of [broadcast] signals" (Act § 2(a)(19)). It is thus wholly illogical to suppose that cable operators, in the hope of securing minuscule increments to advertising receipts, would risk reducing their greatest source of revenue--subscription fees—by denying carriage to the programming their subscribers most want to watch. Indeed, since the advertising rate a cable operator receives is directly tied to its viewership, any action that risked loss of subscribers, far from portending increased advertising revenues, would more likely yield a reduction.

The Act's retransmission-consent provision (§ 6) also undercuts the speculative concerns Congress voiced. The Act

gives each commercial broadcaster an option: it may request mandatory (but uncompensated) carriage under § 4; or it may waive its must-carry rights and demand payment for carriage under § 6. As the government acknowledges, "[i]f a broadcaster carries programming that is popular and attractive to a cable operator, there should be no reason to select the must-carry option, which is uncompensated (Mot. to Aff. 3 n.3). "The stations that need must-carry the most," in other words, "are the ones that are watched the least." *Must Carry Second Further Notice of Proposed Rulemaking*, 6 FCC Rcd. at 4576 (separate statement of Chairman Sikes).

If Congress was genuinely concerned about broadcast stations getting dropped, it is odd that it conferred on them the right, for the first time, to demand negotiated payments for carriage of their signals. Theoretically, such demands should *increase* broadcasters' chances of getting dropped. In fact, the vast majority of commercial broadcasters have waived must-carry protection and elected retransmission consent, indicating that the broadcast industry, far from being imperiled, has significant popularity and bargaining power.[18]

More specifically, the retransmission-consent provision exposes the insubstantiality of Congress' concerns about competition for advertising revenues. By definition, the most effective broadcast competitors for advertising dollars will

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[18] In the top 100 cable markets, approximately 86% of the commercial stations surveyed—network-affiliated and independent—waived must-carry protection and elected retransmission consent from at least some cable systems. *See Cable World*, Nov. 1, 1993, at 10, citing Cable Networks Inc., "Final Retransmission Consent/Must-Carry Survey" (released Oct. 18, 1993). In most of these deals, broadcasters received in-kind rather than cash consideration: they conditioned their consent to retransmission on the cable system's agreement to carry (and pay for) a new cable channel to be created by the broadcaster. *See* Wall St. J., Sept. 27, 1993, at B1; *Cable World*, Sept. 13, 1993, at 1. The retransmission-consent provision thus has exacerbated the problem posed by must-carry: instead of carrying just the broadcaster, the cable system ends up carrying *both* the broadcaster *and* its new cable affiliate, further reducing the number of channels for which unaffiliated programmers can compete.

be those with the largest audiences—the very broadcasters who will be able to demand payment for carriage and thus have no need of must-carry protection. Congress' rationale for the must-carry regime is thus ironic: the broadcasters whom cable operators allegedly have an "economic incentive" to drop are the very ones that cable operators—far from dropping—will end up paying for retransmission consent.

In short, the government has completely failed to prove that the must-carry law was enacted to address "what is in fact a serious problem" (*Edenfield*, 113 S.Ct. at 1803). Neither the FCC nor the D.C. Circuit has previously discerned any threat to local broadcasting, and the evidence that has since accumulated shows that the local broadcasting system continues to enjoy robust health. Roughly 98% of broadcast signals entitled to mandatory carriage under the FCC's 1986 rules have been carried despite those rules' invalidation. The few stations that have been dropped, and the core beneficiaries of must-carry protection, are those broadcasters that the public has evinced little desire to see. It cannot plausibly be contended that "the economic viability of free local broadcast television" (Act § 2(a)(16)) is jeopardized to the slightest degree by cable systems' disinclination to carry a handful of little-watched, marginal stations. Judge Williams thus put it succinctly: "Whatever risk there may be in the abstract has completely failed to materialize" (J.S. App. 62a).

In blessing Congress' statement to the contrary, the district court blinked reality. The excessive deference it accorded Congress' litigation-oriented "factfinding" makes heightened First Amendment scrutiny a lowly thing indeed. Congress in reality has acted, not to preserve the system of local broadcasting, but to protect particular local broadcasters. As the *Quincy* court held (768 F.2d at 1460), that does not constitute a substantial government interest.

B. The Must-Carry Provisions Are Not Narrowly Tailored

1. In order to satisfy the second prong of the *O'Brien* test, a regulation must be "narrowly tailored," *i.e.*, must

not "burden substantially more speech than is necessary to further the government's legitimate interests." *Fox*, 492 U.S. at 478. Whereas under rational-basis review a law will be sustained if it furthers a legitimate goal "without reference to whether it does so at inordinate cost," heightened scrutiny requires "the government goal to be substantial, and the cost to be carefully calculated" (*id.* at 480). "[S]ince the State bears the burden of justifying its restrictions, * * * it must affirmatively establish [a] reasonable fit" between its goal and the means chosen to accomplish it (*ibid.*). Although the government need not select the least restrictive means available, "if there are numerous and obvious less-burdensome alternatives to the restriction [chosen], that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable." *Discovery Network*, 113 S.Ct. at 1510 n.13.

Assuming arguendo that the government has shown a credible threat to the local broadcasting system, and hence a substantial interest in preserving it, the must-carry regime is not "narrowly tailored" to that goal. Like the rules invalidated in *Quincy*, the Act's must-carry provisions are "grossly overinclusive" (768 F.2d at 1460). They "indiscriminately protect each and every broadcaster regardless of the quantity of local service available in the community and irrespective of the number of local outlets already carried by the cable operator" (*ibid.*). Under the Act, as under the rules struck down in *Quincy*, a broadcaster "is entitled to carriage even if it carries no local programming at all" (*ibid.*).

Many broadcast stations in fact offer little local programming. Studies by the FCC and others indicate that broadcast stations now devote only a small percentage of their expenditures to locally-originated programming and are choosing to offer less and less of it.[19] Indeed, one class of

[19] *See* Setzer & Levy, "Broadcast Television in a Multichannel Marketplace," FCC Office of Plans and Policy (June 1991), at 36; Office of Communications of the United Church of Christ, *The Public Cost of TV Deregulation: A Study of the Decline of Informational Programming on Commercial TV* (June 17, 1991).

broadcasters entitled to must-carry protection—home-shopping networks—devote their programming almost entirely to sales presentations and have virtually no local content whatever.[20] On the other hand, "many cable systems are now providing locally originated programming services," contrary to the FCC's premise in first enacting must-carry rules (1986 Report ¶¶ 7, 34, 114). Examples of cable systems' local public affairs programming are NewsChannel 8 in the Washington, D.C. market and "New York 1," a 24-hour local news channel offered by Time-Warner in New York (J.A. 241).

In short, there is no "reasonable fit" between the end posited by Congress—preservation of local broadcasting—and the means it chose to implement that goal. All broadcasters are preferred, regardless of how little local programming they offer; and all cable programmers are discriminated against, regardless of how much local programming they provide. For this reason alone, the must-carry provisions are not "narrowly tailored" for purposes of the *O'Brien* test.

2. There are numerous and obvious less restrictive alternatives to the approach Congress adopted. If one assumes that regulation is needed to preserve local broadcast television, Congress was obligated to choose an alternative that does not disadvantage cable programmers because of the content of their speech. The common denominator of any permissible alternative, in other words, is the principle of nondiscrimination.

One option would be a more carefully crafted must-carry regime keyed to the actual quantity of local programming—from whatever source—available on a cable system. This would require Congress to define a "baseline" of localism, as the *Quincy* court required the FCC to do (768 F.2d at 1461). Under this approach, Congress or the FCC would define in objective terms the minimum amount of local pro-

[20] *See* Act § 4(g)(2) (directing FCC to consider home-shopping networks' eligibility for must-carry protection); *Cable Television Service; Cable Carriage of Home Shopping Broadcast Stations*, 58 Fed. Reg. 39156 (1993) (determining that such networks are so entitled).

gramming needed to serve the public interest, with mandatory carriage rights triggered when available local programming fell beneath that threshold. Such a "baseline" would provide a benchmark for ascertaining whether regulatory intervention is actually necessary to preserve free community-oriented television. The must-carry rules instead represent the kind of "broad prophylactic rule" that is inherently suspect in the area of First Amendment rights. *Riley*, 487 U.S. at 801 (citation omitted).

A second alternative would be an "equal access" regime of the kind suggested by Judge Williams below. A central reason why the Act's must-carry provisions "burden substantially more speech than is necessary to further the government's legitimate interests" (*Fox*, 492 U.S. at 478) is their speaker-partiality—their explicit preference for local broadcaster speech at the expense of cable programmers. Judge Williams aptly captured this vice with a hypothetical example derived from *PruneYard Shopping Center v. Robbins*, 447 U.S. 74 (1980). He supposed that a city, "finding that *local* residents are an especially important source of * * * vibrant debate," passed an ordinance that limited the privilege of access "to persons living within four miles of each shopping center," thus excluding "the proverbial 'outside agitator.' " *See* J.S. App. 52a-53a. Judge Williams concluded that this discriminatory ordinance would be unconstitutional whereas the one involved in *PruneYard* was not: "mandatory access rules of [the *PruneYard*] sort give no special privilege to one set of access seekers over another" (J.S. App. 51a, 52a-53a).

By expanding the existing leased-access provisions[21] or by adopting a new equal-access model, Congress had at its

[21] As Judge Williams recognized (J.S. App. 59a), the existing leased-access provisions (47 U.S.C. § 532), like the must-carry provisions, are vulnerable to First Amendment challenge under *Tornillo* because they compromise cable operators' editorial discretion. We agree with appellants NCTA and Time-Warner that *Tornillo* and the compelled-speech cases mandate application of strict scrutiny to, and consequent invalidation of, the must-carry law. However, if the Court rejects that

disposal a variety of less restrictive alternatives to the must-carry regime. Such alternatives would be far less intrusive on First Amendment rights "in the critical sense of minimizing government interference in the choice of *who* will have access to cable" (J.S. App. 59a (Williams, J., dissenting)). In view of these alternatives, Judge Williams correctly concluded that "the must-carry rules do not provide a reasonable fit" with the goals Congress posited in the Act (*id.* at 60a).

A third alternative method of ensuring access to local broadcast television would be provisions encouraging viewers' maintenance of "switch and antenna" capability, as recommended by the FCC in 1986 and approved by the D.C. Circuit in *Century*. Unlike cable programmers, broadcasters have free access to the airwaves, and there is plainly nothing to *preclude* cable subscribers from receiving broadcast signals over the air. Indeed, Americans for decades have watched broadcast television without the benefit of cable service, and approximately 40% of the public today does not subscribe to cable. *See* H.R. Rep. 102-628, at 30 (noting that cable passes 95% of households, while only 60% subscribe). And there is no dispute that an inexpensive mechanism exists—an input-selector or "A/B switch"—which permits viewers equipped with antennas to alternate between cable and over-the-air reception of broadcast signals. In fact, these switches are built-in features of many high-quality TV sets.[22]

submission, those cases would impose no impediment to the leased-access regime either. It would then represent a viable less restrictive alternative for purposes of the *O'Brien* analysis. Although Congress found in 1992 that the original leased-access provisions had not been as effective as originally predicted in 1984, "to the extent that Congress spotted defects in [the 1984 provisions], it set out to correct them." J.S. App. 60a (Williams, J., dissenting). Section 9 of the 1992 Act amends the leased-access regime to solve the problems identified in the legislative history, clarifying the FCC's authority to set maximum reasonable rates, and relaxing burden-of-proof rules and other "cumbersome enforcement mechanism[s]." H.R. Rep. 102-628, at 39-40; S. Rep. 102-92, at 31.

[22] *See* Dealerscope Master Catalogue, June 1993, at 24 *et seq.* As a practical indication that switch-and-antenna capability is feasible, several

In 1986, the FCC concluded that switch-and-antenna capability is preferable to mandatory carriage as a long-term means of ensuring viewers' access to those few broadcast stations that cable systems do not carry voluntarily (1986 Report ¶ 138). The *Century* court not only agreed with this assessment, but concluded that consumers could acquire switch-and-antenna capability considerably faster than the five years supposed by the FCC. *See* 835 F.2d at 300-304. Indeed, the court found no basis for the FCC's assumption that consumers, "within the span of five years, * * * would not manage to purchase an inexpensive hardware-store switch upon learning that it could provide access to a considerable storehouse of new television stations and shows."

Congress in 1992 briefly considered, and rejected, the switch-and-antenna option. *See* Act § 2(a)(17) & (18). As support for this decision, it relied on a 1986 study commissioned by NAB from the ELRA Group, which purported to demonstrate the option's unworkability. S. Rep. 102-92, at 45 & n.116; *see id.* at 45 & n.114 (citing NAB testimony that relied on ELRA study). This is the same 1986 study that the *Century* court found incompetent to justify even interim must-carry rules. *See* 835 F.2d at 300-302. The court termed this study "a melange of disparate facts and findings" (*id.* at 301); observed that its results were tainted by "[s]urvey imperfections" (*id.* at 302); noted that some of its findings were expressly rejected by the FCC (*ibid.*); and concluded that the study "provides only the spongiest of foundations for the FCC's asserted justification" (*ibid.*).

Congress also relied on a 1991 study by Mark Fratrick, NAB's in-house economist, which purported to update and reconfirm the ELRA study's results. H.R. Rep. 102-628, at 54 & nn. 62, 63. But far from showing that "consumers are not willing to use A/B switches" (*id.* at 54), the Fratrick

cable systems actually distributed A/B switches to subscribers to facilitate continued over-the-air reception of any broadcast stations that "went dark" on the system after refusing retransmission consent. TCI Cablevision of Texas issued about 30,000 A/B switches to subscribers in the Corpus Christi area. *Cable World*, Oct. 18, 1993, at 51. Other cable systems issued vouchers entitling subscribers to 10% discounts on A/B switches at Radio Shack. *CableFax*, Sept. 8, 1993, at 1.

survey supports precisely the opposite conclusion. Whereas the ELRA study estimated that only 12.5% of cable subscribers had hooked-up antennas, the Fratrick study reveals that this percentage had grown to 33% as of 1991—an increase of 164%. Whereas the ELRA study estimated that only 1% of cable subscribers were equipped with an outdoor antenna and A/B switch, the Fratrick survey shows that this percentage had risen to 16% by 1991—an increase of 1500%. And whereas the ELRA study estimated that only 1.5% of cable households had actually used an A/B switch, the Fratrick study reveals that this percentage had grown to 6% by 1991—an increase of 300%. These large improvements in consumers' switch-and-antenna capability between 1986 and 1991 are quite remarkable: since cable systems voluntarily carried about 95% of existing broadcast signals at this time (*see* page 40, *supra*), consumers' need to acquire this capability was not particularly urgent.[23]

In sum, most of the evidence that Congress cited in dismissing the switch-and-antenna alternative had previously been considered and rejected both by the FCC and by the *Century* court. The one bit of new evidence—the 1991 Fratrick study—showed that switch-and-antenna technology was *more workable* in 1991 than it was in 1987, when both the Commission and the D.C. Circuit approved its feasibility. This technology would not in the slightest degree burden anybody's First Amendment rights, and it represents a completely feasible alternative to the must-carry regime.

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[23] Congress also relied on comments submitted by NAB during the 1986 FCC rulemaking, which alleged technical problems with A/B switches and raised cost objections to them. H.R. Rep. 102-628, at 54 n.60; S. Rep. 102-92, at 45 n.115. The FCC considered these arguments and found them to be without factual support. *See* page 12 n.3, *supra*. The *Century* court reached the same conclusion. *See* 835 F.2d at 296 (discussing cost of switch-and-antenna capability); *id.* at 302 (dismissing technical objections).

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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IN THE

Supreme Court Of The United States

October Term 1993

TURNER BROADCASTING SYSTEM, INC., *et al.*,

Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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QUESTION PRESENTED

Whether Congress, consistent with the First Amendment, may compel operators of cable television systems to use their own channels of communications to carry the television signals of programmers favored by Congress—*i.e.* local broadcast television stations—in derogation of the editorial preferences of the operators and regardless of the effect on those programmers not favored by Congress.

LIST OF PARTIES

A list of all parties to this proceeding is set forth in the Jurisdictional Statement at ii-iii. The Rule 29.1 disclosure statement on behalf of Time Warner Entertainment Company, L.P., is set forth in the Appendix to the Jurisdictional Statement at 111a. It should, however, be amended so as to include US West Inc., as a limited partner.

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H.R. Rep. No. 628, 102d Cong., 2d Sess. (1992) 19, 42, 47

In re Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems, MM Docket No. 85-349, 1 F.C.C. Rcd. 864 (1986), *reconsid. denied*, 2 F.C.C. Rcd. 3593 (1987) 24

In re Implementation of Section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992—Home Shopping Station Issues, MM Docket No. 93-8, Report and Order, 8 F.C.C. Rcd. 5321 (1993) 20

In re Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992—Horizontal and Vertical Ownership Limits, MM Docket No. 92-264 Second Report and Order (adopted September 23, 1993; released October 22, 1993) 34, 41

In re The Revision of Programming and Commercialization Policies, Ascertainment Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, MM Docket No. 83-670, Report and Order, 98 F.C.C. 2d 1076 (1984) 20

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In re Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, Gen. Docket No. 84-282, 102 F.C.C. 2d 143 (1985) 32

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No. 93-44

IN THE

Supreme Court Of The United States

October Term 1993

TURNER BROADCASTING SYSTEM, INC., *et al.*,

Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Brief for Appellant Time Warner Entertainment Company, L.P.

OPINION BELOW

The opinion of the three-judge district court is reported at 819 F. Supp. 32 (D.D.C. 1993). It is reprinted in the Appendix to the Jurisdictional Statement at 1a-72a.

JURISDICTION

The judgment of the district court was entered April 8, 1993. A timely notice of appeal was filed in the district court on behalf of Time Warner Entertainment Company, L.P. on May 3, 1993. J.S. App. 74a-75a.

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1253. In § 23 of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. § 555(c)(1), Congress required that challenges to the constitutionality of §§ 4 and 5 of the Act "be heard by a district court of three judges convened pursuant to [28 U.S.C. § 2284]".

CONSTITUTIONAL AND STATUTORY PROVISIONS

In pertinent part, the First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press".

Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1471-1481, are lengthy provisions and their text is reprinted in the Appendix to the Jurisdictional Statement at 82a-110a and in the Joint Appendix ("J.A.") at 3-33.

STATEMENT

Time Warner Entertainment Company, L.P. ("Time Warner"), is, among other things, a cable system operator and a cable programmer.[1] Along with the other appellants in this proceeding, Time Warner challenged the constitutionality of §§ 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Cable Act" or "the Act"), 47 U.S.C. §§ 534, 535, on First and Fifth Amendment grounds. Sections 4 and 5, the so-called "must-carry" provisions, require cable operators to carry local commercial and noncommercial broadcast stations on their cable systems. The three-judge district court, over the dissent of

[1] Time Warner operates cable systems and creates programming through its unincorporated division, Time Warner Cable ("TWC"). Through another unincorporated division, Home Box Office ("HBO"), Time Warner provides cable operators with video programming for dissemination over their cable systems.

Circuit Judge Williams, denied appellants' First Amendment claims and upheld the must-carry provisions.[2]

A. Appellant's First Amendment Activities.

In operating each of its cable systems, TWC, like cable operators generally, engages in a number of editorial activities. One aspect of a cable operator's editorial discretion involves selecting the programming it wants to provide its cable system subscribers from the diverse array of available programming sources.[3] Cable operators also designate channel locations for programming services and package the selected programming into tiers of service.[4] In exercising each aspect of its editorial discretion, one important goal of the cable operator is to present

[2] Appellants also challenged § 6 of the 1992 Cable Act ("retransmission consent") on the ground that it was not severable from §§ 4 and 5. The retransmission consent provision makes it unlawful for a cable operator to retransmit the signal of a commercial broadcast television station without its consent, unless the station has elected must-carry status. Because the majority upheld § 4, the court below did not adjudicate appellants' claim that § 6 is not severable from § 4. If the decision below is reversed, the severability question should be remanded to the three-judge court.

[3] Presently, there are more sources of programming than there are channels available on most cable systems. *See* Klein Aff. ¶ 10 (J.A. 304). Although the channel capacity on any given cable system at any point in time is finite, the number of cable systems in any locale is not physically limited. It is undisputed on the record below that cable is not characterized by an absolute physical limitation like the electromagnetic spectrum that characterizes the broadcasting industry. Federal Defs.' Resp. to Time Warner Entertainment Company L.P.'s Statement of Material Facts Allegedly Not in Dispute ¶ 23 (J.A. 370); Collins Aff. ¶ 21 (J.A. 247). *See Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1449 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986) ("*Quincy*"); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 45 (D.C. Cir.) (per curiam), *cert. denied*, 434 U.S. 829 (1977) ("*HBO*"). Rather, local communities are physically able to accommodate multiple cable operators—a fact explicitly recognized by Congress in the 1992 Cable Act, which prohibits exclusive franchises. *See* 1992 Cable Act, § 7(a)(1), amending 47 U.S.C. § 541(a)(1).

[4] The "basic" tier of service is a service offering that cable operators must provide to all their subscribers, and it is the service tier available at the minimum monthly price. TWC's systems also typically offer an optional tier of service, called the "standard" tier, which generally offers more satellite-delivered programming.

the most attractive package of news, information and entertainment to its subscribers. Rosenblum Aff. ¶ 5 (J.A. 320). In addition, cable operators, including TWC, increasingly create and produce their own programming for distribution over their cable systems. For example, TWC produces "New York 1", a 24-hour local news channel offered to its subscribers on its New York City systems. Collins Aff. ¶ 4 (J.A. 241).

HBO operates two programming services, the Home Box Office Service and the Cinemax Service, Bewkes Aff. ¶ 2 (J.A. 223), each of which is generally not included in the basic or standard tier and is sold to subscribers for an additional monthly subscription fee. *Id.* at ¶ 3.[5] The HBO Service offers a wide variety of programming, including motion pictures, sporting events, concerts and documentaries. In recent years, HBO has produced programs on controversial subjects such as AIDS and abortion, as well as programs critical of the United States Government and major corporations.[6]

Like all cable programmers, HBO must obtain carriage on cable systems in order to reach a cable audience. Thus, it must vie for carriage on cable systems with all other sources of video programming. Without carriage on a sufficient number of cable systems or other multichannel video programming delivery systems, a cable programmer, such as HBO, will not generate audience levels sufficient for economic viability.

B. The Must-Carry Provisions of the 1992 Cable Act.

The must-carry provisions of the 1992 Cable Act require cable operators to set aside significant portions of their channel capacity for the carriage of local commercial and noncommercial broadcast television stations. Section 4 of the Act requires most cable operators—those operating systems with more than 12 activated channels—to devote up to one-third of their channel

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[5] HBO also owns and operates, through a joint venture, a programming service known as Comedy Central, which generally is offered to subscribers as part of a service tier. *Id.* at ¶ 2.

[6] A more detailed description about the particular programming offerings provided by HBO is set forth in the affidavit of Jeffrey Bewkes. *See* J.A. 224-25.

capacity to carriage of local commercial broadcast stations. 47 U.S.C. § 534(b)(1)(B); *see also id.* § 534(c)(1)(A)-(B).[7] The cable operator must carry the signal of the commercial broadcast station "in its entirety". *Id.* § 534(b)(3)(A). When there is an insufficient quantity of full power local commercial broadcast stations to fulfill the required "set asides", cable operators also must carry "low power" broadcast stations. *Id.* § 534(c)(1)(A)-(B). Further, any qualifying local commercial station has the right to elect its channel position on the cable system from among three specified options: its over-the-air channel assignment; the channel on which it was carried on the cable system on July 19, 1985; or the channel on which it was carried on January 1, 1992. *Id.* § 534(b)(6).

In addition to the required one-third allocation of channel capacity for *commercial* stations, § 5 requires cable operators to carry local *noncommercial* educational stations. Any cable system with more than 36 channels generally must carry any qualifying local noncommercial station. 47 U.S.C. § 535(b)(1). Cable systems with between 13 and 36 channels are required to carry up to three noncommercial stations. *Id.* § 535(b)(3). In addition, and notwithstanding any other provision of § 5, every cable operator is required to carry all qualified noncommercial stations "whose signals were carried on their systems as of March 29, 1990". *Id.* § 535(c). If an insufficient number of noncommercial stations is present in a cable operator's service area, a cable operator may be required to import and carry at least one noncommercial station from another community. *Id.* §§ 535(b)(2)(B)(i), (b)(3)(B). Section 5 also gives noncommercial stations channel positioning rights similar to those granted to commercial stations by § 4. *Id.* § 535(g)(5).

Taken together, §§ 4 and 5 significantly injure cable operators and programmers. *First*, a cable operator must include the entire programming content of specified local commercial and noncommercial broadcast television stations in the array of

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[7] The average capacity of a cable system in the United States is about 40 channels, Klein Aff. ¶ 7 (J.A. 303), and virtually all cable systems have a channel capacity that exceeds 12 channels.

programming services it provides subscribers, regardless of whether the cable operator wants to do so. *Second*, cable operators cannot fashion, in the manner they deem appropriate, the package of programming provided to subscribers, because the must-carry provisions (1) give broadcast stations the right to specify, within certain parameters, the cable channel on which they must be carried, and (2) require cable operators to include each mandated station on the basic tier. *See* 47 U.S.C. §§ 534(b)(7), 535(h), 543(b)(7). *Third*, the must-carry provisions, by requiring cable carriage of local broadcasters, prefer the content of those stations over the content of the diverse offerings of cable programmers, who must, in the absence of a right to carriage, vie for whatever available channel capacity might remain on cable systems.[8]

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[8] On a cable system of 36 channels, § 4 guarantees qualifying commercial broadcasters the right to occupy up to 12 channels and § 5 requires carriage of up to 3 noncommercial stations—together occupying over 40% of available capacity. In addition, the Cable Communications Policy Act of 1984 ("the 1984 Cable Act") separately requires cable operators to make available up to 15% of their capacity to unaffiliated programmers on a leased access basis, 47 U.S.C. § 532(b)(1), and requires dedication of a potentially unlimited number of channels for public, educational and governmental ("PEG") usage. *See* 47 U.S.C. § 531.

Indeed, the 1992 Cable Act represents a harsh and invasive regulatory scheme, which, *inter alia* (and in addition to the foregoing), limits the number of subscribers a cable system may have; limits the number of affiliated programmers a cable operator may carry on its system; forbids vertically integrated cable programmers from entering into exclusive contracts for programming distribution unless approved by the FCC; and subjects to price regulation any cable system not subject to "effective competition", a term defined by the statute so as to encompass virtually every cable system in the country. In this civil action, Time Warner also challenged the constitutionality of these provisions, as well as the PEG and leased access provisions of the 1984 Cable Act. However, these claims were severed on jurisdictional grounds by the three-judge court, over a dissent from one of the judges, from the claims asserted against the must-carry provisions, *Turner Broadcasting System, Inc. v. FCC*, 810 F. Supp. 1308, 1315 (D.D.C. 1992) (three-judge court), and they are not presently before this Court.

C. The FCC Must-Carry Regimes.

Must-carry regimes imposed upon cable operators by the Federal government for the benefit of local broadcasting are not without precedent. On two previous occasions, the Federal Communications Commission ("FCC") has, by regulation, created similar, albeit less onerous, regimes. In each case, however, the District of Columbia Circuit invalidated these must-carry schemes. *Quincy*, 768 F.2d at 1463; *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987), *clarified*, 837 F.2d 517 (D.C. Cir.), *cert. denied*, 486 U.S. 1032 (1988) ("*Century*").

In *Quincy*, the District of Columbia Circuit found that the must-carry rules at issue "coerce[d] speech" by requiring carriage of the signals of local broadcasters, and "significantly compromise[d]" a cable operator's "otherwise broad discretion to select the programming it offers its subscribers". 768 F.2d at 1452. Moreover, the rules were "explicitly designed" to prefer local broadcast stations over cable programmers. *Id.* at 1451 ("[t]heir very purpose is to bolster the fortunes of local broadcasters even if the inevitable consequence of implementing that goal is to create an overwhelming advantage over cable programmers"). The court invalidated the rules, because the proffered justification—"the preservation of free, local television service"—was entirely unsubstantiated, *id.* at 1459, and the rules were "grossly overinclusive", *id.* at 1460.

In response to the *Quincy* decision, the FCC adopted a new version of the rules. Their premise was that an inexpensive technical device, known as an "A/B switch", which enables cable subscribers to switch back and forth between cable input and reception of over-the-air signals by antenna, would adequately protect local broadcasting, but that a five-year interim must-carry regime was necessary to protect local broadcasting until subscribers were educated about how to use such switches.

In *Century*, the court reviewed and invalidated these new rules, again concluding that no factual predicate existed to support them. *First*, the court could not find any factual support for the Commission's conclusion that it would take consumers five years to learn about use of A/B switches. *Century*, 835 F.2d

at 302 (rejecting such a "sluggish profile of the American consumer"). *Second*, to the extent the FCC assumed that without must-carry rules cable operators would drop local broadcasters, the court found that "[e]xperience belies that assertion"; that cable operators "generally did not drop the local broadcast signals" being carried before the *Quincy* decision; and, that "both the Federal Trade Commission and the Department of Justice have concluded . . . that the absence of must-carry would not harm local broadcasting". *Id.* at 303.

D. The Decision Below.

A divided three-judge court rejected the claims asserted below by Time Warner, granted defendants' motion to dismiss, and dismissed plaintiffs' complaints.[9] The majority held that the 1992 Cable Act represented Congress's use of "its regulatory powers over the economy to impose order upon a market in dysfunction", J.S. App. 12a, and that "[t]he Cable Act of 1992 is simply industry-specific antitrust and fair trade practice regulatory legislation". *Id.* at 13a. Recognizing that cable operators might be constrained in determining which programming to carry on their cable systems and under what conditions, the majority nonetheless believed that "the First Amendment should not unduly inhibit Congress in what clearly appears on its face to be an effort to level the economic playing field in the television industry". *Id.* at 22a. Further, although acknowledging that cable speakers use video signals as their means of conveying information, *id.* at 12a, the majority analogized the distribution of video signals to regulation of commercial commodities like "printing presses, or broadcast transmitters; loudspeakers or movie projectors", *id.* at 13a, and concluded that Congress intended to "restore competitive balance and assure a functional market in the distribution of video signals". *Id.* at 19a.[10]

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[9] The term "majority" refers to the opinion of Judge Jackson below, in which Judge Sporkin, although also writing separately, concurred.

[10] The concurring opinion termed appellants' First Amendment claims "mischievous" because "[i]t is inconceivable that our forefathers at any time contemplated that the First Amendment would be used to regulate an industry that came into existence over 150 years after the Bill of Rights was adopted". *Id.* at 47a.

In considering the appropriate standard of judicial review, the majority indicated that "[s]trict scrutiny applies only if governmental regulation is overtly content-based or presents an opportunity for official censorship". *Id.* at 16a. Finding that Congress did not intend to regulate content, the majority held that the must-carry provisions were not content-based. *Id.* at 19a. Further, having rejected appellants' arguments that strict scrutiny was appropriate on other grounds (*i.e.*, because the must-carry provisions compel speech; because they promote the speech of broadcast speakers at the expense of the speech of cable programmers; and because they single out a member of the press for burdens from which other members of the press are exempt), the majority determined that the standard of review established in *United States v. O'Brien*, 391 U.S. 367 (1968), and *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), applied. *Id.* at 22a.[11]

The majority held that the must-carry provisions passed constitutional muster under this standard. *First*, the majority found that the preservation of local broadcasting was an important governmental interest. Although appellants had claimed and offered supporting evidence that local broadcasting was not imperiled—indeed, that local broadcasting had been thriving even after the District of Columbia had struck down the FCC's must-carry regime in *Quincy*—the majority deferred to Congress. *Id.* at 26a. *Second*, the majority held that the must-carry provisions were sufficiently tailored to further the interest in preserving local broadcasting, again reaching that result by deferring to Congress. *Id.* at 27a ("[o]nce again, the Court is unwilling to second-guess

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[11] Although acknowledging that "conflicting signals can be discerned from the case law" for determining whether a regulation is content-based, the concurring opinion framed a novel test: "You know it when you don't see it." *Id.* at 44a. Finding that "[t]his is such a case", *id.*, the concurring opinion agreed that review under *O'Brien* was appropriate for the cable operators' claims. *Id.* at 43a. However, the concurring opinion reviewed the First Amendment claims of cable programmers under a rational review standard. *Id.* at 46a-47a.

Congress' determination that the must-carry provisions are necessary to accomplish its objective").[12]

E. The Dissent Below.

In dissent, Circuit Judge Williams concluded that strict scrutiny applied. *First*, he determined that the must-carry provisions were content-based, both because Congress had made a decision as to who should qualify for mandatory access on the basis of an explicit content-related finding, *id.* at 51a (citing 1992 Cable Act § 2(a)(11)), and because, "by virtue of provisions of law outside the 1992 Act, the term used by the Act to define the benefitted class *automatically* entails content requirements". *Id.* at 52a. *Second*, by requiring carriage of local broadcasters, §§ 4 and 5 mandated speech: this requirement was certain to alter the content of speech because "cablecasters must replace the programs they would have chosen, regardless of origin, with programs selected by local broadcasters". *Id.* at 54a. Judge Williams also indicated that strict scrutiny was appropriate because the must-carry provisions infringed upon a cable operator's editorial discretion to select programming, *id.* at 55a, and because the must-carry rules "are in substance indistinguishable from a tax-subsidy combination—a tax falling exclusively on cablecasters, in an amount large enough to fund a subsidy for local broadcasters". *Id.* at 56a.

The must-carry provisions failed to withstand strict scrutiny. Reviewing the interest in promoting a diversity of views on cable television, Judge Williams termed the fit between that interest and the must-carry provisions "extremely weak", and insufficient to support their constitutionality. *Id.* at 58a. Further, he found it "extremely doubtful" that a goal to protect local content could

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[12] With respect to the cable operators' claims, the concurring opinion agreed that the must-carry provisions satisfied the *O'Brien* standard, *id.* at 48a. As for the programmers' claims, the concurring opinion concluded that the must-carry provisions survived rational basis review. Drawing upon language articulated in the broadcast context, the concurring opinion suggested that, if the must-carry rules fail to accomplish their objectives, "there will be time enough to reconsider the constitutional implications". *Id.* at 45a (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969)).

ever represent a compelling interest, and that in any event, "far less restrictive means are readily available" to further that end, including direct subsidies. *Id.* at 61a. With respect to the preservation of local broadcasting, Judge Williams found no evidence that over-the-air broadcast television needed protection, instead, the evidence adduced by appellants indicated "quite the opposite". *Id.* at 62a. Again, Judge Williams declared it "obvious" that less intrusive means than the must-carry provisions were available. *Id.* at 66a.[13]

SUMMARY OF THE ARGUMENT

Cable operators and cable programmers, a principal source of news, information and entertainment for today's American public, indisputably constitute a segment of the press. *See Leathers v. Medlock*, 111 S.Ct. 1438, 1442 (1991) ("[c]able television provides to its subscribers news, information, and entertainment. It is engaged in 'speech' under the First Amendment, and is, in much of its operation, part of the 'press'."); *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986) ("through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, respondent seeks to communicate messages on a wide variety of topics and in a wide variety of formats").

The must-carry provisions directly, not incidentally, interfere with the ability of this segment of the press to engage in speech and to act in an editorial capacity by capturing a substantial

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[13] Judge Williams also rejected the assumption that over-the-air broadcasting was threatened, either because cable operators had dropped broadcast stations in the past or because cable had an incentive to do so to increase its advertising revenues. *Id.* at 63a-66a. He found it unnecessary, however, to express an opinion as to the appropriate level of deference to accord the legislative findings articulated in the 1992 Cable Act, "because the legislative findings simply do not support the inferences needed to sustain must-carry". *Id.* at 67a ("[i]f findings as scantily connected to the conclusion as these can justify must-carry, then the door is open—even in the area of First Amendment rights—to exercise of the most naked interest-group preferences").

portion of a cable operator's channel capacity and compelling that operator to carry speech selected by government—that of local broadcast stations—regardless of whether the operator wants to carry those stations or whether cable subscribers want to view them. The majority below declined to apply strict scrutiny to these provisions, instead applying the less exacting standard of *O'Brien*, accepting, without critical analysis, the congressional findings articulated in the 1992 Cable Act as content-neutral, and expressing the belief that "the must-carry provisions are, in intent as well as form, unrelated (in all but the most recondite sense) to the content of any messages that these embattled cable operators, broadcasters, and programmers have in contemplation to deliver". J.S. App. 13a.

Application of *O'Brien* scrutiny, rather than strict scrutiny, was error. The must-carry provisions dictate the content of programming that a cable operator must provide to its subscribers and are thereby content-based. Moreover, the congressional findings in the 1992 Cable Act are the direct result of concerns or judgments related to content. And, although ignored or otherwise distinguished by the majority below, established principles of First Amendment jurisprudence require strict scrutiny of government regulation that compels speech; that prefers the speech of certain speakers by restricting the speech of others; or that singles out a segment of the press for burdens from which all other speakers are exempt.

The failure to apply strict scrutiny to the must-carry provisions also cannot be attributed to any particular characteristic of cable television. Although this Court has recognized that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them", *Red Lion*, 395 U.S. at 386 (citing *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)), the converse of this established principle is equally significant—that the First Amendment protects all members of the media equally, unless and until it is shown that particular characteristics of the medium justify taking away from that First Amendment protection. Because there are no such characteristics peculiar to cable, the failure to recognize cable's speech as fully protected under the

First Amendment signals an evisceration of the free speech and free press clauses of the First Amendment, and indicates that technological innovation in the area of First Amendment speech (*e.g.*, newspapers as they distribute via videotext) will come at a precious price—a sacrifice in First Amendment protection. Such an outcome would result in a loss of fundamental freedom and is not warranted on the record in this case.

Whether subjected to strict scrutiny or to the less exacting standard ostensibly applied by the majority below, the must-carry provisions fail. Application of any level of scrutiny other than the exceedingly deferential analysis applied by the majority below makes apparent that the interests asserted as justifying enactment of the must-carry provisions—preserving local broadcasting and promoting a diversity of voices in the marketplace—do not have a basis in fact. Local broadcasting is not imperiled and, given the variety of programming available on cable, cable does not pose a threat to diversity in the marketplace—instead, it has achieved it. Moreover, if the must-carry provisions seek to protect local broadcasting or to further diversity, they do so in a constitutionally impermissible manner—by preferring the content of local broadcasters over, and at the expense of, the content of cable programmers.

Beyond the insufficiency of the interests asserted in support of the must-carry provisions, these provisions also fail to further their purported ends. Given that Congress has recognized that cable operators have not dropped broadcasters to any noteworthy extent, a purported loss of audience for broadcasters cannot be redressed by a law that compels carriage. And, even if conceptually these provisions can be said, in some manner, to further the governmental interests identified, they do so in a far more intrusive manner than is necessary, or constitutionally permissible.

ARGUMENT

I. THE MUST-CARRY PROVISIONS TRIGGER STRICT SCRUTINY UNDER THE FIRST AMENDMENT.

A. The Must-Carry Provisions Are Content-Based and Must Be Subjected to Strict Scrutiny.

Although acknowledging "that video signals have no other function than to convey information", the majority, relying upon its interpretation of the various findings enacted with the 1992 Cable Act, concluded that the must-carry provisions were "essentially economic regulation", J.S. App. 13a, and not content-based, because "Congress' primary purpose in enacting must-carry was to restore competitive balance and assure a functional market in the distribution of video signals". *Id.* at 19a. The majority thus held that §§ 4 and 5 were not subject to strict scrutiny. *Id.* at 13a, 22a.

This mode of analysis lacks support from the decisions of this Court, and it represents a narrow, even dangerous, approach to judicial review under the First Amendment. Whether legislation is content-based does not, as the majority below apparently believed, begin and end with the various legislative justifications proffered in support of that legislation. The majority's conclusion, that §§ 4 and 5 constitute mere economic regulation akin to regulation of a "commodity", when they directly, and not incidentally, impair speech, demonstrates the error of undertaking review in this way. Even focusing exclusively upon Congress's findings, as the majority did, the findings reveal judgments related to content, and a legislative determination as to the relative worthiness of the speech Congress has chosen to prefer. Finally, the majority's failure to apply strict scrutiny ignored or misconstrued this Court's First Amendment decisions that stand for an unequivocal proposition: Government may not, absent a compelling justification and a precise fit between means and ends, dictate the content of information that any speaker must disseminate to the public.

1. Judicial Review Under the First Amendment Requires Examination Beyond the Purportedly Content-Neutral Legislative Justifications Proffered.

"Absent an indication of a Congressional purpose, whether avowed or covert, to effect a degree of content-control by mandating carriage of 'local' broadcasters' signals", the majority believed that the must-carry provisions could not be deemed content-based. *Id.* at 22a; *see also id.* at 16a ("[s]trict scrutiny applies *only* if governmental regulation is overtly content-based or presents an opportunity for official censorship") (emphasis added). This analysis clearly turns on manifested legislative intent, and, as a result, presents an obvious risk of abuse. Provided Congress can cobble up an appropriate set of content-neutral "findings", it can successfully shield virtually any statutory scheme from judicial review. Thus, the majority's test analytically seems flawed, and indeed, does not comport with a principle often emphasized by this Court: Legislative intent is not the linchpin for constitutionality under the First Amendment. *See City of Cincinnati v. Discovery Network, Inc.*, 113 S.Ct. 1505, 1516 (1993) (striking down City's regulatory scheme without regard to City's *mens rea* in enacting it); *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 112 S.Ct. 501, 509 (1991) ("[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment") (quoting *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983)); *Leathers*, 111 S.Ct. at 1442-43 (1991) (same); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987) ("no evidence of an improper censorial motive" need be adduced). Quite the opposite, this Court has "long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment". *Simon & Schuster*, 112 S.Ct. at 509 (quoting *Minneapolis Star*, 460 U.S. at 592).[14] Thus,

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[14] This is not to say that the must-carry provisions aim at "proper governmental interests", for, as shown *infra* at pp. 40-45, the interests Congress identifies do not, as a factual matter, exist, and the manner in which Congress

judicial review does not begin and end with whether government can assert a content-neutral justification.

Two recent decisions from this Court illustrate this principle. The City of Cincinnati in *Discovery* contended that its regulation prohibiting the distribution of commercial handbills via newsracks was motivated by content-neutral justifications, such as safety and aesthetics. Because these justifications were "entirely unrelated to the content of [the commercial] publications", it was argued that the regulation was not content-based. *Discovery*, 113 S.Ct. at 1516. This Court disagreed: "True, there is no evidence that the city has acted with animus toward the ideas contained within [the commercial] publications, but just last Term we expressly rejected the argument that 'discriminatory . . . treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas'." *Id.* (citation omitted) (ellipsis in original). Recognizing that the "very basis for the regulation is the difference in content between ordinary newspapers and commercial speech", the ban "by any commonsense understanding of the term" was "'content-based'". *Id.* at 1516-17.

Similarly, in *Simon & Schuster*, the Crime Victims Board of New York argued that the "Son of Sam" law was not content-based because there was no intent to suppress particular ideas. 112 S.Ct. at 509. This Court dismissed the argument, held the law to be content-based and struck it down after applying strict scrutiny.

In holding the "Son of Sam" law to be content-based in *Simon & Schuster*, this Court made clear that it was not resolving the question of whether the statute was content-neutral under the decisions in *Ward* and *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) ("*Renton*"). *See* 112 S.Ct. at 511 n.**. Necessarily, the analysis set forth in *Ward* and *Renton* is not the exclusive means for determining whether legislation is content-based. Indeed, the analysis undertaken in both *Simon & Schuster* and *Discovery* indicates that a *Ward* and *Renton* analysis is a

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seeks to further those interests is, as a matter of law, impermissible.

secondary analysis, not a primary analysis, that is to be undertaken only when a statute is not content-based under other prevailing principles of First Amendment law. Analyzed in this manner, a "neutral" justification cannot salvage what is otherwise a content-based provision. Further, the decisions in *Ward* and *Renton* themselves indicate that their formulation of a content-based analysis is appropriate only when the impact upon speech is truly incidental (*e.g.*, a regulation requiring use of a sound system, provided by the City, for concert performers on City-owned property in order to control excessive volume or zoning laws imposing location restrictions upon adult theatres). Because the must-carry provisions are content-based under prevailing First Amendment principles and because there is nothing incidental about the occupation of a substantial portion of cable operators' channel capacity or the concomitant effect upon the speech of cable programmers, the *Ward/Renton* content-based analysis does not apply here.[15]

Relying upon *Ward*, J.S. App. 19a, and upon the legislative findings promulgated with the 1992 Cable Act, the majority viewed the must-carry provisions as economic legislation, representing an effort by Congress "to level the economic playing field in the television industry", J.S. App. 22a; *id.* at 12a (congressional use of "regulatory powers over the economy to impose order upon a market in dysfunction, but a market in a commercial commodity nevertheless; not a market in 'speech'"), and declined to look further.

If the majority had, to any meaningful extent, looked beyond the proffered legislative justifications, it would have concluded that the must-carry provisions are content-based "by any commonsense understanding of the term"; these provisions necessarily alter the content of the programming a cable operator

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[15] *See* J.S. App. 54a-55a (Williams, J., dissenting) ("[a]pplication of a test for 'incidental' burdens upon speech seems highly artificial here. Given the finite number of cable channels, replacement of the cablecaster's choice of programs with those of local broadcasters suppresses the alternative programs as completely as if Congress had ordered them shut down; there is nothing 'incidental' about the burden") (footnote omitted).

presents to the public and replace it with content selected by the government. Yet, the majority, though recognizing that "*video signals have no other function than to convey information*", *id.* at 13a (emphasis added), and that such signals "*can only be used to convey a message*", *id.* at 12a (emphasis added), persisted in its view of the must-carry provisions as neutral, economic regulation and dismissed the communication of information by video signals as of "no particular significance". *Id.* at 12a-13a.

More significantly, the majority posited that the must-carry provisions regulate a commodity—"the means of delivery of video signals"—and compared that to regulation of the use of other commercial commodities, such as printing presses, loudspeakers or movie projectors. *Id.* at 12a-13a. However, content-neutral regulations pertaining to printing presses, movie projectors or video signals would establish standards for safety, quality or size—concerns that the must-carry provisions do not even remotely implicate. A more accurate and telling analogy would be legislation that tells the owner of the movie projector which producer's films must be placed inside and shown by the movie projector or that tells the owner of the printing press what articles must be printed on that press and included in a publication. In either case, "by any commonsense understanding of the term", the legislation would be considered content-based. No different conclusion should have been reached for the must-carry provisions.

2. The Legislative Findings Themselves Indicate that the Must-Carry Provisions Are Content-Based.

Even under the majority's own analysis, focusing exclusively as it did upon the findings reached in the 1992 Cable Act, the must-carry provisions are content-based. Congress's findings reflect a content-related legislative judgment about the value of local broadcast speech. *Id.* at 53a (Williams, J., dissenting) ("the beneficiaries are local stations that are required by government to include specific content that the government has deemed especially worthy"). For example, § 2(a)(11), a finding Judge Williams believed to be "quite explicitly" based on content, states: "Broadcast television stations continue to be an important

source of local news and public affairs programming and other local broadcast services critical to an informed electorate." This finding, however, is merely illustrative of the content-based nature of §§ 4 and 5; a number of other findings equally demonstrate that Congress guaranteed carriage of local broadcasters based on a judgment about the value of their speech.[16] The legislative history likewise reveals similar content-based judgments.[17]

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[16] *See, e.g.*, § 2(a)(7) (citing substantial interest in ensuring access to "local noncommercial educational stations" and stating that "distribution of unique noncommercial, educational programming services advances that interest"); § 2(a)(8)(A) ("public television provides educational and informational programming to the Nation's citizens"); § 2(a)(8)(B) ("public television . . . provides public service programming that is responsive to the needs and interests of the local community"); § 2(a)(8)(C) (specifying public television's "integral role in serving the educational and informational needs of local communities"); § 2(a)(10) (citing the interest in "local origination of programming"). Even § 2(a)(13) of the 1992 Cable Act, an ostensibly neutral finding concerning the "marked shift in market share from broadcast television to cable television services", is content-based, because it demonstrates that Congress is actually concerned about what programming the public is viewing.

[17] *See, e.g.*, H. R. Rep. No. 628, 102d Cong., 2d Sess. 56 (1992) ("H.R. Rep.") (discussing the "importance of local programming", including local news); H.R. Rep. 69 (discussing array of noncommercial programming, such as "Sesame Street", "3-2-1 Contact", "The MacNeil/Lehrer NewsHour" and "Nova"); H.R. Rep. 51–52 (discussing the harm noncarriage poses to local broadcasters in the form of "forced reductions in local news, public affairs, and other public interest programs"). S. Rep. No. 92, 102d Cong., 1st Sess. 59 (1991) ("S. Rep.") (citing potential audience loss by broadcasters who might be "unable to continue to provide local public service programming . . . [t]hat would . . . lead to diminished diversity of opinion").

Also telling is that a low-power station cannot qualify for carriage, unless it "meets all the obligations and requirements applicable to television broadcast stations . . . with respect to the broadcast of nonentertainment programming: programming and rates involving political candidates, election issues, controversial issues of public importance, editorials, and personal attacks; [and] programming for children". 47 U.S.C. § 534(h)(2)(B). In addition, the FCC must find that "the provision of such programming by such [low-power] station would address local news and informational needs which are not being adequately served by full power television broadcast stations". *Id.* Similarly, the FCC was required to promulgate rules addressing whether so-called home shopping

Moreover, the selection of the class of local broadcasters brings with it a number of additional content-related requirements. J.S. App. 51a-52a (Williams, J., dissenting) ("by virtue of provisions of law outside the 1992 Act, the term used by the Act to define the benefitted class *automatically* entails content requirements"). For example, FCC licensing regulations require a local broadcast television station to "provide programming responsive to issues of concern to its community". *In re The Revision of Programming and Commercialization Policies, Ascertainment Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, MM Docket No. 83-670, Report and Order, 98 F.C.C. 2d 1076, 1091-92 (1984). The FCC must also review, upon an application for a renewal of a broadcast station license, the extent to which a station "has served the educational and informational needs of children". 47 U.S.C. § 303b(a)(2). And, Congress has directed the FCC to promulgate regulations prohibiting the broadcasting of indecent programming during certain times of the day. Pub. L. No. 102-356 § 16(a), 106 Stat. 954 (1992) (to be codified at 47 U.S.C. § 303). Necessarily, Congress was aware of these content requirements when it gave preferential status to the class of local broadcasters and the must-carry provisions are thereby presumptively invalid. *See R.A.V. v. St. Paul*, 112 S.Ct. 2538, 2542 (1992); *see also Burson v. Freeman*, 112 S.Ct. 1846, 1855 (1992) ("distinguishing among types of speech requires that the statute be subjected to strict scrutiny"). Indeed, drawing any distinction between broadcasters and cable speakers on a class basis would lack purpose, unless Congress had weighed the relative value of their speech and found one, but not the other,

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channels served the public interest and therefore were entitled to must-carry status. *Id.* § 534(g)(2). The Commission has determined that such channels are entitled to carriage. *See In re Implementation of Section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992—Home Shopping Station Issues*, MM Docket 93-8, Report and Order, 8 F.C.C. Rcd. 5321 (1993). As a result, the must-carry provisions prefer the content of a local broadcast station that provides home shopping services over the content of a cable programmer like C-Span or The Learning Channel.

wanting.[18] For these reasons, the must-carry provisions are content-based and thus should be subject to strict scrutiny.

3. The Must-Carry Provisions Compel Speech and That Triggers Strict Scrutiny.

This Court has long recognized that compelled speech is no less constitutionally suspect under the First Amendment than compelled silence. *See Riley v. National Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 796-97 (1988) ("[t]here is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say").[19] In *Riley*, the Court explained the premise underlying the principle: "The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it." 487 U.S. at 790-91; *see also id.* at 791 ("government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers").

The majority below, however, adopted an exceedingly restrictive view of the suspicion with which government-compelled speech should be regarded, believing that compelled speech or a speech requirement that imposed upon a speaker's

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[18] As discussed further *infra* at pp. 32-33, Congress is allowed to impose content-related restrictions upon the broadcasting industry because of a unique characteristic—physical scarcity—that characterizes that industry. By imposing obligations upon cable operators to carry local broadcasters, Congress is, in effect, "bootstrapping" its ability to regulate the content of broadcasting into content regulation of cable television, a medium that is not characterized by physical scarcity.

[19] *See also Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985) ("freedom of . . . expression 'includes both the right to speak freely and the right to refrain from speaking at all'") (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974) ("[t]he Florida [right-of-reply] statute operates as a command in the same sense as a statute or regulation forbidding appellant to publish specified matter").

discretion to say that which he or she wished, "is to be strictly scrutinized only if it appears that the government has prescribed the content—either the message or the subject matter—of the speech to be spoken". J.S. App. 16a. This view misunderstands the nature of compelled speech. Compelled speech necessarily aims at content. *Riley*, 487 U.S. at 789 n.5 ("a statute regulating how a speaker may speak directly affects that speech"); *id.* at 795 ("[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech" and is "content-based"); *see also Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 9 (1986) (plurality opinion) ("compelled access . . . both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set").

It is for this reason that government-compelled speech is subjected to strict First Amendment scrutiny. *See Riley*, 487 U.S. at 800 ("government [may] not dictate the content of speech absent compelling necessity, and then, only by means precisely tailored"); *Pacific Gas & Elec. Co.*, 475 U.S. at 19 (plurality opinion) (forced right of access must be narrowly tailored to further compelling state interest). In such cases, government has rarely satisfied this heavy burden. *See, e.g., Riley*, 487 U.S. at 798 (invalidating compelled disclosure by professional fundraisers); *Pacific Gas & Elec. Co.*, 475 U.S. at 9 (plurality opinion) (finding access order unconstitutional); *Wooley*, 430 U.S. at 717 (prohibiting state from requiring license plates to display phrase "Live Free or Die"); *Tornillo*, 418 U.S. at 256-58 (holding right-of-reply statute unconstitutional); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 633-34 (1943) (invalidating compulsion to salute the flag).

The majority rejected this line of authority, choosing to rely on *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), rather than the cases cited above. J.S. App. 17a. However, the principles of *PruneYard* are not applicable to the facts of this case.

First, the state access requirement in *PruneYard* had a *de minimis* effect upon the mix of information available to the

public; the shopping center owner did not engage in any editorial activity in terms of deciding who should speak or what should be said in the open areas. *See PruneYard*, 447 U.S. at 88 (noting that statute in *Tornillo* involved an intrusion into the function of editors—a concern "obviously" not presented by the shopping center). In contrast, the must-carry provisions directly affect the mix of information available to the public by telling cable operators what programming they must provide to subscribers without regard to whether the operators want to provide that programming or whether their subscribers want to receive it. Moreover, the right of access in *PruneYard* did not deprive other speakers of the right to speak. However, the must-carry provisions do substantially impair the ability of cable programmers to reach their audiences.

Second, unlike cable operators, the shopping center owner in *PruneYard* voluntarily invited the general public into the center and its common area, rendering the area akin to a public forum. *See Pacific Gas & Elec. Co.*, 475 U.S. at 12 n.8 (plurality opinion) ("the open area of the shopping center into which the general public was invited . . . was, almost by definition, peculiarly public in nature"); *see also id.* at 21, 23 (Marshall, J., concurring) ("the shopping center in *PruneYard* bore a strong resemblance to the streets and parks that are traditional public forums"). The private systems of cable operators are not akin to a public forum, nor do cable operators extend an open invitation to the public to enter those systems. For these reasons, *PruneYard* does not apply and strict scrutiny, under the compelled speech cases cited above, should have been applied.

B. The Must-Carry Provisions Override Editorial Discretion and Should Be Struck Down Under *Tornillo*.

In addition to invalidating the Florida right-of-reply statute in *Tornillo* on the ground that the statute compelled speech, this Court also held that a legislative scheme may not infringe upon the functions of editors. 418 U.S. at 258 (statute "fails to clear the barriers of the First Amendment because of its intrusion into the function of editors"). Indeed, this Court indicated that a

statute intruding upon the editorial activity of the print press had never survived judicial review. *Id.* ("[i]t has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with [the] First Amendment").

The majority below avoided the first holding of *Tornillo* because of their mistaken belief, discussed above, that a content trigger was necessary and was here absent, and entirely ignored the second holding of *Tornillo*. On the basis of the latter holding alone, however, the must-carry provisions should be invalidated. Cable operators engage in editorial activity that parallels that engaged in by the print press. *See Leathers*, 111 S.Ct. at 1442 ("[c]able television provides to its subscribers news, information, and entertainment. It is engaged in 'speech' under the First Amendment, and is, in much of its operation, part of the 'press'."); *City of Los Angeles*, 476 U.S. at 494 ("through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, respondent seeks to communicate messages on a wide variety of topics and in a wide variety of formats").[20] By overriding an operator's discretion to select programming, the must-carry provisions

[20] *See also FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979) (cable operators possess a "significant amount of editorial discretion regarding what their programming will include"). Indeed, the FCC itself has recognized cable's coming of age:

> "As cable systems have expanded their services to include programming from other sources, the editorial role of cable operators has grown accordingly. This editorial function whereby cable operators select and tailor their program mix to meet viewer interests or other objectives is akin to that performed by publishers of print media. Like the *Quincy* court, we recognize that concomitant with the expanding role of cable systems in providing program services is the expansion of cable operators' editorial discretion which is protected by the First Amendment." *In re Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems*, MM Docket No. 85-349, 1 F.C.C. Rcd. 864, 880 at ¶ 120 (1986), *reconsid denied*, 2 F.C.C. Rcd. 3593 (1987).

prevent cable operators from offering programming that, in their judgment, is most deserving of carriage on their cable systems.[21]

Because there is no characteristic of cable comparable to the physical scarcity of the spectrum that justifies reducing the First Amendment protection to which cable is otherwise entitled, see *infra* at pp. 31-38, the must-carry provisions should be struck down. *See Turner Broadcasting System, Inc. v. FCC*, 113 S.Ct. 1806, 1807-08 (1993) (Rehnquist, C.J., in chambers) ("Congress plainly could not impose the must-carry provisions on privately owned newspapers").[22]

C. The Must-Carry Provisions Trigger Strict Scrutiny Because They Establish a Preference for the Speech of Broadcasters at the Expense of the Speech of Cable Programmers.

The must-carry provisions abrogate the First Amendment rights of cable programmers like HBO, as well as those of cable operators. Congress perceived that viewership for broadcast television had declined in response to competition from the increased quality and quantity of cable programming. *See* 1992 Cable Act § 2(a)(13) ("[a]s a result of the growth of cable television, there has been a marked shift in market share from broadcast television to cable television services"). Thus, Congress, by securing channel capacity for the speech of local

[21] Moreover, the must-carry provisions give broadcast television stations the right to dictate their channel position on cable systems and thereby permit even a single broadcast channel to prevent a cable operator from presenting the most attractive package of news, information and entertainment to its subscribers. *See* Collins Aff. ¶ 27 (J.A. 252); Rosenblum Aff. ¶ 7 (J.A. 321). And, must-carry broadcast stations must be included in the basic tier of service, which all cable subscribers must receive. 47 U.S.C. § 543(b)(7).

[22] Although the speech and editorial activities of cable operators and programmers parallel that of the print press and there is no characteristic particular to cable that can justify reducing its First Amendment protection from that of any other fully protected speaker, including the print press, the Court need not reach the question whether cable's First Amendment protection is co-extensive with that of the print press in order to find that strict scrutiny applies or to determine that the provisions at issue cannot survive judicial review.

broadcast television channels, preferred their speech over, and at the expense of, that of cable programmers—their direct competitors. The must-carry provisions thus represent an effort by government to prevent cable operators from replacing less watched broadcast channels with more popular cable programming services. A governmental scheme that restricts the speech of some in order to enhance the speech of others contravenes a bedrock principle of the First Amendment, and that this is done in the name of "diversity" is of no constitutional significance. *See Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (per curiam) ("the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment"); *see also Pacific Gas & Elec. Co.*, 475 U.S. at 14 (plurality opinion) (speaker has First Amendment right "to be free from government restrictions that abridge its own rights in order to 'enhance the relative voice' of its opponents") (citation omitted).[23] Moreover, the must-carry regime goes beyond merely enhancing the relative strength of broadcasters' voices—its effect is to silence completely the voices of cable programmers on certain cable systems.

Although the $1,000 per candidate expenditure limitation in *Buckley* sought to equalize participation in the political process and was "neutral as to the ideas expressed", *Buckley*, 424 U.S. at 39, the majority considered *Buckley* to be "a case in which the government sought, in effect, to suppress the expression of a meretricious idea", because there was "[i]mplicit . . . a Congressional judgment that the speech of those spending over $1,000 was not only 'louder' than those spending less than $1,000, but was also different and, more importantly, more

[23] Indicative of how government interference in the marketplace for speech is destined to go awry is the fact that home shopping services that are transmitted by broadcast stations are guaranteed carriage by the must-carry provisions, impairing the ability of cable operators to offer cable programming services such as C-Span, CNN, or The Learning Channel.

sinister". J.S. App. 18a.[24] Even if that were a proper reading of *Buckley*, Congress here, in much the same fashion, has determined that the speech of broadcasters is more worthy or deserving of favor than that of cable speakers. Indeed, in at least one critical respect, the must-carry provisions achieve their equalizing goal in a constitutionally more troublesome manner than the expenditure limitation in *Buckley*. There the limitation merely placed a cap upon the amount that all could spend. In sharp contrast, the must-carry provisions take opportunities to speak—in the form of channel capacity—away from cable speakers and give those rights to local broadcasters in order to equalize viewership levels. Thus, the majority erred in not applying exacting First Amendment scrutiny.

D. The Must-Carry Provisions Trigger Strict Scrutiny by Singling Out a Specific Segment of the Press.

The First Amendment's Free Speech and Free Press clauses recognize the indispensable societal interests served by an uninhibited press and therefore shield the press from untoward governmental interference. *See Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring) ("The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion.").[25] Government's guardianship of the public mind can take the form of heavy-handed regulatory schemes that unduly burden or entirely foreclose an ability to present public opinion and comment. *See City of Lakewood v.*

[24] Interestingly, by looking beyond the "neutral" justification asserted in *Buckley* to find that Congress was in fact regulating content, the majority engaged in an analysis quite unlike the approach it had taken with respect to the must-carry provisions.

[25] *See also Smith v. California*, 361 U.S. 147, 155 (1959) ("'[t]he fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States'") (quoting *Roth v. United States*, 354 U.S. 476, 488 (1957)); *see generally*, Potter Stewart, *Or of the Press*, 26 Hastings L.J. 631 (1975).

Plain Dealer Publishing Co., 486 U.S. 750, 757 (1988) ("a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint"); *Lovell v. City of Griffin*, 303 U.S. 444, 452-53 (1938) (invalidating municipal ordinance requiring a license to distribute literature by hand). However, it is no less suspect for government selectively to burden speech, especially when government exercises discretion to impose burdens specifically upon the press, or upon certain members of the press, leaving others free from those burdens. *See, e.g., Arkansas Writers' Project*, 481 U.S. at 228 ("singling out the press as a whole or targeting individual members of the press—poses particular danger of abuse by the State"); *Minneapolis Star*, 460 U.S. at 591 ("Minnesota's ink and paper tax violates the First Amendment not only because it singles out the press, but also because it targets a small group of newspapers").

Although regulation that singles out the press to impose burdens triggers heightened First Amendment scrutiny, this is not to say that the First Amendment proscribes any regulation of the press. Such is clearly not the law, nor should it be. As recognized in this Court's decisions, the First Amendment is not an obstacle to regulation that is generally applicable to all, including the press. *See, e.g., Lorain Journal Co. v. United States*, 342 U.S. 143, 155-56 (1951) (antitrust laws); *Associated Press v. United States*, 326 U.S. 1, 19-20 (1945) (same); *Associated Press v. NLRB*, 301 U.S. 103, 132-33 (1937) (labor laws). The principle is equally valid with respect to generally applicable taxation. *Leathers*, 111 S.Ct. at 1447 (upholding generally applicable sales tax applied to cable television). Legislation of general applicability does not implicate the "fear that a government will 'destroy a selected group . . . if it must impose the same burden on the rest of its constituency". *Minneapolis Star*, 460 U.S. at 585.

In contrast, the inherent political constraints associated with general applicability are absent when legislation targets the press, or certain members of the press, and imposes burdens upon them

from which others are exempt.[26] Principally for this reason, "differential treatment . . . suggests that the goal of the regulation is not unrelated to suppression of expression", *Minneapolis Star*, 460 U.S. at 585, and government must satisfy strict First Amendment scrutiny. *Id.* (State must "assert a counterbalancing interest of compelling importance that it cannot achieve without differential taxation"); *see also id.* at 592-93 ("[a] tax that singles out the press, or that targets individual publications within the press, places a heavy burden on the State to justify its action").

With the must-carry provisions, Congress has singled out cable operators—members of the press—and imposed a burden upon them, compulsory carriage of local broadcast stations on their cable systems, from which all others, including other segments of the press, remain exempt. Illustrating the precision with which Congress has taken aim, other multichannel video programming delivery systems that—as Congress recognized—compete with cable, including multichannel multipoint distribution ("MMDS") or "wireless cable" systems, satellite master antenna television ("SMATV") systems, and direct broadcast satellite systems ("DBS"), are not subject to the must-carry provisions.[27]

The majority below did not take issue with the argument that the must-carry provisions target a particular group of speakers, acknowledging that the provisions are "industry specific". J.S. App. 13a. Further, the majority recognized that a presumption of

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[26] *See Leathers*, 111 S.Ct. at 1443 ("[w]hen such a law applies only to a single constituency, however, it is insulated from this political constraint"); *Minneapolis Star*, 460 U.S. at 585 ("[w]hen the State singles out the press, though, the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened").

[27] Pursuant to § 25 of the 1992 Cable Act, however, DBS operators are obligated to dedicate between four and seven percent of their channel capacity "for noncommercial programming of an educational or informational nature". 47 U.S.C. § 335(b)(2). In the portion of Time Warner's civil action that was severed from its challenge to the constitutionality of the must-carry provisions, this provision was held to be unconstitutional. *See Time Warner Entertainment Company, L.P. v. FCC*, ___ F. Supp. ___, 1993 WL 393000 (D.D.C. Sept. 16, 1993).

unconstitutionality has been applied "to certain taxes that single out members of the press". *Id.* at 18a n.22. However, it rejected applying this presumption to §§ 4 and 5, because it was "unpersuaded that mandatory carriage of local broadcasters, as opposed to the specifically targeted differential taxes struck in *Minneapolis Star*, will so cripple cable operators as to leave them unable to exercise their own constitutionally conferred right to inform and entertain the public as they wish". *Id.* According to the majority, the inference of government censorship usually associated with targeted legislation did not arise in the must-carry context because "there are plausible legitimate goals that can be served by compelling broadcast carriage that cannot be served by any generally applicable means". *Id.*

The majority's reasoning is flawed. *First*, the application of strict scrutiny in *Minneapolis Star*, *Arkansas Writers' Project*, and *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), did not turn on a regulation extinguishing or even severely impairing the speaker's ability to reach the public. In fact, the taxes struck down in *Grosjean* (2%), *Minneapolis Star* (4%) and *Arkansas Writers' Project* (4%) imposed only slight, and certainly not crippling, burdens upon the newspapers involved. In contrast, the effect of the must-carry provisions is severe—taking over 40% of a typical cable system's capacity and requiring the dedication of that capacity to local broadcasters. *Second*, the impact of the must-carry provisions upon First Amendment activity is more significant than that of a tax. A tax diminishes net profitability and thereby only indirectly affects the ability to speak. In contrast, the effect of the must-carry provisions upon speech is direct and immediate: Cable operators are compelled to say that which they otherwise would not and all channels that Congress requires to be allocated to local broadcasters are lost to the speech of both cable operators and cable programmers. *Third*, the majority's characterization of the must-carry provisions as "industry specific antitrust legislation" or merely "economic regulation", when the industry targeted or regulated is a member of the press and the regulation affects speech, is not a rationale for declining to apply strict scrutiny—indeed, it is the precise reason to do so. *Fourth*, the majority's conclusion that the must-carry provisions plausibly serve legitimate goals that could not be served by generally applicable means is only relevant in scrutinizing a statute, but it is not relevant to determining what level of scrutiny should apply.[28]

II. THERE ARE NO CHARACTERISTICS OF CABLE THAT JUSTIFY REDUCING ITS PROTECTION UNDER THE FIRST AMENDMENT.

Cable systems today are an important, if not the principal, source of news, opinion, and other information for tens of millions of people throughout this country, and have supplanted in many ways the historical role of the newspaper. *See* 1992 Cable Act § 2(a)(3) (noting that nearly 56 million households subscribe to cable, over 60 percent of the households with televisions); § 2(a)(13) (noting the "marked shift in market share from broadcast television to cable television services"). In many respects, such as its ability to communicate news information from around the world as it occurs, cable television has capabilities unmatched by most other components of the press.

In *Joseph Burstyn*, this Court recognized that "the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary", 343 U.S. at 503 and that those principles "make freedom of expression the rule". *Id.* Finding "no justification . . . for making an exception to that rule", this Court held that expression through motion pictures was

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[28] In any event, generally applicable antitrust laws can be enforced against cable operators and they have been. *See, e.g., Sunbelt Television, Inc. v. Jones Intercable, Inc.*, 795 F. Supp. 333, 336 (C.D. Cal. 1992) (rejecting cable operator's First Amendment defense to local broadcast station's Sherman Act claim arising from noncarriage). If Congress believes generally applicable antitrust laws are inadequate to address certain competitive situations, it can either rewrite those generally applicable laws or it can selectively regulate the press, provided there is a compelling interest and the means are precisely tailored to further that interest. Here, quite unlike the generally applicable sales tax upheld in *Leathers*, Congress has selectively regulated the press. *See* J.S. App. 56a (Williams, J., dissenting) ("[w]hile the must-carry regulations are not in form taxes, they are in substance indistinguishable from a tax-subsidy combination—a tax falling exclusively on cablecasters, in an amount large enough to fund a subsidy for local broadcasters").

entitled to full protection under the First Amendment. *Id.* The framework is thus clear: Unless there is some characteristic peculiar to cable that justifies reducing its First Amendment protection, cable speakers should be given the same First Amendment rights as all other members of the media. As discussed below, there is no such characteristic.

A. Physical Scarcity Does Not Characterize Cable and Cannot Justify Reduced First Amendment Protection.

The only recognized rationale that has justified reduced First Amendment protection for a member of the media is the physical scarcity of the electromagnetic spectrum. *Red Lion*, 395 U.S. at 388-89. Unless government parcels out the spectrum, there would be the problem of interference: If all try to speak at once, no one can be heard. *Id.* at 388 ("only a tiny fraction of those with resources and intelligence can hope to communicate by radio at the same time if intelligible communication is to be had"). Thus, the reduced First Amendment status of broadcasting is the direct result of the umpiring role that spectrum scarcity necessitates. *Id.* ("Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.").[29]

It is uncontroverted on the record below, however, that space for cable systems is not characterized by scarcity comparable to the broadcast spectrum. *See* Federal Defs.' Resp. to Time Warner Entertainment Company L.P.'s Statement of Material Facts

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[29] Even in the context of broadcasting, the scarcity rationale has come under heavy attack from diverse quarters, *see, e.g., Telecommunications Research & Action Ctr. v. FCC*, 801 F.2d 501, 508-09 (D.C. Cir. 1986) (Bork, J.), *cert. denied*, 482 U.S. 919 (1987); Laurence H. Tribe, *American Constitutional Law* 1005-06 (2d ed. 1988); *In re Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees*, Gen. Docket No. 84-282, 102 F.C.C. 2d 143 (1985), and this Court has hinted that it may be willing to revisit this area, *FCC v. League of Women Voters*, 468 U.S. 364, 376 n.11 (1984). Revisiting that issue, however, is not necessary for reversal here.

Allegedly Not in Dispute ¶ 23 (J.A. 370) ("[d]efendants do not dispute . . . that there exist no absolute *physical* limitations to the construction of cable systems equivalent to the physical scarcity of the broadcast spectrum").[30] And, in virtually every community, it is physically possible to have multiple cable systems, a fact Congress apparently accepts, because it has prohibited exclusive franchising of cable operators. 47 U.S.C. § 541(a)(1) ("a franchising authority may not grant an exclusive [illegible]hise").

B. Economic Scarcity Cannot, as a Matter of Law, Reduce a Speaker's First Amendment Rights.

The principle of "economic scarcity" or the theory of "natural monopoly" cannot justify reducing the First Amendment status of cable. This theory asserts that the economic characteristics of the cable industry permit only one cable operator in a given area. As a result, the cable operator is able to act as a "bottleneck" or "gatekeeper" over television programming provided to subscribers via cable. By exercising that discretion, the theory goes, a cable operator can jeopardize the economic viability of programmers, particularly broadcast television stations.

The economic scarcity theory is flawed. *First*, Congress itself has recognized in the 1992 Cable Act that several multichannel video programming delivery systems other than cable (including MMDS, television receive-only satellite program distributors and DBS systems) provide reasonable substitutes for cable. 47

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[30] Lower courts have typically agreed. *See Quincy*, 768 F.2d at 1449 (scarcity doctrine "has no place in evaluating government regulation of cable television"); *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1404 (9th Cir. 1985) (cable not characterized by electromagnetic scarcity like broadcasting), *aff'd on narrower grounds*, 476 U.S. 488 (1986); *HBO*, 567 F.2d at 45 ("an essential precondition of that [broadcast] theory—physical interference and scarcity . . . is absent"). *But see Telesat Cablevision, Inc. v. City of Riviera Beach*, 773 F. Supp. 383, 396 (S.D. Fla. 1991) (finding physical scarcity in one particular community because there was little room on existing telephone poles and in existing utility ducts). However, in any location where existing space on poles and ducts is limited, there is nothing that stops would-be cable operators from adding space by, for example, erecting higher or additional telephone poles or laying cables underground.

U.S.C. § 522(12), as amended.[31] *Second*, the FCC itself has recently determined that cable operators do not possess undue power over local programming. *See In re Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992—Horizontal and Vertical Ownership Limits*, MM Docket No. 92-264, Second Report and Order ¶ 17 (adopted September 23, 1993; released October 22, 1993) ("Second Report and Order §§ 11 and 13") ("the record suggests that cable operators do not possess undue power in the local programming or advertising markets where they face competition from local broadcast stations and other multichannel program distributors"). *Third*, Congress has found that broadcast television stations are the most popular programming services on cable systems. *See* 1992 Cable Act § 2(a)(19). It defies logic that cable operators would exercise their purported "gatekeeper" status to any notable extent if the result would be to deprive their subscribers of the most popular programming.[32] *Fourth*, even if cable operators were to exercise their discretion not to carry a broadcast television station, the public can receive the signal of that station over the air.

Even assuming, however, that economic scarcity did characterize the cable industry, this rationale fails as a matter of law to justify a reduction in First Amendment protection. Similar arguments about economic concentration were propounded in

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[31] Moreover, although Congress has indicated that the expense of constructing a cable system may be a factor in whether there is more than one cable operator for a given geographic area, see 1992 Cable Act § 2(a)(2), it apparently does not regard it as an insurmountable factor, for the 1992 Cable Act regulates the provision of programming to cable overbuilders (cable companies who run their cables beside the cable of another cable company and offer subscribers a choice of being served by either company), 47 U.S.C. § 548, and prohibits exclusive franchises, 47 U.S.C. § 541(a)(1). *See also* S. Rep. 14 ("the Committee believes that local franchising authorities should be encouraged to award second franchises").

[32] Time Warner does not concede that cable operators are monopolists, *i.e.*, have power over price and entry. However, even a monopolist has the incentive to, and can, generate more revenue by selling services for which there is a higher demand.

Tornillo; there, the advocates of a right of access to the press argued: "[n]ewspapers have become big business"; "[c]hains of newspapers, national newspapers, national wire and news services, and one-newspaper towns, are the dominant features of a press that has become noncompetitive and enormously powerful"; and that there existed a "concentration of control of [media] outlets to inform the public". *Tornillo*, 418 U.S. at 249-50 (footnote omitted).[33] In short, the argument asserted: "The First Amendment interest of the public in being informed is said to be in peril because the 'marketplace of ideas' is today a monopoly controlled by the owners of the market", and this monopoly control required "government to take affirmative action". *Id.* at 251.

This Court flatly rejected the argument; any right of access imposed by government "at once brings about a confrontation with the express provisions of the First Amendment". *Id.* at 254. Under the First Amendment, government cannot compel access and cannot impinge on the editorial discretion of speakers, even if those speakers possess monopoly characteristics. *Id.* at 258.[34]

The majority below distinguished *Tornillo* on this point, believing that this Court had rejected the economic scarcity

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[33] According to the opinion in *Tornillo*, one-newspaper towns were the rule, and effective competition existed in only four percent of the nation's large cities. 418 U.S. at 249 n.13. Economic factors foreclosed the obvious solution—additional newspapers. *Id.* at 251 ("the same economic factors which have caused the disappearance of vast numbers of metropolitan newspapers, have made entry into the marketplace of ideas served by the print media almost impossible") (footnote omitted).

[34] This is not to say that government could not act against otherwise unlawful economic concentration, for, as previously discussed, *supra* at p. 28, members of the press are not shielded from generally applicable laws, like the antitrust laws. *See, e.g., Associated Press*, 326 U.S. at 19-20. Yet, even in *Associated Press*, this Court took care to point out that the remedy imposed by the district court did not require any association member to publish "anything which 'reason' tells them should not be published". *Id.* at 20 n.18; *see also Tornillo*, 418 U.S. at 254 (noting that the Court in *Associated Press* "carefully contrasted the private 'compulsion to print' called for by the Association's bylaws with the provisions of the District Court decree").

argument because the speech compelled was triggered by the content of the newspaper's speech and was compelled in a political context. J.S. App. 22a n.25. However, nothing in *Tornillo* limits its rejection of the economic scarcity argument to a particular context. Indeed, if the majority's rationale were accurate, government could force newspapers to print local columnists, because that requirement would be outside a "political" context. This is simply incorrect. *See Turner Broadcasting System*, 113 S.Ct. at 1807-08 (Rehnquist, C.J.). Moreover, *Tornillo*'s holding on economic scarcity does not depend upon a content trigger. As noted above, *Tornillo* does not even support a reading that a content trigger is necessary to invoke strict scrutiny—interference with the editorial function is sufficient. 418 U.S. at 258.[35] Thus, economic scarcity, or its namesake—the "bottleneck" theory—cannot, as a matter of law, justify reducing cable television's First Amendment protection.

C. Subsidy or Condition-Benefit Principles Are Not Implicated by the Must-Carry Provisions and Cannot Justify Reducing Cable's First Amendment Protection.

This Court has indicated that, although government may bestow its benefits upon some, it need not bestow those benefits upon all, even when it acts to promote speech. *See, e.g., Rust v. Sullivan*, 111 S.Ct. 1759 (1991). It may also be said that government may impose conditions upon the benefits it bestows,

[35] Although the majority gave lip service to this Court's ruling that an economic impediment to access cannot justify compelled speech, J.S. App. 22a n. 25, it then justified that compulsion "in order to overcome technological, structural, and historic, as well as economic factors creating a bottleneck". *Id.* There are no technological factors, such as spectrum scarcity, which would justify the intrusive speech regulation here, see *supra* at pp. 32-33, and the other factors are the very factors that the majority itself recognized had been determined to be insufficient to justify compelled speech in *Tornillo*. Whatever the circumstances or the factors that create a purported "bottleneck"—here, the bottleneck purportedly being that in most franchised territories there is only one cable operator – the result is the same condition as the one newspaper town in *Tornillo*. The analysis applied should thus be no different.

provided the conditions relate to the award of the benefit and the conditions are reasonable and unambiguous. *Id.* at 1774-76.

These arguments do not save the must-carry provisions. Foremost, the must-carry provisions do not purport to, and do not, in fact, grant a subsidy to cable operators. Nor is there any other benefit that the Federal government provides to cable operators for which the must-carry provisions conceivably could be construed as a related condition.[36]

Although cable operators do make use of public rights-of-way, it is not a benefit provided by the Federal Government. *Local* governments generally own those rights-of-way. The Federal government should not be allowed to impose a condition upon municipal authorization to use those rights-of-way. Moreover, the concept of "benefit" seems wholly inapposite when one recognizes that cable operators are allowed access only in exchange for substantial payments in the form of franchising fees, typically 5% of a cable operator's gross revenues. *See* 47 U.S.C. § 542(b). Finally, the use of rights-of-way cannot justify any and all regulation of cable, particularly regulation impinging upon cable's First Amendment rights. Regulation of cable based on its use of rights-of-way must be related to the burden imposed by such use. For example, a municipality could impose reasonable

[36] Consider, for example, two often cited examples of "benefits" given to cable by the Federal government. The first, the compulsory license, 17 U.S.C. § 111, which allows cable operators to provide their subscribers with copyrighted broadcast programming if they pay royalty fees, can scarcely be termed a benefit for cable, because, prior to its enactment, under this Court's decision in *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974), cable operators were not subject to any royalty liability. The second alleged benefit, the Pole Attachment Act, 47 U.S.C. § 224, prevents utilities from discriminating against cable operators with respect to their use of poles, ducts and rights-of-way and gives the FCC certain powers to ensure that rates, terms and conditions of pole attachment agreements are "just and reasonable", but nonetheless, the result is that cable operators pay for the purported benefit. Thus, cable's purported benefits are entirely unlike the direct financial assistance presented in *Rust*. Moreover, it is difficult to perceive how the must-carry provisions could be described as a condition related to the receipt of either of these purported "benefits", such that a cable operator could be said knowingly to have consented to the imposition of the condition in exchange for the benefit.

restrictions upon the construction of cable systems, but it cannot prescribe whose messages run through a cable and must be received in the homes of subscribers. For these reasons, a subsidy or condition-benefit analysis cannot justify reducing cable's First Amendment status in analyzing the must-carry provisions.[37]

III. THE GOVERNMENT'S JUSTIFICATIONS FOR SECTIONS 4 AND 5 REST ON FACTUAL PREMISES THAT DO NOT EXIST AND THAT, AS A MATTER OF LAW, ARE ILLEGITIMATE.

Whether exacting scrutiny or the less rigorous *O'Brien* test applies, some governmental interest sufficient to justify the restriction on speech must be identified. If exacting scrutiny applies, the governmental interest must be compelling; under *O'Brien*, the interest need be substantial. Congress has identified two interests as justifying the must-carry provisions: the preservation of local broadcasting and furthering a diversity of voices in the marketplace for speech. *See* S. Rep. 58.[38] If the majority had properly scrutinized these purported interests, and not, as it did, accorded an unwarranted level of deference to Congress's findings—particularly given the infringement of First Amendment rights—the unsubstantiated nature of these interests would have been apparent and held insufficient, even under *O'Brien*.

A. Congressional Findings, When Used to Justify an Abridgment of First Amendment Rights, Must Be Subjected to Meaningful Judicial Review.

Although this Court has recognized the deference owed to Congress, see *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 569 (1990) (weight should be accorded to expertise of agency and fact-finding of Congress with respect to "'complex' empirical

[37] Moreover, any application of the condition-benefit rationale would disregard the claims of cable programmers, who do not burden public rights-of-way and are not recipients of governmental largesse in any form.

[38] A third interest, the promotion of fair competition in the video marketplace, see S. Rep. 58, must fairly be considered subsumed by the interest in preserving local broadcasting and in furthering diversity.

question"), the Court has equally recognized the unique role of the judiciary as the final arbiter of the Constitution. *Id.* ("we do not defer to the judgment of the Congress and the Commission on a constitutional question") (citation and internal quotation marks omitted). Moreover, this Court has made clear that meaningful judicial review in the First Amendment context requires searching scrutiny of the legislative findings upon which the speech restrictions rely. *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 129 (1989) ("whatever deference is due legislative findings would not foreclose our independent judgment of the facts bearing on an issue of constitutional law"); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978) ("[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake").[39] A failure to engage in such an inquiry jeopardizes the limit that the First Amendment imposes upon the legislature. *Landmark*, 435 U.S. at 844 (were it not for the judicial function, "the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified").[40]

[39] Although "[a] legislature appropriately inquires into and may declare the reasons impelling legislative action", the judiciary must analyze "whether the specific conduct charged falls within the reach of the statute and if so whether the legislation is consonant with the Constitution". *Landmark*, 435 U.S. at 843.

[40] It would be especially incongruous for a statutory scheme that triggers strict scrutiny, like the must-carry provisions, to escape that scrutiny merely because Congress has made certain "findings". The danger that a legislature can "find" certain facts to support the constitutionality of a policy should be the impetus for searching judicial review. Otherwise, "a legislature could make a statute constitutional simply by 'finding' that black is white or freedom, slavery", *Lamprecht v. FCC*, 958 F.2d 382, 392 n.2 (D.C. Cir. 1992) (Thomas, J.), and judicial review would be nothing more than "an elaborate farce", a mere rubber stamp on legislative enactments. *Id.* The must-carry provisions are illustrative of the danger. *See* J.S. App. 67a (Williams, J., dissenting) ("[i]f findings as scantily connected to the conclusion as these can justify must-carry, then the door is open—even in the area of First Amendment rights—to exercise of the most naked interest-group preferences").

The majority below accorded Congress unwarranted deference. There was not limited review of Congress's fact-finding; there was virtually none at all. Despite considerable evidence that local broadcasting was not in peril and that the congressional findings were largely unsubstantiated, the majority, "unwilling to second-guess Congress' determination", J.S. App. 27a, concluded that "Congress . . . did not agree". *Id.* at 24a. The refusal to undertake meaningful judicial review was error.

B. Local Broadcast Television Is Not Imperiled.

The purported threat to local broadcast television is based upon Congress's perception that broadcast television is in economic decline and that its future has been jeopardized by the growth of cable. *See* 1992 Cable Act § 2(a)(13) (noting "marked shift in market share from broadcast television to cable television" as a result of the growth of cable television); § 2(a)(16) (stating that "the economic viability of free local broadcast television" will be "seriously jeopardized"). If the majority had engaged in any independent review of these findings, the supposed threat to local broadcast television would have been exposed for what it is—mere chimera. Contrary to Congress's supposition, the growth of cable has not come at the expense of broadcast television; rather, broadcast television has been flourishing since the FCC's must-carry regime was struck down in 1985.[41]

Because it relied on Congress's unduly gloomy assessment of the state of the broadcast industry, the majority below did not review the assumptions underlying the premise that local broadcasting was in jeopardy. *First*, Congress perceived that cable had a competitive incentive to deny carriage to local broadcasters, because cable and broadcast television compete for

[41] As noted by Judge Williams, appellants demonstrated below that the number of commercial broadcast stations has increased by 22% (from 919 in 1986 to 1,118 in 1992) (J.S. App. 62a), the number of noncommercial educational broadcast stations increased by 15% (from 316 in 1986 to 363 in 1992) (*id.*) and the number of cities receiving broadcast television has increased by 16% (from 514 cities in 1985 to 594 in 1992) (*id.*).

advertising revenue.[42] *Second*, Congress believed that cable had the means to act upon this incentive by dropping or repositioning local broadcast stations, thereby depriving such stations of a substantial portion of their audience. *Third*, Congress found that A/B input selector switches, which allow cable subscribers to choose between receiving input over the cable system and receiving broadcast signals over the air by antenna, are not effective. Putting these three assumptions together, Congress concluded that the viability of local broadcast stations was in jeopardy without a requirement for carriage on cable systems. These assumptions, however, are all unsubstantiated and, taken together, offer nothing more than speculation as a basis for assisting local broadcasters by restraining cable.

1. The Assumption Concerning Cable's Incentives Fostered By Competition for Advertising Revenue.

The assumption that cable has the incentive to deny carriage to local broadcasters because of their competition for advertising revenue suffers from a critical flaw: Advertising revenue represents but a tiny fraction of the revenue earned by cable operators. In fact, as Judge Williams noted in dissent, it is uncontroverted that the ratio of revenue from subscription fees to advertising revenues is 25 to 1. J.S. App. 66a. Cable's overwhelming incentive, then, is to attract subscribers, not advertisers. It is specious to suggest that cable operators would risk reducing their greatest source of revenue, subscription fees, by denying carriage to popular programming like broadcast television stations, in exchange for a minuscule gain in additional advertising revenues. Indeed, the FCC itself has just concluded in a rulemaking proceeding under the 1992 Cable Act that cable operators "do not possess undue power" in local advertising markets. Second Report and Order §§ 11 and 13, ¶ 17.

[42] *See* § 2(a)(14) ("Cable television systems and broadcast television stations increasingly compete for television advertising revenues"); § 2(a)(15) (citing economic incentive not to carry broadcast signals).

2. Cable's Ability to Act on Its Incentives.

Congress's apparent belief that cable operators would act upon this purported competitive incentive is equally unsound. The conclusion that broadcasters were in danger of being dropped was based on a single study that indicates that 80% of cable operators had never dropped a single broadcast station.[43] Furthermore, only 10% of cable operators reported dropping even one station.[44] The study also failed to provide any information regarding the time period over which any drops occurred or the total number of broadcast signals that *were* being carried on cable systems.[45] It certainly is not a basis to conclude that cable operators might act upon their purported incentive by dropping broadcast television signals. Indeed, the legislative record indicates that Congress "has not found that cable systems are engaging in a widespread pattern of denying carriage of local television stations". H.R. Rep. 52.[46]

3. The A/B Switch Finding.

At the time of *Century*, the FCC strongly advocated use of an A/B switch in lieu of must-carry requirements, because there

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[43] *Cable System Broadcast Signal Carriage Report*, FCC Staff Report, Policy & Rules Division of the Mass Media Bureau, September 1, 1988, at 13.

[44] *Id.*

[45] The study indicated that, of the 4,303 cable systems disclosing data, 869 had dropped one or more stations, for a total of 1,820 instances of drops. *Id.* But these figures represented only about one-half of the over 8,000 cable systems in the nation, and from these figures Congress extrapolated to conclude that 1,700 cable systems had dropped broadcast stations, and that there were a total of 3,640 instances of drops. H.R. Rep. 52.

[46] In addition, the record below shows that, even in the absence of must-carry rules, 98% of broadcast stations that would have been entitled to mandatory carriage were being carried voluntarily by cable operators in 1988, and the number of broadcast stations carried by cable operators *increased* 7% between 1985 and 1990. Klein Aff. ¶¶ 12-13 (J.A. 305). Also, the average cable system in 1990 carried over eight local broadcast channels. Klein Aff. ¶ 13 (J.A. 305). When viewed in the context of approximately 64,000 instances of carriages of broadcast signals, 3,600 instances of drops do not tend in the least to support the conclusion that local broadcast television is in imminent peril as a result of noncarriage.

cannot be a threat to local broadcasting if cable subscribers can freely change between reception over the air and reception via cable. The majority did not analyze the critical A/B switch finding, but rather deferred to Congress, because Congress had found that "viewers tended not to use them". J.S. App. 27a. However, Congress ignored the undisputed fact that viewers have never had to use input switching devices. As discussed above, popular local broadcast programming consistently has been available on cable systems, with or without must-carry requirements. Moreover, Congress's perception of viewer inertia, which is not based upon any reliable surveys or studies, flies in the face of "'[c]ommon sense'", which "'suggests that consumers who want to receive an off-the-air channel will quickly observe that they may need to purchase (or reconnect) antennas should their cable system cease offering their favorite broadcast stations'". *Century*, 835 F.2d at 301 (citation omitted).[47] The A/B switch finding is thus unsubstantiated.

Thus, Congress's conclusion that broadcast television is in imminent jeopardy was without basis. For this reason, the purported interest in preserving local broadcasting is not sufficient to support the constitutionality of the must-carry provisions under *O'Brien*.[48]

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[47] To some extent, the unsupported finding by Congress on viewer inertia here parallels the Commission's unsubstantiated belief rejected in *Century* that it would take five years to educate consumers in the use of A/B switches. 835 F.2d at 302.

[48] The result is *a fortiori* if strict scrutiny applies. Moreover, the preservation of local broadcasting is not a compelling governmental interest sufficient to overcome strict scrutiny. This Court has typically recognized an interest as compelling when the ability to exercise a fundamental right is endangered or when norms of societal behavior would be jeopardized, not for an economically protectionist regime. *See, e.g., Burson*, 112 S.Ct. at 1852 (concluding that "State has a compelling interest in ensuring that an individual's right to vote is not undermined by fraud in the election process"); *Simon & Schuster, Inc.*, 112 S.Ct. at 510 (noting State's compelling interest "in ensuring that criminals do not profit from their crimes"); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 659 (1990) (finding compelling the governmental interest in preventing corruption in elections). The notion that the preservation of local broadcasting constitutes a compelling interest sufficient to justify

C. There Is No Need to Further a Diversity of Voices, and Congress Cannot, in Any Event, Legislate in the Name of Diversity When It Does So By Burdening the Speech of Some Speakers in Order to Promote the Voice of Others.

Congress also relies, in part, upon an interest related to the preservation of local broadcasting—increasing the diversity of programming on cable systems. However, this purported interest also cannot justify the must-carry provisions. The proliferation of cable programmers and local origination programming of cable operators has already created a strikingly diverse array of programming services.[49] The must-carry provisions ignore the diversity achieved by cable programmers and impair—indeed, stifle—the ability of those services to obtain access to audiences by compelling carriage of local broadcasters and reducing the cable operator's discretion to provide subscribers with those services. *See* J.S. App. 58a (Williams, J., dissenting) ("[i]t is far from clear that giving local broadcasters an entitlement to be carried will increase program diversity *at all*"; "the must-carry rules may have little effect, but where they have any, it will only be to replace the mix chosen by cablecasters—whose livelihoods depend largely on satisfying audience demand—with a mix derived from congressional dictate"). Thus, the must-carry provisions prefer the homogenous programming of broadcast television to the array of programming provided by cable. *See*

restricting the speech rights of operators and programmers can find no support in the First Amendment, which is a limit on government's power, not a source. *See infra* at p. 45.

[49] *See* Collins Aff. ¶ 7 (J.A. 242) (noting that cable operators may select from a vast array of programming services, including, but not limited to, C-Span I and II, Cable News Network ("CNN"); Courtroom Television Network; Black Entertainment Television; Galavision; The Discovery Channel; Mind Extension University; ESPN; Sportschannel; USA Network; and Turner Network Television); Klein Aff. ¶ 6 (J.A. 303) (noting that there are now 80 national cable programming services compared to 4 such services in 1976 and that there are now also an additional 48 regional cable programming services).

Collins Aff. ¶ 2 (J.A. 241) (noting that a former FCC Chairman has termed broadcast television the "Vast Wasteland").[50]

Even assuming *arguendo* that the must-carry provisions do implicate a diversity rationale and that this rationale is a sufficiently important governmental interest, the must-carry provisions advance the diversity agenda in a constitutionally impermissible manner—by burdening the speech of some in order to promote those government has favored. Although the majority below apparently accepted the principle that Congress has the right to legislate in furtherance of a diversity agenda, the principle is problematic.

First, the First Amendment is a constraint on Congress's power; it is not a source of power. *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 112 S.Ct. 2701, 2716 (1992) (Kennedy, J., concurring). By permitting Congress to legislate in the name of "diversity", the majority ratifies the transformation of what is a bulwark against governmental power into a weapon to be wielded at government's whim. *Second*, if Congress has determined that the marketplace for speech lacks sufficient "diversity", then Congress has, necessarily, examined and evaluated the existing mix of voices in the marketplace and found it wanting—a content-based judgment. *Third*, even assuming that a diversity goal legitimately may be advanced consistent with the First Amendment, this Court has held that government cannot pursue that interest at the cost of abridgment of others' rights to free speech.[51]

[50] In addition, the diversity rationale necessarily assumes that local broadcasting is in jeopardy, but, as shown above, this is a flawed premise.

[51] *See Pacific Gas & Elec. Co.*, 475 U.S. at 12 (plurality opinion) ("offer[ing] the public a greater variety of views" cannot be accomplished at the expense of inhibiting the expression of others or directly burdening other points of view); *Buckley*, 424 U.S. at 48-49 ("the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment"); *Tornillo*, 418 U.S. at 248, 256-58 (interest in ensuring that "a wide variety of views reach the public" could not justify the abridgment of newspapers' free speech).

IV. THE MUST-CARRY PROVISIONS ARE NEITHER PRECISELY NOR NARROWLY TAILORED TO FURTHER ANY GOVERNMENTAL INTEREST.

Even if the government demonstrates that the must-carry provisions promote a sufficiently important or compelling governmental interest, it must also prove that these provisions are sufficiently tailored to further that interest. In the area of the First Amendment, this Court has recognized that government cannot further its legislative ends with imprecision. *Consolidated Edison Co. of New York, Inc. v. Public Serv. Comm'n*, 447 U.S. 530, 540 (1980) (government must show that regulation is "a precisely drawn means of serving a compelling state interest"); *NAACP v. Button*, 371 U.S. 415, 438 (1963) ("Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.") (citations omitted). Even under *O'Brien*, this Court has indicated that regulation may not be "substantially broader than necessary to achieve the government's interest", *Ward*, 491 U.S. at 800, and that the presence of "numerous and obvious less-burdensome alternatives to the restriction . . . is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable". *Discovery*, 113 S.Ct. at 1510 n.13.[52]

The majority, however, in applying the *O'Brien* standard, stripped away *any* tailoring requirement whatsoever. In rejecting the less restrictive alternatives put forth by appellants, the majority stated that "[i]mportantly . . . under *O'Brien*, the government is not required to settle for means that serve its interests less effectively merely because an alternative might be less burdensome" and concluded that "the must-carry provisions

[52] The tailoring test articulated in *Discovery* cannot be considered more rigorous than the *O'Brien* test. First, *Discovery* involved commercial speech, which has been recognized to have somewhat less protected status under the First Amendment. Second, this Court's decisions have indicated that the "reasonable fit" tailoring test applicable in the commercial speech context is essentially equivalent to the "narrowly tailoring" requirement of *Ward*. *See Board of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 477 (1989).

are sufficiently, if not surgically, tailored". J.S. App. 26a. Because Congress had found that "prophylactic measures were necessary", *id.* at 27a, the majority was "[o]nce again . . . unwilling to second-guess Congress' determination that the must-carry provisions are necessary to accomplish its objective". *Id.*

This analysis was wholly insufficient, and, as a result, the majority failed to recognize a critical fact—that the must-carry provisions simply do not further the purported interests in preserving local broadcasting or promoting diversity. In any event, there are obviously less-burdensome alternatives. Finally, by their terms, the must-carry provisions are overbroad.

A. The Must-Carry Provisions Do Not Further the Purported Governmental Interests.

Imposing upon cable operators requirements to carry local broadcast channels does not advance the purported governmental interests in preserving local broadcasting or in promoting diversity. These interests reflect Congress's concern with the "marked" shift in viewership levels from broadcast television stations to cable, 1992 Cable Act § 2(a)(13), and the perception that broadcast television stations would fail without sufficient viewership. However, the must-carry provisions do not secure viewership for broadcast channels; they secure access to cable systems. As Congress itself has recognized, access has not been a problem. *See* H.R. Rep. 52 (noting that there is no widespread pattern of denying carriage to broadcast stations). This suggests that the problem in broadcasting, if there is one, is not that broadcast stations are unavailable to cable viewers, but that viewers simply do not wish to watch them to the degree they once did. The must-carry provisions do not, and cannot, solve that problem. Rather, this is something an unregulated marketplace for video programming should resolve.[53]

[53] As discussed *supra* at pp. 44-45, the must-carry provisions actually undermine the purported diversity agenda.

B. There Are Obviously Less Burdensome Alternatives to the Must-Carry Provisions.

Even assuming that the must-carry provisions do further the purported governmental interests, this Court made clear in *Discovery* that it is relevant to an assessment of the reasonableness of the "fit" between legislative ends and means if obviously less-burdensome alternatives exist. 113 S.Ct. at 1510 n.13. Because there are at least two obviously less-burdensome means of advancing the purported governmental interests in preserving local broadcasting and promoting diversity, the must-carry provisions should be invalidated, even under *O'Brien*.

First, the government could have advanced goals of preserving local broadcasting and diversity by directly subsidizing the speech of broadcasters. *See, e.g.*, J.S. App. 61a (Williams, J., dissenting) ("Congress is free to subsidize favored speech if the market is too weak to sustain the quantity that Congress seeks"). A direct subsidy would not promote broadcasters' speech by curtailing the speech of others, and would not run afoul of the First Amendment. *Second*, the A/B input selector switch, discussed *supra* at pp. 42-43, represents another less-burdensome means of furthering an interest in preserving local broadcasting—a means strongly advocated by the FCC in lieu of must-carry requirements at the time of *Century*.[54] Given such obviously less-restrictive alternatives, the must-carry provisions are not sufficiently tailored.[55]

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[54] Congress could also impose technical requirements upon television manufacturers requiring them to supply with television sets at the time of sale apparatus adequate to receive over-the-air signals. Elsewhere in the 1992 Cable Act, Congress has imposed similar requirements. *See* 47 U.S.C. § 544a(c)(2)(A) (requiring FCC to promulgate technical requirements with which television sets and video cassette recorders must comply in order to be sold as "cable compatible" or "cable ready").

[55] In dissent, Judge Williams suggested that the leased access scheme created by § 612 of the 1984 Cable Act, 47 U.S.C. § 532, which requires dedication of up to 15% of a cable operator's channel capacity to unaffiliated programmers, also represented a less burdensome alternative. J.S. App. 59a. However, the constitutionality of leased access was not before Judge Williams. Rather, he was merely suggesting what might be a closer "fit" to the interests

C. By Their Terms, the Must-Carry Provisions Are Fatally Overbroad.

The must-carry provisions, by their terms, are fatally overinclusive. *First*, although purportedly seeking to protect the competitive viability of broadcast stations and to ensure their continued availability, §§ 4 and 5 provide every local broadcast station with a right to carriage without regard to whether the particular station is imperiled.[56] *Second*, the must-carry provisions are not sufficiently tailored to further any legislative goal tied to the preservation of "localism", because all local broadcast stations indiscriminately receive the right to carriage.[57] Indeed, this overinclusiveness is especially troublesome, because cable programming that may be displaced is often more consistent with "localism". Time Warner Cable, for example, offers subscribers "New York 1", Collins Aff. ¶ 4 (J.A. 241), a 24-hour local news programming service, and there are numerous local and regional programming services. Klein Aff. ¶ 4 (J.A. 302).[58]

Because the must-carry provisions entirely fail to further their purported ends or, even when they conceivably might do so,

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asserted. Further, even he acknowledged that measures such as § 612 "are subject to challenge under *Tornillo*, as they replace the cablecaster's speech with that of others". *Id.*

[56] The rules in *Quincy* were similarly flawed. 768 F.2d at 1461 ("[t]his blanket protection, by sweeping even the most financially secure broadcaster under the rules' beneficent mantle, reaches well beyond the rules' asserted objective of assuring that the advent of cable technology not undermine the financial viability of community-oriented, free television").

[57] This also is an infirmity from which the *Quincy* rules suffered. *Id.* at 1460 ("the rules indiscriminately protect each and every broadcaster regardless of the quantity of local service available in the community and irrespective of the number of local outlets already carried by the cable operator").

[58] In fact, the requirements imposed upon some cable operators by § 5 to import the signal of a noncommercial station from a distant community could never advance the goal of preserving local broadcasting. It reflects instead a content-based, and highly paternalistic congressional judgment that people should watch government supported noncommercial broadcast stations.

restrict far more speech than is constitutionally permissible, they should be invalidated.

CONCLUSION

For the foregoing reasons, §§ 4 and 5 of the 1992 Cable Act, 47 U.S.C. §§ 534 and 535, should be declared unconstitutional in their entirety and the decision of the three-judge district court below should be reversed.

November 9, 1993

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,
v.
FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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QUESTION PRESENTED

Whether Congress, consistent with the First Amendment, may require operators of cable television systems to devote more than one-third of their channels to a special class of video programmers whose programming is favored by Congress—local broadcast stations—even though the direct effect of such requirement is to cause cable operators to drop or not carry the speech of unfavored video programmers, even though cable operators would prefer to carry a different mix of programming than that mandated by the government, and even though the provisions operate without regard to—and often in contravention of—the preferences of cable subscribers.

PARTIES TO THE PROCEEDINGS

Five separate civil actions were consolidated in the district court.

Plaintiffs:

The plaintiffs in each civil action brought in the district court are identified below.*

Civil Action No. 92-2247:

Turner Broadcasting System, Inc.
Arts & Entertainment Network
Black Entertainment Television, Inc.
E! Entertainment Television, Inc.
Hearst/ABC-Viacom Entertainment Services
International Family Entertainment, Inc.
National Cable Satellite Corporation
QVC Network, Inc.
The Travel Channel, Inc.
USA Networks

Civil Action No. 92-2292:

Daniels Cablevision, Inc.

Civil Action No. 92-2494:

Time Warner Entertainment Company, L.P.

Civil Action No. 92-2495:

National Cable Television Association, Inc.

Civil Action No. 92-2558:

Discovery Communications, Inc.
The Learning Channel, Inc.

Plaintiff-Intervenors:

Atlanta Interfaith Broadcasters, Inc.
National Interfaith Cable Coalition, Inc.

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* Appellants' Rule 29.1 disclosure statements are set forth in the Appendix to the Jurisdictional Statement at 111a-17a.

Federal Defendants:

Federal Communications Commission
United States of America

Defendant-Intervenors:

Association of America's Public Television Stations
Association of Independent Television Stations, Inc.
Community Broadcasters Association
Consumer Federation of America
The Corporation for Public Broadcasting
Sandra Engle
The International Association of Machinists and Aerospace Workers, AFL-CIO
International Broadcasting Network
The International Television Broadcasting, Inc.
Morningstar Communications
National Association of Broadcasters
National Council of Senior Citizens
National Rural Telecommunications Cooperative
Office of Communication of the United Church of Christ
Paging Associates, Inc.
The Public Broadcasting Service
Sherjan Broadcasting Co., Inc.
Triplett & Associates, Inc.
TV 14, Inc.
TV 58 St. Louis, Inc.
Zantech, Inc.

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Staff Report, Policy and Rules Division of the Mass Media Bureau, *Cable System Broadcast Signal Carriage Survey Report* (Sept. 1, 1988)	43
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

No. 93-44

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,
v.
FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF FOR APPELLANTS TURNER BROADCASTING SYSTEM, INC., *ET AL.*

OPINION BELOW

The opinion of the three-judge United States District Court for the District of Columbia is reported at 819 F. Supp. 32. It is reprinted in the Appendix to the Jurisdictional Statement ("J.S. App.") at 1a-72a.

JURISDICTION

The judgment of the district court was entered on April 8, 1993. Timely notices of appeal were filed in the district court on May 3, 1993. *See* J.S. App. 73a-81a. This Court noted probable jurisdiction on September 28, 1993.

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1253. Section 23 of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. § 555(c)(1), requires that challenges to Sections 4 and 5 of the Act "be heard by a district court of three judges convened pursuant to [28 U.S.C. § 1253]."

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. §§ 534 & 535, together with other relevant provisions of the Act, are reprinted at J.S. App. 82a-110a.

STATEMENT OF THE CASE

On October 5, 1992, over a Presidential veto, Congress enacted the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"), Pub. L. No. 102-385, 106 Stat. 1460. Among the most controversial provisions of the legislation were the so-called "must carry" requirements set forth in Sections 4 and 5 of the Act, 47 U.S.C. §§ 534 & 535, mandating that operators of cable television systems devote over one-third of their channel capacity to local broadcast television stations licensed by the Federal Communications Commission ("FCC" or the "Commission"). Twice before, the U.S. Court of Appeals for the District of Columbia Circuit had unanimously struck down such mandatory carriage obligations as violative of the First Amendment rights of cable programmers and cable operators.[1] In vetoing the legislation, President Bush specifically condemned the Act's must carry provisions as "unconstitutional," and noted that they "require[] cable companies to carry certain television stations regardless of whether the viewing public wants to see these stations."[2]

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[1] *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986); *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988). Cable programmers create video programming distributed to the public through cable systems. Cable operators own and operate cable television systems, and increasingly produce their own locally-originated programming.

[2] 138 Cong. Rec. H1477 (daily ed. Oct. 5, 1992). President Bush described the legislation as "fallen prey to special interests." *Id.*

Appellant Turner Broadcasting System, Inc. filed suit challenging the constitutionality of Sections 4 and 5 less than an hour after Congress voted to override the President's veto.[3] Subsequently, numerous other cable programmers joined the *Turner* suit,[4] and additional parties filed separate actions challenging the must carry requirements as well as other provisions of the Act.[5] Consistent with the Executive Branch's view that the must carry provisions violated the First Amendment, the Department of Justice declined to defend the constitutionality of Sections 4 and 5 of the Act.[6] Only after the new Administration took office did the Department reverse its position and provide a defense to must carry. On April 8, 1993, by a 2-1 vote (Williams, J., dissenting), the three-judge district court upheld Sections 4 and 5.[7]

A. The Cable Medium

Cable television systems distribute video programming by transmitting video signals over coaxial and fiber optic

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[3] *Turner Broadcasting Sys., Inc. v. FCC, et al.*, Civil Action No. 92-2247 (D.D.C.). *See* J.S. App. 6a & n.7.

[4] Appellants represented on this brief (plaintiffs in No. 92-2247 below) are creators of the following cable program networks: The Turner networks (CNN, Headline News, TBS Superstation, TNT, and The Cartoon Network), The Arts and Entertainment Network (A&E), The Black Entertainment Television Network (BET), E! Entertainment Television, Lifetime Television Network, The Family Channel, C-SPAN, C-SPAN 2, QVC Network, The Travel Channel, USA Network, and The Sci-Fi Channel.

[5] J.S. App. 6a & n.8.

[6] *See* Letter from Assistant Attorney General Stuart M. Gerson to President of the Senate Dan Quayle (Nov. 4, 1992) (noting the "strong position" taken in the President's veto message that the must carry provisions are unconstitutional and stating that "[t]he Department of Justice provided the analysis that underlies the legal position taken in the President's message") (this letter is included in the Appendix accompanying appellants' Application for an Injunction Pending Appeal, filed in this Court April 19, 1993).

[7] The challenges to the non-must carry provisions were severed and heard by a single district judge. J.S. App. 7a. On September 16, 1993, the district court issued a decision upholding some provisions and striking down others. *Daniels Cablevision, Inc. v. United States*, 1993 U.S. Dist. LEXIS 12806 (D.D.C. 1993).

cables to their subscribers. Operators of cable systems select programming from a number of sources, including broadcast television stations, cable program networks, and locally-originated programming produced by cable operators themselves. Since its origination in the late 1940s, cable television has evolved from a sparsely employed "antenna service" to an electronic media outlet providing a wide variety of video programming choices from diverse sources.

Cable program networks are distributed almost exclusively through cable systems, and thus their potential audiences are generally limited to persons who choose to subscribe to cable.[8] Unlike broadcast television stations, which are licensed by the FCC to utilize portions of the electromagnetic spectrum free-of-charge to transmit their signals to television viewers,[9] a cable program network *must* obtain carriage on a cable system to reach a particular television audience. J.A. 59-60. A broadcast station's signal, by contrast, reaches over-the-air virtually every home within its licensed community even without carriage on a cable system. *Id.*

The supply of video programming alternatives currently exceeds the channel capacity of virtually all cable systems, and will for the foreseeable future. The average cable system in the United States has a capacity of approximately 40 channels, while 26 percent of systems have a capacity of fewer than 30 channels.[10] Currently, there are 80 national and 48 regional cable program networks,

[8] While cable television is presently available to approximately 95 percent of American households, only slightly over 60 percent choose to subscribe. *See* 1992 Cable Act § 2(a)(3); J.A. 306. The rate of cable subscribership has remained relatively steady over the past 12 years. In 1980, 55 percent of homes passed by cable actually subscribed. J.A. 306.

[9] *See* Communications Act of 1934, 47 U.S.C. §§ 301 *et seq.*

[10] J.A. 303. *See* S. Rep. No. 92, 102d Cong., 1st Sess. 3 (1991) ("Senate Report") ("the average cable system offers about 36 channels").

with additional networks being planned. J.A. 303. In addition, cable operators increasingly are creating their own locally-originated programming, including local news and information services. J.A. 241, 268. And, as of December 1992, over 2800 commercial, noncommercial, and low power broadcast television stations were operating throughout the country.[11]

B. Previous Must Carry Requirements and Their Repudiation

Must carry is not a new idea. As the District of Columbia Circuit explained when it first confronted must carry regulations, early federal regulation of the cable industry focused principally on ensuring that the growth of cable not "threaten the economic viability of broadcast television" or "undermine the regulatory framework already established" with respect to broadcast television.[12] Accordingly, the Commission sought "to channel the growth of cable" in a manner "consistent with" these objectives.[13]

"Must-carry rules in various forms have been major tools in this campaign to protect local broadcasting from cable." *Century*, 835 F.2d at 294. In 1965, the FCC imposed must carry requirements on cable systems receiving broadcast signals by microwave. *Rules re Microwave-Served CATV, First Report and Order in Docket No. 14895*, 38 FCC 683 (1965), and one year later adopted mandatory carriage obligations applicable to all cable systems that carried at least one broadcast signal. *Second Report and Order in Docket No. 14895*, 2 FCC2d 725 (1966). In addition, the Commission's fundamental objective—ensuring that cable "not undermine the financial

[11] *See* FCC News Release: Broadcast Station Totals as of December 31, 1992 (Jan. 13, 1993).

[12] *Quincy*, 768 F.2d at 1439.

[13] *Id.* at 1442. *See also Century*, 835 F.2d at 293 (since the mid-1960s, the FCC "has labored to protect the local broadcast media through regulation of the cable industry").

viability" of broadcast television—was reflected in many "regulatory siblings" of must carry.[14]

By the late 1970s and early 1980s, however, the Commission's view of cable television in relation to broadcasting began to change.[15] The Commission came to recognize that cable television had enormous potential to become a significant provider of diverse video programming in its own right, and that a federal communications policy centered merely on protecting local broadcasters from competition from alternative sources of video programming failed to serve the public interest. As the Commission explained in 1979:

> When we embarked upon the regulation of intermodal competition between cable and broadcast firms, *we proceeded upon the assumption that commercial broadcast television was our society's chosen instrument for the provision of video services.* Today, we appreciate that such services are being, and in the future will be to an even greater extent, supplied through a more diverse set of media.[16]

Congress also recognized that the Commission's early regulatory approach to cable television had *stifled*—not promoted—diversity. In enacting cable legislation in 1984, Congress concluded that "FCC policies in the 1960s and

[14] *See Quincy*, 768 F.2d at 1440, 1456.

[15] This reevaluation was driven in significant part by entrepreneurship within the cable industry. Satellite distribution of Home Box Office and TBS to cable systems was instituted in 1975 and 1976. The predecessor of The Family Channel was introduced in 1977. CNN, C-SPAN, USA Network, and Black Entertainment Television all were launched in 1979 and 1980.

[16] *Inquiry Into the Economic Relationship Between Television Broadcasting and Cable Television*, 71 FCC2d 632, 645-46 (1979) (emphasis supplied). At about the same time, the Commission began repealing a number of must carry's regulatory "siblings" as ill-founded, protectionist measures. *See Quincy*, 768 F.2d at 1442-43, 1455-58 (describing FCC's deregulatory actions and the analysis accompanying those actions).

early 1970s unfairly inhibited the growth and development of cable." [17]

In 1985, the D.C. Circuit invalidated the FCC's must carry rules as violative of the First Amendment.[18] The court found that the rules impinged upon First Amendment freedoms in three principal respects. *First*, the rules were explicitly designed to, and did in fact, promote a governmentally-favored class of speakers—local broadcasters—at the direct expense of other speakers—cable programmers.[19] *Second*, the must carry requirements imposed far-reaching intrusions on the constitutionally-protected editorial discretion of cable operators to select the mix of programming they offer their subscribers. 768 F.2d at 1452. *Third*, the rules "profoundly affect[ed] values near the heart of the First Amendment" by preventing cable program networks from reaching their intended audiences "even if that result directly contravenes the preference of cable subscribers," whose interests are "paramount." *Id.* at 1453 (citing *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969)).

The *Quincy* court found it unnecessary to resolve the question of whether strict scrutiny or some other level of review properly applied, because the rules "so clearly fail[ed]" to survive review even under the more forgiving test, advocated by the government, set forth in *United States v. O'Brien*, 391 U.S. 367 (1968), and its progeny. 768 F.2d at 1448. The Commission failed to demonstrate

[17] H.R. Rep. No. 934, 98th Cong., 2d Sess. 22 (1984), accompanying the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779. Congress noted that "by the mid-1970s, cable systems were reaching no more than 12 to 15 percent of American homes" and blamed this lack of growth on regulatory obstacles. H.R. Rep. No. 98-934, *supra*, at 21-22.

[18] *Quincy Cable TV, Inc. v. FCC*, *supra*.

[19] 768 F.2d at 1445-46, 1451-52. The court noted that "[u]nder the protective aegis of the rules, local broadcasters are guaranteed the right to convey their messages over the cable system while cable programmers must vie for a proportionately diminished number of channels." *Id.* at 1451.

that the burdens imposed on free speech were justified by the asserted governmental interest in "preserving" local broadcasting, the court concluded, because the government could not show that any genuine threat to local broadcasting even existed. *Id.* at 1455. Moreover, in view of the government's asserted interests, the rules were " 'grossly' overinclusive." *Id.* at 1460. In short, they were "tailored," if at all, to protect broadcast*ers*, not the public's interest in local broadcast*ing*.

Following the *Quincy* decision, and under pressure from the broadcast industry and some members of Congress,[20] the FCC promulgated new, "scaled back" must carry rules in 1986.[21] These revised rules limited the number of broadcast stations a cable system was required to carry to 25 percent of cable system capacity, and attempted to account for viewer interests by establishing a minimum viewership standard for broadcast stations to be eligible for carriage. Most importantly, the FCC determined that must carry rules should be phased out entirely; the revised rules were to remain in effect for a transition period of five years only.[22]

[20] *See* Senate Report at 39 (explaining how "Congress and the broadcast community" "forced" the FCC to go forward).

[21] *In re Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems*, 1 FCC Rcd 864 (1986) ("*Report and Order*"). *See also In re Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems*, 2 FCC Rcd 3593 (1987).

[22] In support of its decision to eliminate must carry rules, the Commission emphasized that "the public interest would be better served by a policy that maximizes program choices, rather than one that protects one segment of the television industry by substantially limiting the ability of others to offer service to consumers." *Report and Order*, 1 FCC Rcd at 880. It expressly recognized "the impact on cable operators' and cable programmers' First Amendment rights" of must carry rules. *Id.*

Moreover, the Commission concluded that cable subscribers could receive broadcast signals not carried on cable if they so desired by using an inexpensive input selector or "A/B" switch. The five-year transition period was intended to give consumers time to become familiar with and connect such switches if they wished to do so. *Id.* at 886.

Despite their more limited scope and temporary character, the FCC's revised rules were also unanimously struck down as violative of the First Amendment. *Century Communications Corp. v. FCC*, *supra*. The court again found it unnecessary to decide whether exacting First Amendment scrutiny should apply, because the purported governmental interests were insufficiently substantiated regardless of the standard of review. 835 F.2d at 298. Noting that the rules were premised on an "assumption that in the absence of must-carry rules, cable companies would drop local broadcasts," the court found that "[e]xperience belies that assertion." *Id.* at 303. The court also cited reports of the Federal Trade Commission and the Department of Justice concluding that "absent must-carry rules, cable systems can be expected to carry *many or most* local broadcast stations." *Id.* (emphasis supplied).

C. Growth of Video Programming Alternatives Following the Demise of Must Carry and Similar Protectionist Measures

The demise of the FCC's must carry rules—together with the elimination of similar measures premised on the misguided notion that protecting broadcasters from competition would somehow promote "diversity"—vitiated the government's artificial distortion of the video marketplace and permitted genuine diversity to flourish. Over 120 national and regional cable programming services now provide a diverse mix of news, entertainment, public affairs, sports, financial, religious, minority-oriented, and children's programming. J.A. 60, 303. In 1976 there were four.[23] Basic cable program networks spent $340 million for programming in 1984; by 1991, that investment had increased to $1.5 billion.[24] As Congress itself noted in

[23] *See* NCTA, *Cable Television Developments* 7-A (March 1993).

[24] H.R. Rep. No. 628, 102d Cong., 2d Sess. 31 (1992) ("House Report"). For example, the news programming budget of CNN and Headline News was $65 million in 1984. In 1993 it will be $181 million. J.A. 62. A&E's investment in programming increased 450

1991, "[p]rogramming choices have . . . grown about 50 percent" since 1984. Senate Report at 3.

Broadcast television outlets, as well, have grown significantly during this period, as cable systems have invested in increased channel capacity. From July 1985, when *Quincy* was decided, to December 1992, the total number of broadcast television stations nearly doubled.[25] The number of broadcast television stations being carried on cable systems increased during the same period.[26]

The cable programmers represented in this action illustrate this growth and diversity of programming alternatives:

- *Turner Broadcasting System, Inc.*—Turner has been a pioneer in cable programming. Its networks include **CNN,** a 24-hour per day news cable program network offering up-to-the-minute national and international news, financial news, science and medical news, sports, weather, interviews, analysis, and commentary; **Headline News,** a second 24-hour per day news cable program network using a format which provides a consistent, updated half-hour newscast (and which allows local cable companies to insert a five-minute local newscast at the end of each half-hour); **Turner Network Television (TNT),** which commenced operations in 1988 and offers original programming, films, sports, and syndicated programming; and **The Cartoon Network,** which commenced operations in October 1992 and consists entirely of animated programming. In addition, Turner owns and operates **TBS Superstation,** an independent UHF television station operating in the Atlanta market and distributed throughout the United States on cable sys-

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percent during the same period. J.A. 45. Lifetime's total programming investment has grown ten-fold since its introduction in 1984, while USA Network's programming expenditures increased from $29 million in 1985 to $193 million in 1992. J.A. 36, 51.

[25] *Compare* FCC News Release: Broadcast Station Totals as of December 31, 1992 (Jan. 13, 1993), *with* FCC News Release: Broadcast Station Totals for July 1985 (Aug. 9, 1985). *See infra* at 40.

[26] J.A. 305. Moreover, the number of cities served by their own broadcast stations also increased. *Id.*

tems, offering original programming, movies, features, sports, and syndicated shows.

- *Arts & Entertainment Network*—**A&E,** launched in 1984, offers a variety of quality entertainment programming, including drama, documentaries, performing arts, and comedy. A&E has announced plans to launch **The History Channel,** focusing upon historical documentaries, in 1994.
- *The Black Entertainment Television Network*—**BET** offers urban contemporary programming including music videos, sports, family sitcoms, concerts, specials, talk shows, gospel, news, and other informational programming. BET has announced plans to launch **"BET on Jazz: The Cable Jazz Channel"** in 1994.
- *E! Entertainment Television*—**E!** provides continuous coverage of the entertainment industry through interviews, news, and features. Formerly named "Movietime," the network was originally launched in 1987. It was renamed and its format completely changed in 1990.
- *Hearst/ABC-Viacom Entertainment Services*—HAVES produces the **Lifetime Television Network,** a 24-hour service offering contemporary programming of particular interest to women six days per week. On Sundays, Lifetime offers **Lifetime Medical Television,** the world's foremost provider of television programs produced for medical professionals.
- *International Family Entertainment, Inc. (IFE)*—IFE owns and operates **The Family Channel,** originally launched in 1977 as "CBN Satellite Network." The Family Channel provides family-oriented entertainment including original made-for-television movies, dramatic and comedy series, classic westerns, specials, inspirational programs, and children's programming.
- *National Cable Satellite Corporation dba C-SPAN*—NCSC produces **C-SPAN,** created in 1979, and **C-SPAN 2,** introduced in 1986. Both channels are devoted entirely to informational and public affairs programming, including live gavel-to-gavel coverage of the proceedings of both the U.S. House of Representatives and the U.S. Senate, and a variety of other events at public forums

around the country and the world. NCSC was created and continues to be funded exclusively by cable television operators as an independent journalistic organization. It has no connection to any agency of government at any level.

- *QVC Network, Inc.*—**QVC,** which was launched in 1986, is a televised home-shopping service.
- *The Travel Channel, Inc.*—**The Travel Channel** offers programming dedicated to the subject of travel and related information, news, and specials. Originally launched in 1987, it offers original and acquired programs hosted by travel experts, authors, and newsmakers from around the world.
- *USA Networks*—USA operates two cable program services, **USA Network** and **The Sci-Fi Channel.** USA Network's programming includes original and previously-viewed movies, television series, cartoons, game shows, and other entertainment programming. The Sci-Fi Channel commenced operations in September 1992, and offers programming consisting of original series, previously-viewed theatrical movies and television series, and cartoons in the science fiction genre.

D. The Cable Television Consumer Protection and Competition Act of 1992

Confronted with the FCC's refusal to impose must carry rules a third time, and riding on the coattails of consumer complaints regarding increases in monthly cable bills, the broadcast industry convinced Congress to include new must carry requirements—even more sweeping than those struck down as unconstitutional in *Century*—in its 1992 cable legislation. 1992 Cable Act §§ 4 & 5, 47 U.S.C. §§ 534, 535. Not only do these provisions appropriate a greater portion of cable system capacity for the benefit of broadcasters than did the *Century* rules, they, unlike the earlier rules, contain *no mechanism whatsoever* for taking viewer interests and preferences into account.

Section 4 requires operators of cable systems with more than 12 channels—the vast majority of cable systems—

to devote up to one-third of their channels to carriage of local commercial broadcast stations.[27] Cable systems with 12 or fewer channels and more than 300 subscribers are required to carry at least three commercial broadcast stations. 47 U.S.C. § 534(b)(1)(A).

Section 5 conveys mandatory carriage rights to noncommercial broadcast stations, over and above the one-third of cable system channel capacity appropriated by Section 4. Cable systems with more than 36 channels must carry *all* noncommercial broadcast stations within 50 miles requesting carriage, unless the programming of a station requesting carriage "substantially duplicates" the programming of another station carried by the system.[28] Section 5(b) specifies that cable systems with between 12 and 36 channels are required to carry the signals of three qualified noncommercial stations. 47 U.S.C. § 535(b)(3). Significantly, however, Section 5(c) provides that notwithstanding the limits otherwise set forth in Section 5, each cable system must continue to carry *all* qualified noncommercial stations that were carried on March 29, 1990, regardless of the total number of local stations carried and regardless of the channel capacity of the system. *See* 47 U.S.C. § 535(c).

The statute also contains "channel positioning" requirements permitting broadcast stations to dictate the specific

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[27] *See* 47 U.S.C. §§ 534(b)(1)(B), 534(h)(1)(A). In the event there are not sufficient full power commercial stations to fill the allocated channel capacity, cable operators are required to carry the signals of qualified low power broadcast stations pursuant to 47 U.S.C. §§ 534(c) and 534(h)(2). The rules invalidated in *Century* contained no carriage requirements with respect to low power broadcast stations.

[28] *See* 47 U.S.C. § 535(e). *See In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992 (Broadcast Signal Carriage Issues)*, 8 FCC Rcd 2965, 2970 (1993) (*"Must Carry Report and Order"*) (a station does not "substantially duplicate" the programming of another if at least 50 percent of its "typical weekly programming" is "distinct").

cable system channels on which they must be placed.[29] Thus, under the statute, not only are cable networks forced off cable systems, those that do obtain carriage receive less desirable channel positions.

Finally, the purpose and effect of the must carry provisions cannot be understood without reference to the "retransmission consent" rights granted to commercial broadcasters by Section 6 of the Act, 47 U.S.C. § 325(b). Section 6 gives commercial broadcasters the right, if they so elect, to bar retransmission of their signals by cable operators. The effect of Section 6, in conjunction with Section 4, is to give all commercial broadcasters the option of demanding carriage by cable operators (free of charge) or demanding payment from cable operators for retransmission of their signals.[30] Under this new carriage scheme, popular commercial broadcast stations are able to demand payment from cable operators for carriage pursuant to Section 6, while, at the same time, cable operators are *forced* to carry relatively unpopular stations—without compensation—pursuant to Section 4.[31]

[29] Section 4(b)(6) requires each cable system to carry commercial stations and qualified low power stations on the cable system channel number on which each station is broadcast over the air, on which it was carried on January 1, 1992, *or on which it was carried on July 19, 1985*. 47 U.S.C. § 534(b)(6). Similarly, Section 5(g)(5) requires carriage of qualified noncommercial stations on the channel number on which each station is broadcast over the air *or on which it was carried on July 19, 1985*. *Id.* § 535(g)(5).

The July 19, 1985 date is significant, apart from being the date of the *Quincy* decision. Because cable systems at that time generally had more limited channel capacity, stations that now demand carriage on the channel on which they were *then* carried are guaranteed carriage on lower, more desirable channel numbers. *See* House Report at 55 (lower channels are more accessible to "grazing" by viewers).

[30] Prior to enactment of Section 6, cable operators were free to retransmit available over-the-air signals of local broadcasters subject only to the "compulsory license" provision of the Copyright Act. *See* 17 U.S.C. § 111.

[31] *See* J.S. App. 5a-6a. Moreover, the retransmission consent provision, which had no counterpart in the FCC's carriage rules,

The impact of the must carry provisions is significant. Thousands of cable systems today have little or no available channel capacity.[32] The record establishes that, given this lack of excess channel capacity, Sections 4 and 5 are having profound effects:

1. Throughout the country, cable systems already carrying a full complement of local broadcast stations are being forced to carry additional broadcast stations, displacing cable program networks and other programming.[33] A few examples illustrate the effect of the statute:

- A Viacom cable system in Marin County, California with 37 usable channels already carrying 14 broadcast stations (10 commercial and 4 non-commercial) with no available channel capacity was required to add 3 *additional* broadcast stations (2 commercial and 1 non-commercial), forcing the system to drop programming of 2 cable program networks.[34]

has exacerbated the impact of must carry. Powerful broadcasters have leveraged their retransmission rights to demand carriage of new broadcaster-affiliated cable program networks—now referred to in the industry as "ransom" channels—in exchange for retransmission of their signals. *See, e.g., NBC Says Cable Channel is Retrans Option*, Broadcasting & Cable, May 24, 1993, at 12; *Fox Signs Deals with Six MSOs*, Electronic Media, Aug. 2, 1993, at 1. NBC, ABC, and Fox, as well as some local stations, have signed retransmission consent deals involving operator agreements to launch new cable channels. Carriage of such broadcaster-affiliated cable networks, of course, is not counted towards the one-third of channel capacity that must be allocated to commercial broadcasters pursuant to Section 4.

[32] *See* Turner Plaintiffs' Statement of Material Facts as to Which There is No Genuine Issue ¶ 5 and affidavits cited therein. J.A. 178, 268-70, 304. Moreover, expansion of channel capacity can be an enormously expensive proposition. J.A. 304.

[33] J.A. 36-37, 45-46, 64-68, 135-36, 141-42, 144, 146, 277-78, 299-301, 307, 332.

[34] Because of the impact of the must carry requirements on this and other Viacom systems (*see* J.A. 277-80), Viacom commenced suit in the Northern District of California challenging Sections 4 and 5 as applied to Viacom. The three-judge district court held that Viacom's First Amendment claims—filed after the district

- A 38-channel system operated by Community Cablevision Company dba Dimension Cable Services in Orange County, California already carrying 11 broadcast stations (8 full-time and 1 part-time commercial, and 2 noncommercial) with no excess capacity was forced to add 4 *additional* commercial stations. As a result, programming of 4 cable program networks had to be dropped as well as operator-originated local programming.[35]
- C-SPAN, which has been dropped or reduced to part-time status by numerous cable systems as a result of the must carry requirements, was dropped from a 37-channel system in Steubenville, Ohio after the system was required to add 2 new noncommercial stations to its line-up. As a result of must carry, the system now carries 5 PBS affiliates.[36]

2. Cable program networks are finding it difficult or impossible to expand their audiences.[37] The Family Channel, for example, has found that launches on additional cable systems have come to a "virtual halt" due to must carry, while E! has found the Act has "created nearly a complete barrier to new launches." J.A. 55-56, 324.

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court decision in the present action—were barred by *res judicata* because Viacom is a member of appellant NCTA. *Viacom Int'l, Inc. v. FCC*, No. C-93-1984 EFL (N.D. Cal. Aug. 26, 1993).

[35] Dimension brought suit in the Central District of California challenging the must carry requirements as applied to this system. Like Viacom, however, Dimension's suit was held to be barred because its parent company is a member of NCTA. *Community Cablevision Co. v. FCC*, No. CV 92-3104-R (C.D. Cal. Sept. 23, 1993).

[36] *See Local Channels Bump C-SPAN in Some Areas Because of Cable Bill's "Must Carry" Provision*, Roll Call, July 19, 1993, at 3. In the Washington area, C-SPAN 2 was cut back to part-time service on a Jones Intercable system in Alexandria, Virginia in favor of an independent religious broadcaster from Manassas, Virginia (WTKK) asserting must carry rights. This system also carries 5 noncommercial stations, all of which enjoy must carry status. *See Dimming Cable's Eye on Congress*, Washington Post, Sept. 7, 1993, at E1, E4.

[37] J.A. 51-52, 63-68, 79-80, 291-92, 324.

3. Newer cable program services, such as The Sci-Fi Channel, The Cartoon Network, and The Learning Channel, are finding it especially difficult to obtain access to audiences because of the must carry provisions. J.A. 51-52, 64, 152-54. If upheld, must carry may have a crippling impact on announced, but yet unlaunched, networks such as A&E's The History Channel, BET's Jazz Channel, and a proposed Spanish-language version of CNN.

4. Most importantly, all of these impacts are occurring utterly without regard to, and often in direct contravention of, consumer preferences.[38]

5. The full impact of the must carry provisions, which only recently became effective, has yet to be felt. Stations presently ineligible for must carry status due to the quality of their signals (*see* 47 U.S.C. §§ 534(b)(4), 535(g)(4)) can take steps to extend or improve their signals and thereby qualify for mandatory carriage. Noncommercial stations with duplicative programming beyond the 50 percent limit (*see* note 28, *supra*) can qualify for must carry status by making adjustments in their programming. And, cable operators will shortly have to begin to add the "ransom" channels—broadcaster-affiliated cable program networks to be launched in the future pursuant to retransmission consent deals (*see* note 31, *supra*)—which will occupy additional channel capacity, making it even more difficult for other cable program networks to reach television audiences.

E. The Decision Below

The three-judge district court, by a 2-1 vote, upheld the constitutionality of the must carry provisions. The majority expressed the view that in enacting the statute, Congress sought to impose order on a "market in a commercial commodity . . . not a market in 'speech.'" J.S. App. 12a. That "video signals can only be used to convey a message is of no particular significance," the majority reasoned, as "[t]he same is true of printing presses, or broadcast transmitters . . . ." *Id.* at 12a-13a.

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[38] J.A. 76, 135-36, 146-47, 274-75, 327-28, 332.

The majority held that strict scrutiny did not apply. It opined that "[a] compulsory speech requirement, or one imposing upon the discretion of a speaker to say only what he wishes, it appears, is to be strictly scrutinized only if it appears that the government has prescribed the content—either the message or the subject matter—of the speech to be spoken." *Id.* at 16a. Similarly, with respect to the programmers' claims, the majority concluded that "[s]peaker-partial" regulations—"those that purportedly favor one group of speakers at the expense of others"—are not subject to strict scrutiny "unless they are content-based." *Id.* at 17a. "[I]f the must carry provisions are content-related at all," the majority asserted, "they are only marginally so, to the point of *de minimis*." *Id.* at 20a. Finally, although less than clear on this point, the majority appeared to conclude that "contextual factors unique to cable require relaxed First Amendment scrutiny of the must-carry provisions even if marginally content-related." *Id.* at 22a n.25.

Applying the criteria established in *United States v. O'Brien, supra*, and its progeny, the majority held that Sections 4 and 5 passed muster under that standard. As to the substantiality of the governmental interests set forth in the legislative "findings" (1992 Cable Act § 2(a)), the majority simply declined to conduct an independent review, stating that "[f]ederal courts do not ordinarily review the adequacy of the record before Congress to support the laws it enacts." J.S. App. 15a. Thus, with respect to "the factual premise on which the must-carry provisions are based, *viz.*, that local broadcasting is in peril," the court deemed it sufficient that Congress had determined "to its satisfaction" that local broadcast television "is in serious jeopardy." *Id.* at 24a-25a. The majority also found that the provisions are "sufficiently, if not surgically" tailored to their objectives.[39]

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[39] *Id.* at 26a. Judge Sporkin filed a concurring opinion. As to the programmers' claims, at least, its reasoning is unclear. *See* J.S. App. 46a-47a.

Circuit Judge Williams dissented. As to the standard of review, he concluded that "the proper test is strict scrutiny." J.S. App. 57a. Congress explicitly rested its decision to promote local broadcast stations, Judge Williams noted, on a finding about the content of the programming they offer. *Id.* at 51a. Indeed, because local broadcast stations were "legally bound" to offer certain types of programming by virtue of provisions of law outside the 1992 Cable Act, "the term used by the Act to define the benefitted class *automatically* entails content requirements." *Id.* at 51a-52a (emphasis in original). The statute, he found, "is content-based under controlling precedent." *Id.* at 54a.

Judge Williams then determined that the interests advanced in support of the law were inadequate to justify it. This determination, Judge Williams explained, did not turn on a resolution of the question of what degree of deference was due to the legislative findings, "because the legislative findings simply do not support the inferences needed to sustain must-carry."

> The problems are (1) there is *no* finding of any present or imminent harm; (2) the evidence of some dropping of broadcast channels in itself fails to show any widespread problem; (3) the proliferation of local broadcast stations since the end of the FCC's must-carry rules undermines any inference of a problem; (4) the findings as to structure and incentives, taken together with the evidence of cable's dependence on broadcasting, fail to raise the concern beyond the level of speculation; and (5) even if the hazard were perceptible, the record does not address the less intrusive alternatives.

Id. at 67a (emphasis in original). Judge Williams concluded that "[i]f findings as scantily connected to the conclusion as these can justify must-carry, then the door is open—even in the area of First Amendment rights—to exercise of the most naked interest-group preferences." *Id.*

SUMMARY OF ARGUMENT

From the cable *programmers'* perspective, the central vice of must carry is that it guarantees a governmentally-favored class of speakers—local broadcasters—access to television audiences through means which necessarily restrict the ability of cable programmers to reach the same audiences. While cable *operators* rightfully complain of, *inter alia,* the statute's invasion of their editorial functions, appellant cable programmers focus their challenge on the governmental decision to promote a special class of speakers at the programmers' expense.

1. The must carry provisions directly regulate the *programming*—the speech—that cable systems may offer their subscribers, and nothing else. In enacting these provisions, Congress has made it abundantly clear that its legislative objectives are speech-specific and content-based. Local broadcasters must be carried because they offer "unique . . . educational" programming, "local news and public affairs programs," "programs offering outlets for local cultural and artistic groups," "coverage of local and state government activities" and other types of speech the government seeks to promote, *and* because they are statutorily "accountable" to governmental authorities. Moreover, the question of whether particular broadcast stations qualify for must carry status under the statute turns upon official review of the *content* of the programming they offer. Sections 4 and 5 are not "content-neutral." Strict scrutiny applies.

The must carry provisions seek to promote the speech of governmentally-favored speakers through means which necessarily burden the First Amendment freedoms of other, less-favored speakers. As Judge Williams recognized, in view of the lack of unused channel capacity, "replacement of the cablecaster's choice of programs with those of local broadcasters suppresses the alternative programs as completely as if Congress had ordered them shut down. . . ." J.S. App. 55a. But "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others

is wholly foreign to the First Amendment. . . ." *Buckley v. Valeo,* 424 U.S. 1, 48-49 (1976). Fundamentally, the majority's view that the government may decide which speakers shall and shall not be heard—so long as it does not "overtly" discriminate on the basis of the content of their speech (J.S. App. 16a)—is contrary to the basic command of the First Amendment.

Strict scrutiny applies for additional, important reasons. Sections 4 and 5 deliberately interfere with—indeed usurp on a large scale—the editorial functions of members of the press in selecting the information they choose to provide to the public. And their impact on free speech and free press is direct and purposeful, not "incidental" to some governmental objective unrelated to regulating speech.

2. The apparent conclusion of the majority below that "contextual factors unique to cable" require "relaxed" First Amendment scrutiny of the must carry provisions "even if marginally content-related" (J.S. App. 22a n.25) has no principled basis. Neither the present economic or technological characteristics of cable television, nor any purported "government benefits" cable operators have received, justify branding the cable medium as a whole with an inferior constitutional "status," or tolerating the infringement of cable programmers' rights here.

3. The government asserts that the burdens these provisions impose on free expression are justified by asserted governmental interests in "preserving" local television service, promoting "diversity," and promoting "fair competition." Yet even if such interests might be considered substantial "in the abstract," the government may not silence the speech of cable programmers as a means to further them. In any event, the purported threat to these asserted interests is nonexistent.

First, by any objective standard, "local broadcasting" is thriving. More television broadcast stations are available to Americans today—both over-the-air *and* on cable systems—than at any time in the Nation's history. *Second,* the "diversity" of video programming alternatives avail-

able to the public has increased dramatically over the past eight years in the *absence* of must carry. Like their predecessors, the new must carry requirements will harm —not promote—programming diversity. *Third*, it is undisputed that the vast majority of local broadcast stations have in fact been carried on cable systems in the absence of must carry requirements. Indeed, Congress acknowledges that no "widespread pattern of denying carriage" to broadcast television stations exists.

4. The must carry provisions burden substantially more speech than is necessary to serve any legitimate governmental interest. And though the government asserts that the must carry scheme is a "carefully crafted mechanism to promote the interests of viewers," the statute—unlike prior must carry rules—in fact contains *no mechanism whatsoever* to account for viewer interests and preferences.

This failure to account for the interests of viewers, the absence of any genuine threat to "local broadcasting," the undisputed evidence that most broadcast stations are carried by cable systems, and the "extremely weak" fit (J.S. App. 58a) between the purported governmental interests and the sweeping provisions adopted, not only establishes the constitutional invalidity of Sections 4 and 5 but also reveals them for what they are: blatantly protectionist, special interest measures which, like their predecessors, will in fact *reduce* competition in the video marketplace to benefit broadcasters and *reduce* the video programming alternatives available to television viewers.

ARGUMENT

I. THE MUST CARRY REQUIREMENTS OF THE 1992 CABLE ACT ARE SUBJECT TO EXACTING FIRST AMENDMENT SCRUTINY

The district court majority asserted that in the 1992 Cable Act Congress sought to regulate only "the *means of delivery* of video signals" and "not the information the video signals may be used to impart." J.S. App. 12a (emphasis supplied). This assertion is contradicted by the express terms of the must carry provisions themselves, the

congressional "findings" supporting them, as well as the legislative reports accompanying the Act. The must carry provisions directly and purposefully regulate the *programming* cable operators must offer their subscribers, not merely its "means of delivery." They regulate speech and nothing but speech. Under applicable precedents, they are subject to exacting First Amendment scrutiny.

A. Sections 4 and 5 Are Content-Based

It is well-established that the First Amendment bars governmental regulations which discriminate on the basis of the content of expression except in the most compelling and narrow circumstances.[40] In assessing content neutrality, the Court has repeatedly "rejected the argument that 'discriminatory . . . treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas,'" *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1516 (1993) (quoting *Simon & Schuster*, 112 S. Ct. at 509), and has made clear that "distinguishing among *types of speech* requires that [a] statute be subjected to strict scrutiny." *Burson*, 112 S. Ct. at 1855. To be deemed "content neutral," a regulation affecting expressive activity must, at minimum, be justified "without reference to the content" of the regulated speech. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

As Judge Williams recognized, the must carry provisions extend the privilege of government-mandated access to cable systems only "to a special class of unaffiliated programmers—local commercial and non-commercial tele-

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[40] *See R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2545 (1992) (government may not regulate speech based on hostility "or favoritism"); *Burson v. Freeman*, 112 S. Ct. 1846, 1855 (1992); *Forsyth County, Georgia v. Nationalist Movement*, 112 S. Ct. 2395, 2403, 2404 (1992); *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 112 S. Ct. 501, 509 (1991); *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989); *Riley v. Nat'l Fed'n of the Blind of North Carolina*, 487 U.S. 781, 795, 800-01 (1988); *Consolidated Edison Co. of New York v. Public Service Comm'n*, 447 U.S. 530, 536-37 (1980).

vision stations." J.S. App. 51a. Congress "rested its decision to promote these stations in part, but quite explicitly, on a finding about their content—that they were 'an important source of local news and public affairs programming . . . critical to an informed electorate.'" *Id.* (quoting 1992 Cable Act § 2(a)(11)). In fact, the statute and relevant committee reports are replete with content-based, speech-related justifications for the must carry provisions. The legislative "findings" identify the "governmental interests" purportedly served by the must carry requirements as, *inter alia*, distributing "unique noncommercial educational programming" (§ 2(a)(7)); providing "programming that is responsive to the needs and interests of the local community" (§ 2(a)(8)(B)); supporting "local origination of programming" (§ 2(a)(10)); and, ensuring that broadcast television stations "continue to be an important source of local news and public affairs programming" (§ 2(a)(11)).[41]

Further, whether particular broadcast stations may assert must carry rights on particular cable systems depends on the content of the programming they offer. Pursuant to Section 4, a broadcaster may request the FCC to modify the "local" geographic market in which the station may assert must carry rights. 47 U.S.C. § 534(h)(1)(C). The statute provides that in considering such requests, the Commission shall take into account, *inter alia*, whether the station "provides coverage or other local service to such community" and whether other stations "provide[] news coverage of issues of concern to such community or provide[] . . . coverage of sporting and other events of interest to the community."[42] Similarly,

[41] Even the "economic" goals of the legislation are expressed not in terms of creating jobs or improving the balance of payments, but in terms of ensuring "the economic viability of free local broadcast television and *its ability to originate quality local programming* . . . ." *See* § 2(a)(16) (emphasis supplied).

[42] 47 U.S.C. § 534(h)(1)(C)(ii). The Commission's rules implementing the must carry requirements suggest that "[c]overage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of program offerings." *Must Carry Report and Order*, 8 FCC Rcd at 2977.

to qualify for must carry status, a low power station must meet express requirements with respect to "nonentertainment programming: programming . . . involving political candidates, election issues, controversial issues of public importance, editorials and personal attacks; [and] programming for children."[43] Whether a particular noncommercial station must be carried turns upon a determination of whether 50 percent of its "typical weekly programming" is "distinct" from programming of another noncommercial station. *See supra* at 13 & n.28.

The legislative reports confirm the congressional purpose of promoting broadcast programming because of its content. The House Report asserts that without mandatory carriage requirements, the result would be "reductions in local news, public affairs, and other public interest programs . . . ." House Report at 51-52. Indeed, in justifying the mandatory carriage requirement for noncommercial stations, Congress could hardly have been more content-specific:

> [P]ublic television stations have developed a wide array of programming to fulfill their legislative mission and to serve the public interest, including the familiar and acclaimed "Sesame Street," "3-2-1 Contact," "Mister Rogers' Neighborhood," and "Where in the World is Carmen San Diego?" for children; informative news and public affairs programming such as "The MacNeil Lehrer NewsHour;" unique cultural series such as "Live From Lincoln Center" and "American Playhouse;" documentaries such as "Nova" and the "National Geographic Specials;" and

[43] *See* 47 U.S.C. § 534(h)(2)(B). Further, the Commission is to determine whether "the provision of such programming by such station would address local news and informational needs which are not being adequately served by full power . . . stations." *Id. See also* § 534(g) (requiring FCC to conduct proceedings to determine whether broadcast television stations predominately utilized for the transmission "of sales presentations or program length commercials" are serving the "public interest" and should qualify for must carry status).

> special series such as "The Civil War," "Ethics in America," and "Eyes on the Prize." . . . Local public television stations also provide a variety of special services to their communities, including local news and public affairs programs, programs offering outlets for local cultural and artistic groups, and coverage of local and state government activities and personalities.

Id. at 69. On the same pages, the report asserts a "compelling governmental interest" in "*increasing the amount of educational, informational and local public interest programming* available to the nation's audiences," and concludes that "mandatory carriage of noncommercial television stations would further this important goal." *Id.* at 69-70 (emphasis supplied).

Plainly, "it cannot be said that the [statute's] justification 'ha[s] nothing to do with content,'"[44] or that the statute "serves purposes *unrelated* to the content of expression . . . ."[45] Indeed, as Judge Williams emphasized, because every local broadcaster is *required by law* to provide programming of a type mandated by the government, "the term used by the Act to define the benefitted class *automatically* entails content requirements." J.S. App. 51a-52a (emphasis in original). It is no accident that the speakers who are given federally-guaranteed access to television audiences are those media entities over which the government exercises the greatest formal and informal control. The Senate Report emphasizes that broadcast stations "have a statutory obligation to serve their local communities" and are "accountable to the public interest"—that is, directly accountable to the government.[46]

[44] *Forsyth County*, 112 S. Ct. at 2403 (quoting *Ward*, 491 U.S. at 792).

[45] *Ward*, 491 U.S. at 791 (emphasis supplied).

[46] Senate Report at 40 (quoting separate statement of Commissioner Quello in *Report and Order*, 1 FCC Rcd at 912). *See also* House Report at 50-51 (describing the programming broadcast stations have offered "to fulfill their legislative mission"). *See, e.g.*, 47 U.S.C. § 303b (children's programming considered in

"Cable," by contrast, has "little or no *program* accountability to any public or government authority."[47]

B. The Must Carry Requirements Impermissibly Burden the Speech of Certain Speakers in Order to Promote the Speech of Other, Governmentally-Favored Speakers

The must carry requirements create a governmentally-imposed pecking order of speakers: commercial and non-commercial local broadcasters who are guaranteed access to television audiences, and then cable programmers and others who must compete with each other for the channel capacity left over. But as this Court has long held, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . ." *Buckley*, 424 U.S. at 48-49. Indeed, any speech-related law that artificially "limits the size of the audience" a speaker may reach raises fundamental First Amendment concerns. *Meyer v. Grant*, 486 U.S. 414, 419, 422-23 (1988).

Consistent with these principles, the D.C. Circuit in *Quincy* held that governmental rules which guaranteed local broadcasters the right to convey their messages to cable audiences through means which necessarily forced cable programmers to vie for a diminished number of channels abridged the First Amendment rights of cable programmers. 768 F.2d at 1451-52. The must carry provisions of the 1992 Cable Act operate in precisely the same manner and result in precisely the same First Amendment injury to cable programmers. As Judge Williams explained, "[g]iven the finite number of cable chan-

license renewal); Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16(a) (authorizing FCC to regulate "indecent" programming); 47 U.S.C. 312(a)(7), 47 C.F.R. § 73.1944 (access for federal political candidates); 47 C.F.R. § 73.1930 (regulating "political editorials"); 47 C.F.R. § 73.1920(a) (mandating right to respond to "personal attacks"); 47 C.F.R. § 73.621 (regulating programming of noncommercial educational television stations).

[47] Senate Report at 40 (emphasis supplied).

nels, replacement of the cablecaster's choice of programs with those of local broadcasters suppresses the alternative programs as completely as if Congress had ordered them shut down. . . ." J.S. App. 55a.

The majority did not dispute that the imposition of this burden on the speech of cable programmers constitutes a First Amendment injury giving rise to a First Amendment "claim" (J.S. App. 13a-14a & n.19); it concluded, however, that the "speaker-partiality" embodied in the statute is not "content-based" and therefore does not trigger "strict" scrutiny. J.S. App. 17a-18a. The majority's analysis is wrong on a number of counts.

First, for all the reasons set forth in Point I.A. above, the "speaker-partiality" embodied in the statute is in fact *expressly* content-based. Local broadcasters are favored because they offer "educational" programming, "local news and public affairs programs," "programs offering outlets for local cultural and artistic groups," "coverage of local and state government activities," and other "types of speech" (*Burson*, 112 S. Ct. at 1855) the government seeks to promote. They are favored because they are "accountable to the public interest." Senate Report at 40. In short, the *content* of the programming they offer is of a type the government considers "especially worthy," and, perhaps more importantly, is subject to significant governmental control. *See* J.S. App. 53a. Even assuming, *arguendo*, the purest of intentions, the First Amendment bars Congress from creating this mandatory hierarchy of speech—or speakers—on the basis of the government's assessment of the worthiness or importance of particular types of speech.

Second, there is no principled basis for the majority's conclusion that the First Amendment permits the government to decide which speakers shall be heard and which shall not—so long as it does not "overtly" discriminate on the basis of content. J.S. App. 18a. "In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak *and the speakers who may address a public*

issue." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784-85 (1978) (emphasis supplied). *See Buckley*, 424 U.S. at 18 (government may not "discriminate *among speakers or ideas.*").[48] Rather, " '[t]he constitutional right of free expression is . . . intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us . . . .' " *Leathers v. Medlock*, 111 S. Ct. 1439, 1444 (1991) (quoting *Cohen v. California*, 403 U.S. 15, 24 (1971)). For the government to pick and choose who may or may not speak is fundamentally inconsistent with the basic command of the First Amendment. "[F]ree and robust debate cannot thrive if directed by the government." *Riley*, 487 U.S. at 791. *Any* statute which explicitly grants a particular class of speakers preferred access to public audiences at the expense of other First Amendment speakers should be given the most exacting scrutiny.

We emphasize that this case does not involve merely the granting of a subsidy or benefit to one group in society that is not granted to another group.[49] Rather, the issue here, and the fundamental First Amendment concern articulated in *Buckley*, is the promotion of the speech of certain classes of speakers *by means of* placing burdens on the constitutionally-protected speech of others. 424 U.S. at 48-49. Thus, in *Buckley*, the expenditure limitations restricting the speech of some in order to give others better access to public audiences were subject to strict scrutiny—and struck down—even though they were

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[48] (Emphasis supplied.) *See also City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 176 (1976) (government may not "discriminate between speakers on the basis of their employment, *or* the content of their speech.") (emphasis supplied).

[49] *Compare Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 546 (1983) (Congress is not obliged to "subsidize" lobbying); *Leathers*, 111 S. Ct. at 1447 (the state legislature "has chosen simply to exclude or exempt certain media from a generally applicable tax"). The majority appears to have understood the distinction. J.S. 13a-14a & n.18.

"neutral as to the ideas expressed." *Id.* at 39. And in doing so, the Court specifically reversed the Court of Appeals' conclusion that the *O'Brien* standard applied. *Id.* at 15-17. Here, even such neutrality is lacking.

C. Because the Must Carry Provisions Regulate and Interfere With Editorial Decisions of Members of the Press, They Are Subject to the Highest Level of Constitutional Scrutiny

Few laws more directly confront the First Amendment than one which purposefully and directly interferes with the editorial functions of the press in selecting the information it chooses to provide to the public. As the Court stated in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974), "[i]t has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time." This teaching applies fully here: "Cable television provides to its subscribers news, information, and entertainment. It is engaged in 'speech' under the First Amendment, and is, in much of its operation, part of the 'press.' " [50] Further, as the Court recently affirmed, "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech" and therefore is considered "content-based regulation of speech." *Riley*, 487 U.S. at 795.

The FCC has found that "cable operators now function as independent media voices exercising broad editorial control over content," and that "[t]his editorial function whereby cable operators select and tailor their program mix to meet viewer interests or other objectives is akin to that performed by publishers of print media." *Report and Order*, 1 FCC Rcd at 879-80. There can be

[50] *Leathers*, 111 S. Ct. at 1442. This Court has long recognized that a cable operator's selection of programming to offer its subscribers involves the exercise of editorial discretion. *See City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986); *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 & n.17 (1979).

no debate that the must carry provisions dramatically impinge upon this constitutionally-protected editorial function. They expressly wrest editorial control of roughly 40 percent of a cable operator's channels from the operator —channels that cable programmers can no longer even compete for—and vest that control with the government. Such a law demands the highest level of constitutional scrutiny.

We join the more-detailed arguments on this point set forth in the briefs of the other appellants representing cable operators.[51]

D. Sections 4 and 5 Impose Direct—Not "Incidental" —Burdens on First Amendment Freedoms

As the discussion above makes clear, the must carry provisions of the 1992 Cable Act purposefully and directly regulate speech and the press to achieve speech-related objectives. Indeed, they do *nothing other* than specify the programming that must be offered to cable subscribers and the channel positions on which specific programming must be carried. These provisions bear no resemblance to the types of laws this Court has tested under the standard set forth in *United States v. O'Brien*, *supra*, and its progeny. The majority's conclusion that the *O'Brien* standard applies to these speech-specific provisions (J.S. App. 15a, 22a) is unsustainable, regardless of the "economic" label placed on the legislation by its proponents.

This Court's decision in *Riley*, *supra*, which the majority chose to ignore except on another point, gives guidance as to what constitutes a direct—as opposed to merely "incidental"—burden on speech. In *Riley*, the Court invalidated a state statute limiting the fees that professional fundraisers could charge charities, finding that provision restricted both charities' and fundraisers'

[51] While we refer to the operators' briefs on this point, we note that cable programmers unquestionably have standing to raise this argument independently. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64 n.6 (1963); *Block v. Meese*, 793 F.2d 1303, 1309 (D.C. Cir.) (Scalia, J.), *cert. denied*, 478 U.S. 1021 (1986).

"ability to speak." 487 U.S. at 794. In rejecting the assertion that the statute should be considered merely "economic" legislation having only an "incidental" effect on speech, the Court stated that "[f]ar from the completely incidental impact of, for example, a minimum wage law, a statute regulating how a speaker may speak directly affects that speech."[52] Such a statute, the Court held, must be subject to "exacting" First Amendment scrutiny.

As *Riley* and similar decisions of this Court make clear, laws aimed at regulating speech itself, or the speech-related functions of the press, may be upheld—if at all—only if they are necessary to serve a compelling government interest and are precisely tailored to do so.[53] The more relaxed *O'Brien* standard, by contrast, was formulated to address laws regulating "conduct" where particular applications of such laws may have "incidental" effects on the exercise of free expression.[54]

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[52] *Id.* at 788-89 & n.5. Moreover, the asserted purpose for the statute at issue in *Riley*—preventing fraud—was significantly *less* speech-related than the asserted governmental interests in the present case (*e.g.*, promoting specific types of video programming).

[53] *See, e.g., Buckley*, 424 U.S. at 15-17; *Miami Herald*, 418 U.S. at 254-57; *Gentile v. State Bar of Arizona*, 111 S. Ct. 2720, 2724 (1991) (strict scrutiny required where "speech is . . . the direct target of the regulation or statute in question") (plurality opinion). *See also Talley v. California*, 362 U.S. 60, 64-66 (1960).

[54] *O'Brien*, 391 U.S. at 376; *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294 (1984). In *O'Brien*, the Court held that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, *a sufficiently important governmental interest in regulating the nonspeech element* can justify *incidental* limitations on First Amendment freedoms." 391 U.S. at 376 (emphasis supplied).

A similar standard of review applies to "time, place, and manner" regulations affecting activities protected by the First Amendment. *Ward*, 491 U.S. at 798; *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47 (1986). "[T]he essence of time, place, or manner regulation lies in the recognition that various *methods* of speech, *regardless of their content*, may frustrate legitimate govern-

As *Quincy* emphasized, the governmental objective in promulgating must carry rules "is a far cry from the sort of interests that typically have been viewed as imposing a merely 'incidental' burden on speech."[55] Judge Williams agreed. *See* J.S. App. 55a (there "is nothing 'incidental' about the burden"). The majority itself described the issue as what level of scrutiny applies "to speech regulation" in the cable context. J.S. App. 9a. Neither the court below nor appellees contends that the must carry requirements seek to regulate only some "nonspeech element" of "conduct," or that they may be regarded merely as "time, place, and manner" regulations.

Instead, appellees seek to escape rigorous First Amendment scrutiny merely by referencing the purported "economic" purposes of the legislation. Again, this is precisely the argument that was advanced and rejected in *Riley*. The ability to articulate a legitimate governmental objective does not, by itself, take a statute out of the realm of strict scrutiny.[56] This Court has "long recognized

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ment goals." *Consolidated Edison Co. of New York v. Public Service Comm'n*, 447 U.S. at 536 (emphasis supplied). Although a particular time, place, or manner regulation may "directly" regulate expressive activities (*e.g.*, the noise level), its validity depends upon "whether some interest *unrelated to speech* justifies" the regulation at issue. *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 763 (1988) (emphasis supplied).

[55] 768 F.2d at 1451. The House Report concedes that "[t]he analogy between must carry regulations and the type of regulation dealt with in *O'Brien* is questionable" and that the new cable law "is quite different from the regulations which have been generally been [sic] analyzed under *O'Brien*." House Report at 61 n.90.

[56] *See City of Cincinnati*, 113 S. Ct. at 1516-17 (the fact that the City "justified" restriction on "commercial handbills" by referencing the City's interest "in safety and esthetics" did not change the "content-based" nature of the ordinance). Indeed, in most strict scrutiny cases the governmental purposes asserted are entirely legitimate. *See, e.g., Burson*, 112 S. Ct. at 1851-52 (preventing voter intimidation at polling places); *Simon & Schuster*, 112 S. Ct. at 510 (compensating victims of crime); *Riley*, 487 U.S. at 789 (preventing fraud); *Sable Communications*, 492 U.S. at 126 (protecting well-being of minors). There is no requirement, as the

that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment." [37] Neither the *O'Brien* analysis, nor the comparable analysis applicable to "time, place, and manner" regulations used in cases such as *Ward* or *Renton*, applies to a law which *on its face* regulates the information that members of the press provide to the public (or which otherwise explicitly regulates the content of speech) merely because an assertedly neutral justification is proffered for the statute.

Like the statute at issue in *Riley*, the must carry provisions directly and purposefully regulate protected First Amendment activity. Even assuming, *arguendo*, "the purest of motives" on the part of legislators, these provisions deserve the same "exacting" First Amendment scrutiny. *Riley*, 487 U.S. at 791.

II. NO PRINCIPLED BASIS EXISTS FOR APPLYING A "REDUCED" LEVEL OF CONSTITUTIONAL SCRUTINY TO THE CABLE MEDIUM

In its Motion to Affirm, the government asserted that technological and economic characteristics of cable television, as well as purported government "benefits" that cable operators have received, justify a "reduced" level of constitutional protection for the cable medium generally—akin to the "scarcity doctrine" applied to over-the-air broadcasters. Similarly, the majority below, with less-than-ample clarity, suggested that "contextual factors unique to cable require relaxed First Amendment scrutiny of the must-carry provisions" even if they are, as the majority characterized them, "marginally content-related." J.S. App. 22a n.25.

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majority below appeared to assume, that the underlying governmental purpose must be "nefarious" or improper (J.S. App. 20a) to trigger strict scrutiny. That being said, there is ample evidence supporting President Bush's characterization of the 1992 Cable Act as "fallen prey to special interests." *See* note 2, *supra*.

[37] *Simon & Schuster*, 112 S. Ct. at 509; *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983).

The Court should decline the invitation to brand the cable medium with an inferior constitutional "status" based on the bundle of imprecise and variable "contextual factors" relied upon by the government and the majority below. While each medium of expression "may present its own problems," *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975), "the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952). Those basic principles apply fully here. To the extent particular characteristics of the cable medium may bear upon the constitutional analysis, such factors are most appropriately considered in the context of assessing the specific governmental interests put forth to justify the specific regulation at issue—not by creating a second "scarcity doctrine."

We join the briefs of the other appellants demonstrating that none of the characteristics of cable television appellees rely upon—*e.g.*, cable's use of public rights of way or the existence of local cable monopolies—justifies diminished First Amendment protection. We note, however, that the Court need *not* decide the question of whether the First Amendment protection afforded cable television is in every respect co-extensive with that of the print press to conclude that the must carry provisions properly are subject to strict scrutiny and cannot survive judicial review. None of the "contextual factors" identified by the government or the court below justify sweeping must carry requirements which solely benefit a special class of governmentally-favored speakers at the direct expense of all others. We do wish to address, however, the assertion that "vertical integration" in the cable industry somehow justifies the Act's must carry requirements.

The fact that some cable operators have invested in some cable programming services does not justify sweeping, universal must carry privileges for broadcasters. Although Congress theorized that affiliations between operators and cable program networks create "incentives" for operators to favor their affiliated networks with re-

spect to carriage, the record offered no evidence that such affiliations had given rise to any actual, serious problem. As summarized in the House Report, a study by the National Telecommunications and Information Administration (NTIA) of the Department of Commerce concluded that "none of the top five multisystem operators (MSOs) showed a pattern of favoring basic services with which they were affiliated." [58]

As to this non-existent problem, the must carry provisions represent a non-existent solution. As Judge Williams points out, Sections 4 and 5 grant mandatory access to only a "special class" of unaffiliated programmers—broadcast stations—who benefit universally, on all cable systems, regardless of whether a cable system has an interest in *any* programmer. J.S. App. 51a, 53a n.2. Sections 4 and 5 are not a solution to "vertical integration": they are special rights granted solely to broadcasters.[59] Moreover, to the extent vertical integration is a concern *at all*, Congress has addressed it directly in Section 11(c) of the 1992 Cable Act.[60]

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[58] House Report at 41 (quoting NTIA, *Video Program Distribution and Cable Television: Current Policy Issues and Recommendations* 102 (June 1988)). The Report acknowledges that operator investments have made the creation of innovative, and risky, programming services possible and have *promoted* programming diversity. *Id.*

[59] A large number—almost half—of national cable program services have *no* affiliation with the operating side of the industry. *See* House Report at 41. Similarly, many operators have no or extremely limited interests in program services. *See, e.g.*, J.A. 272, 326.

[60] Section 11(c) directs the FCC to prescribe regulations "establishing reasonable limits on the number of channels on a cable system that can be occupied by a video programmer in which a cable operator has an attributable interest." 47 U.S.C. § 533(f)(1)(B). The Commission has now done so. *In re Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992 (Horizontal and Vertical Ownership Limits) Second Report and Order*, MM Dkt. No. 92-264 (Oct. 22, 1993). Section 11(c) and the Commission's regulations thereunder raise significant constitutional questions of their own, which, obviously, are not before the Court. But if the issue is "vertical integration," Section 11(c)—unlike the must carry provisions—at least addresses itself to that issue.

III. THE MUST CARRY REQUIREMENTS FAIL TO SURVIVE REVIEW UNDER ANY LEVEL OF FIRST AMENDMENT SCRUTINY

For all the reasons set forth above, Sections 4 and 5 are subject to "strict" or "exacting" scrutiny. These provisions may be upheld—if at all—only if the government can demonstrate that they are necessary to serve a "compelling" governmental interest and employ "the least restrictive means to further the articulated interest." [61] In view of the unfocused, prophylactic, highly-intrusive nature of the must carry provisions—which in one stroke appropriate editorial control of roughly 40 percent of channel capacity on all cable systems throughout the country—they cannot conceivably survive such review; indeed, the government makes no claim that they can.

Yet even under the less demanding *O'Brien* test appellees advocate, the result would be the same. Under *O'Brien*, the government must demonstrate that the statute "furthers an important or substantial governmental interest . . . unrelated to the suppression of free expression," and that the law's "incidental restriction on alleged First Amendment freedoms is no greater than is essential" to further its "non-speech" objective. 391 U.S. at 376-77. The majority below, having concluded—erroneously—that exacting First Amendment scrutiny did not apply, proceeded to give the purported justifications for the must carry provisions no independent scrutiny *at all*. Instead, the Court merely "deferred" to the "findings" of substantiality and necessity set forth in Section 2 of the Act. J.S. App. 15a ("Federal courts do not ordinarily review the adequacy of the record before Congress to support the laws it enacts.").

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[61] *Sable Communications*, 492 U.S. at 126. *See also Burson*, 112 S. Ct. at 1852 ("To survive strict scrutiny . . . a State must do more than assert a compelling state interest—it must demonstrate that its law is necessary to serve the asserted interest.").

What matters, however, is not that proponents of the legislation have drafted "findings," but whether such findings actually justify the burdens the legislature has imposed on First Amendment freedoms.[62] Even where an Act of Congress is at issue, " '[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake.' "[63] Here, as in *Quincy* and *Century*, the sweeping must carry benefits granted to broadcasters cannot survive a faithful application of the *O'Brien* criteria, much less the rigors of strict scrutiny.

A. The Substantiality of the Asserted Interests

The government bears the burden, even under *O'Brien*, of demonstrating that the asserted governmental interests "are sufficiently substantial to justify the effect" of the challenged regulation on protected expression. *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984). In commercial speech cases applying an "intermediate" level of scrutiny comparable to the *O'Brien* standard, the Court has emphasized that the government "must demonstrate that the harms it recites are real," and more than mere "speculation or conjecture" is required for the government to meet its burden of justification.[64] The "governmental interests"

[62] *See* J.S. App. 67a ("[T]he legislative findings simply do not support the inferences needed to sustain must-carry.") (Williams, J., dissenting). *See also* J.A. 183-94, responding to J.A. 81-86.

[63] *Sable Communications*, 492 U.S. at 129 (quoting *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843-44 (1978)). In *Sable*, the Court made clear that "whatever deference is due legislative findings would not foreclose our independent judgment of the facts bearing on an issue of constitutional law" (concluding that a federal statute violated the First Amendment). *See also Lamprecht v. FCC*, 958 F.2d 382, 392 n.2 (D.C. Cir. 1992) ("If a legislature could make a statute constitutional simply by 'finding' that black is white or freedom, slavery, judicial review would be an elaborate farce.") (Thomas, J.).

[64] *Edenfield v. Fane*, 113 S. Ct. 1792, 1800 (1993). *See also City of Cincinnati*, 113 S. Ct. at 1510 & n.12 ("we require the governmental goal to be substantial, and the costs to be carefully calculated") (quoting *Bd. of Trustees of the State Univ. of New York*

purportedly justifying the constitutional intrusions imposed by the must carry requirements are set forth in Section 2 of the Act.[65] The Senate Report formulates the interests somewhat differently, but more succinctly, as (1) "preserving" local television service, (2) promoting the widespread dissemination of information from "diverse" sources, and (3) "promoting fair competition" in the video marketplace. Senate Report at 58.

As demonstrated below, the purported "threat" to these asserted interests simply cannot be substantiated. We emphasize at the outset, however, that even assuming that interests such as "preserving" local broadcasting or "promoting a diversity of views" could be understood to be substantial "in the abstract," *Edenfield*, 113 S. Ct. at 1800, promoting the speech of a particular class of speakers by mandating that they have access to public audiences through means which necessarily restrict other, less-favored speakers' access to the same audiences is *not* a legitimate governmental objective.[66] Certainly there is no "substantial governmental and First Amendment interest" (*see* 1992 Cable Act §§ 2(a)(6), (7)) in restraining First Amendment freedoms.

1. *"Preserving Local Broadcasting"*

Assuming, again, that burdening the speech of certain classes of speakers in order protect the economic well-

v. Fox, 492 U.S. 469, 480 (1989)). In *Fox*, the Court noted that the test applicable to restrictions on commercial speech is "substantially similar" to that applicable to "time, place, and manner" regulations. 492 U.S. at 477.

[65] As noted *supra*, these interests are stated variously as "promoting a diversity of views," §§ 2(a)(6), 2(b)(1); promoting "unique noncommercial educational programming," § 2(a)(7); ensuring that broadcast stations "continue to be an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate," § 2(a)(11), and promoting "local origination of programming." § 2(a)(10).

[66] *Pacific Gas & Elec. Co. v. Pub. Util. Comm'n of California*, 475 U.S. 1, 12 (1986) (plurality opinion); *Buckley*, 424 U.S. at 48-49; *Miami Herald*, 418 U.S. at 248, 258.

being of a governmentally-favored segment of the media is legitimate in concept, the government cannot establish that the asserted threat to the "economic viability" of local broadcasting (1992 Cable Act § 2(a)(16)) is sufficiently "real" to justify the intrusions of must carry. The FCC's own data demonstrates that, as of December 1992, the total number of full power commercial television stations has increased by more than 25 percent since the demise of the FCC's must carry rules in July 1985 (from 915 to 1,147).[67] Similarly, the number of noncommercial stations has grown substantially, increasing approximately 21 percent during the same period (from 299 to 362). *Id.* In addition, there has been *dramatic* growth in the number of local low power broadcast television stations, expanding from 343 stations in July 1985 to 1,310 in December 1992—a 282 percent increase. *Id.* Overall, the number of broadcast television stations has nearly doubled since the *Quincy* decision.

Other data suggests "local broadcasting" is not facing extinction. According to financial data compiled by appellee National Association of Broadcasters ("NAB"), in the year *prior* to imposition of the current mandatory carriage requirements, average pre-tax profits among independent stations more than doubled.[68] During the same period, average pre-tax profits among network affiliates increased by more than 36 percent,[69] continuing a long trend of significant profitability.[70] Plainly the government lacks authority to silence members of the press whenever, in the government's view, a competing segment of the media is not *growing fast* enough. As was the case in

[67] *Compare* FCC News Release: Broadcast Station Totals as of December 31, 1992 (Jan. 13, 1993), *with* FCC News Release: Broadcast Station Totals for July 1985 (Aug. 9, 1985).

[68] *See* NAB, *Television Financial Report* 64, 181 (1993).

[69] *See id.* at 33, 150.

[70] Since the demise of the first must carry rules, the average annual pre-tax profits of network affiliates have averaged more than 24 percent of net revenues, as shown in NAB's *Television Financial Report* for each of the years 1986 through 1993.

Quincy, it cannot be shown "that without the protection afforded by the must-carry rules the economic health of local broadcast television is threatened by cable." 768 F.2d at 1455. *See* J.S. App. 60a-67a.

2. *"Promoting Diversity"*

Assuming, *arguendo*, the legitimacy of a governmental effort to "promote diversity" by means of burdening the First Amendment freedoms of some elements of society, we start with the finding of the Senate Commerce Committee in its report accompanying the 1992 Cable Act that "[p]rogramming choices have . . . grown about 50 percent" since 1984—in the *absence* of must carry. Senate Report at 3. As described *supra*, video programming alternatives from every source—including broadcast outlets, locally-originated cable programming, and especially cable program networks—have expanded dramatically since the *Quincy* decision.

In view of (a) previous real world experience with must carry and its harmful effects on cable programmers as documented in *Quincy* and *Century*, (b) the fact that the demise of must carry and its "regulatory siblings" resulted in a great expansion of innovative programming alternatives, and (c) the FCC's express findings that cable program networks have provided "a significant array of diverse programming" contributing to video programming diversity,[71] one would think that Congress would not resurrect must carry in a statute purportedly aimed at promoting a "diversity" of video programming alternatives without carefully assessing the necessarily negative impact of sweeping new must carry requirements on cable programmers. Instead, the effect on cable programmers did not appear to enter into the calculus of costs and benefits

[71] Both in connection with must carry and its review of the "fairness doctrine," the FCC has found that cable program networks have contributed substantially to programming diversity. *See Report and Order*, 1 FCC Rcd at 880; *Report Concerning General Fairness Doctrine Obligations of Broadcast Licensees*, 102 FCC2d 145, 196-221 (1985); *In re Complaint of Syracuse Peace Council*, 2 FCC Rcd 5043, 5051-54 (1987).

associated with the provisions *at all*; the House Report states that in enacting the must carry requirements, "the Committee seeks to balance the interests of cable operators, broadcasters, and the public." [72]

As Judge Williams noted, there is nothing to suggest that requiring cable operators to carry broadcast stations they would not otherwise choose to carry *in lieu of* cable networks or other programming will promote "diversity." J.S. App. 58a. Because *most* local broadcast stations are carried in any event, where the must carry rules have an effect "it will only be to replace the mix chosen by cablecasters—whose livelihoods depend largely on satisfying audience demand—with a mix derived from congressional dictate." *Id.*

3. *"Promoting Fair Competition"*

To the extent the government seeks to justify the must carry provisions as a remedy to an alleged problem of "anticompetitive" behavior on the part of cable operators, this justification is premised on assertions that (a) decisions by cable operators not to carry particular broadcast stations may generally and fairly be characterized as "anticompetitive conduct"; and (b) the instances of such allegedly anticompetitive conduct are so widespread and alarming as to require a broad, prophylactic solution despite the intrusion on precious First Amendment freedoms. Neither assertion withstands scrutiny.

Signal carriage studies show that the vast majority of broadcast stations are carried on cable systems in the *absence* of must carry rules, and that the number of "drops" of broadcast stations by cable systems is utterly insignificant in view of the overall carriage picture. *See generally* J.S. App. 63a-64a. The FCC's 1988 Staff Report, upon which Congress principally relied,[73] showed that approximately 80 percent of cable systems responding reported *no* instances of discontinued or denied carriage, with an additional 10 percent of the systems reporting discontinued or denied carriage of a *single* station.[74] Indeed, a *greater* number of broadcast television stations were being carried on cable systems in 1990 than in 1985, when the Commission's must carry rules were first struck down. J.A. 305. Consistent with this data, Congress acknowledged that it "has *not* found that cable systems are engaging in a widespread pattern of denying carriage of local television stations. . . ." [75]

Nonetheless, the legislative "findings" postulate that because cable systems and broadcast stations compete for advertising revenues, cable operators have "incentives" to drop and otherwise harm broadcast stations, giving rise to the need for new must carry requirements to protect the "economic viability" of free broadcast television. *See*

[72] House Report at 57-58. The committee reports contain no discussion of the impact on cable programmers other than the bald assertion that the legislation "ensures adequate opportunity for cable program services to obtain access to cable audiences," providing no support or explanation for this statement other than to assert that cable system channel capacity "is likely to continue to expand." *Id.* at 61.

[73] Staff Report, Policy and Rules Division of the Mass Media Bureau, *Cable System Broadcast Signal Carriage Survey Report*, (Sept. 1, 1988) ("1988 Staff Report"). The committee reports present only selected data from the relevant studies—for example, there is no discussion of the number of broadcast stations that have been *added* to cable system line-ups—and the data that is referred to is presented in what appears to be an intentionally misleading and confusing manner. *See* House Report at 52; Senate Report at 42-44.

[74] 1988 Staff Report at 13. Moreover, a second study Congress cited demonstrated that 94 percent of cable systems carried *all* stations that would have qualified for carriage under the carriage rules struck down in *Century*, that 98 percent of all broadcast stations so-qualified were in fact being carried, and that a substantial number of cable systems *added* broadcast stations to their line-ups after the demise of the FCC's must carry rules. NCTA, *Broadcast Station Carriage Survey* 8 (Sept. 1988). *See* J.A. 305 (describing study and results thereof); J.S. App. 64a. The Senate Report (at 43) makes references to this study only in a cryptic, affirmatively misleading manner.

[75] House Report at 52 (emphasis supplied). *See also id.* at 67 (acknowledging that "most cable systems have continued to carry a number of local over-the-air signals").

1992 Cable Act § 2(a)(15), (16). Yet those same alleged "incentives" have existed during the past eight years, and cable systems have continued to carry most broadcast stations.[76] In fact, as Judge Williams explained, cable operator revenues are "overwhelmingly" due to *subscription fees*, not advertising. J.S. App. 65a n.6, 66a (noting ratio of subscription fee revenues to advertising revenues of 25:1). Cable operators' overwhelming economic "incentive," therefore, is to attract and retain subscribers by offering an attractive mix of programming, including whatever broadcast programming subscribers may find appealing.

What the evidence shows is not only that *most* broadcast stations are carried in the absence of must carry requirements, but that to the extent *particular* stations are not carried, cable operators' decisions have been based on something other than a generalized incentive to destroy any entity that competes for advertising. No basis whatsoever exists for concluding that a decision by an operator to carry CNN, C-SPAN, The Sci-Fi Channel, or Black Entertainment Television in lieu of WXYZ-TV can be accurately described, in any substantial number of instances, as "anticompetitive conduct."

B. The Act's Must Carry Provisions Are Substantially Broader Than Necessary To Further Any Legitimate Governmental Objective

Even under *intermediate* scrutiny, a regulation affecting First Amendment rights must be "narrowly tailored" to survive; that is, the government bears the burden of demonstrating that the regulation "is not 'substantially broader than necessary' to achieve the [government's]

[76] *See also Century*, 835 F.2d at 303 (noting that cable systems did not drop significant numbers of broadcast stations after the *Quincy* decision and citing government studies which concluded that "absent must-carry rules, cable systems can be expected to carry *many or most* local broadcast stations.") (emphasis supplied). Moreover, these incentives would appear to be less of a factor with respect to noncommercial stations, which, if they compete for local advertising dollars at all, do so to a limited, if not minimal, degree.

legitimate ends." *Ward*, 491 U.S. at 802 (quoting *Taxpayers for Vincent*, 466 U.S. at 808). *See Fox*, 492 U.S. at 480 (since the government "bears the burden of justifying its restrictions, it must affirmatively establish the fit we require"). In *Frisby v. Schultz*, 487 U.S. 474, 485 (1988), relied upon in *Ward*, the Court held that "[a] statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." If the Court's admonition that a regulation must "target" the evil it seeks to remedy and may not be "substantially broader than necessary" to further its legitimate goals has any meaning at all, the must carry provisions cannot credibly survive First Amendment review under any standard.

1. In the broadcasting context, the Court has emphasized that it is "the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Red Lion*, 395 U.S. at 390. Indeed, the government seeks to invoke this principle as the fundamental justification for must carry.[77] Yet, unlike the FCC's prior must carry rules (*see Century*, 835 F.2d at 297), the provisions Congress has enacted contain no "mechanism" whatsoever to account for viewer interests or preferences. Even assuming there may be different views as to how best to accommodate viewer preferences, the Act's approach of protecting all broadcasters *utterly without regard* to whether the carriage requirements have the effect of "thwart[ing] viewer preferences" is unsustainable. *Quincy*, 768 F.2d at 1461.

2. The must carry requirements do not "target"—even remotely—"anticompetitive conduct" by cable operators. As noted above, Congress specifically acknowledged that it has "*not* found that cable systems are engaging in a widespread pattern of denying carriage" to broadcasters,

[77] *See* Govt. Mot. to Affirm at 2 (asserting that the must carry requirements "constitute a carefully designed mechanism specifically aimed at promoting the First Amendment interests of viewers—interests this Court has described as 'paramount.'") (citing *Red Lion*).

House Report at 52 (emphasis supplied), and the relevant carriage studies confirm this fact. J.S. App. 58a, 63a-64a. Further, it cannot be disputed that in many if not virtually all instances in which a cable operator has chosen to carry a cable program network in lieu of a particular broadcaster, such decisions have been properly based on the operator's legitimate assessment of its subscribers' preferences and other valid editorial criteria.[78]

Adoption of broad, "prophylactic" measures purportedly to combat "anti-competitive treatment of broadcasters" (J.S. App. 27a), where the carriage evidence strongly suggests that at least 90 percent of cable systems have done no such thing (*see supra* at 42-43), is surely "burn-[ing] the house to roast the pig." *Butler v. Michigan*, 352 U.S. 380, 383 (1957). As the Court recently reaffirmed—again, outside the context of strict scrutiny—" '[b]road prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.' " [79] To the less than "widespread" extent that actual anticompetitive abuses by cable operators have occurred, the government "can regulate such abuses . . . through far less restrictive and more precise means." *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 476 (1988), such as through case-specific application of the antitrust laws.[80] *See Riley*, 487 U.S. at 795 (even though alternative of enforcing state antifraud statute may not be the "most efficient" means of addressing legitimate state concern, "we reaffirm simply and emphatically that the First Amendment does not permit the State to sacrifice speech for efficiency.").

3. In *Quincy*, the D.C. Circuit found that "if the goal [of must carry] is to preserve 'localism' and not 'local broadcasters,' the [Commission's] must carry rules are 'grossly' overinclusive." 768 F.2d at 1460 (internal citation omitted). The Commission's rules, the court noted, indiscriminately protected all local broadcasters without regard to the amount of local programming actually offered by the broadcaster and without reference to the amount of local programming otherwise offered by the cable system. *Id.*

The must carry requirements of the 1992 Cable Act are "grossly overinclusive" in the same manner as the rules struck down in *Quincy*. While purportedly aimed at promoting "local origination of programming" (1992 Cable Act § 2(a)(10)),[81] they, too, require a cable system to carry broadcast stations without regard to the quantity of local programming originated by those stations or the quantity of local programming originated or otherwise made available by the cable system.[82] They should suffer the same fate.

4. Perhaps the most blunderbuss feature of the must carry regime is Congress's decision to appropriate a flat one-third of each cable system's channel capacity for commercial broadcasters regardless of the size of the system. A subscriber to an average 39-channel system is mandated to receive up to 13 commercial broadcast stations (plus *all* local noncommercial stations), while a subscriber to a 60-channel system may receive 20, even if the two systems are in the same television market as defined by the FCC. *See* 47 U.S.C. § 534(h)(1)(C). Neither Congress nor the FCC has attempted to establish a baseline beyond which government intervention is deemed un-

[78] *See, e.g.*, J.A. 135-36, 146-47, 274-75, 327-28, 330-31.

[79] *Edenfield*, 113 S. Ct. at 1803-04 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

[80] *See Sunbelt Television, Inc. v. Jones Intercable, Inc.*, 795 F. Supp. 333, 336 (C.D. Cal. 1992).

[81] Promoting local content in programming is, of course, a content-based, speech-specific objective. *See* J.S. App. 61a.

[82] Section 5 even requires cable operators to "import" the signals of noncommercial stations from distant communities if one is not available locally. 47 U.S.C. § 535(b)(2)(B)(i). Obviously, requiring such importation does not serve the goal of "localism," nor could it conceivably be a remedy for "anticompetitive" conduct by the operator.

necessary to "preserve" local broadcasting.[83] And the channel capacity of a cable system is, of course, completely fortuitous. There is simply no basis upon which to conclude that appropriating a flat one-third of channel capacity of all cable systems nationwide for commercial broadcasters is "tailored" at all to any of the asserted governmental interests.

5. The Act's channel positioning requirements also burden substantially more speech than is justifiable in furtherance of any legitimate governmental interest. Both Sections 4 and 5 permit a broadcaster to demand carriage on its over-the-air channel position *or* the channel number *on which it was carried on July 19, 1985*. *See* note 29, *supra*. The legislative reports assert that cable operators have repositioned broadcast stations for allegedly "anticompetitive" reasons, again relying upon the purported incentive of cable operators to harm broadcasters because of competition for advertising revenues. *See* Senate Report at 44. Even assuming, *arguendo*, that changes of channel position could generally be regarded as "anticompetitive" conduct,[84] the government can have *no* legitimate interest in requiring carriage of broadcast stations on any channel *other* than the channel on which it is broadcast over-the-air. The only purpose for granting broadcasters the right to choose some other channel position is to guarantee them the most favorable channel positions.[85]

6. Finally, that the must carry provisions are tailored to the broadcasters'—not the public's—interests is further exposed by the "retransmission consent" option for commercial broadcasters provided by Section 6 of the Act. Section 6 empowers broadcast stations to *override* the asserted governmental interest in ensuring public access to local broadcast programming by withholding their signals from a cable operator unless the station gets paid (or for any other reason). *See supra* at 14. Instead of furthering the paramount First Amendment interests of viewers, as the government claims, Congress has enacted a scheme with two basic elements: (1) redistribution of wealth from cable operators to powerful broadcasters; and (2) a legislative mandate that the least popular local broadcasters, who otherwise might fail in the competition for public attention in the marketplace, *must* be carried on cable systems even though viewers might prefer to watch A&E, C-SPAN, Lifetime, USA Network, or programming of other appellants represented here.

CONCLUSION

The Court should reverse the decision of the district court, declare Sections 4 and 5 of the 1992 Cable Act to be in violation of the First Amendment, enjoin the federal defendants from enforcement thereof, and remand

[83] The *Quincy* court held that in the absence of such a baseline "we simply cannot know whether the rules are adequately tailored to pass constitutional muster." 768 F.2d at 1461.

[84] Appellants emphatically deny that such characterization is accurate or sustainable. The past several years have seen enormous growth in new programming services, together with expansions in channel capacity for many cable systems. If a cable system expands from 12 to 26 channels, it is not necessarily "anticompetitive" for a cable operator to decide to add Headline News to its line-up and to carry it somewhere in its top 12 channels. If the some system subsequently expands to 36 or 56 channels, it will be necessary to rethink the channel line-up again. Broadcasters *and* cable program networks get moved in this process, and, overall, broadcasters tend to do *better* with respect to channel position than cable program networks. Again, the Act's premise—that repositioning can *uniformly* be treated as an "anticompetitive" practice—renders the channel positioning requirements "grossly overinclusive."

[85] The papers Station WNYC-TV (New York, New York) filed on January 29, 1993, in the district court in support of its motion for a temporary restraining order against Time Warner illustrate the effect of the channel positioning requirements. Station WNYC complained bitterly that it was being repositioned from channel 3 "to the hinterland of channel 31"—*its over-the-air position*. Station WNYC described channel 3, where TNT had been placed, as "substantially more valuable," and asserted that "viewers browsing among channels are far less likely to encounter WNYC at channel 31 then [sic] at channel 3." WYNC Mem. at 1, 7 (R. 133 in 92-2247). Pursuant to Section 5, the FCC has ordered Time Warner to return WNYC to channel 3, *Complaint of WNYC Communications Group*, 8 FCC Rcd 3925 (1993), and TNT is now carried on channel 31.

the case to the district court to resolve the issue of whether Section 6 of the 1992 Cable Act is severable from Section 4.[50]

Respectfully submitted,

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[50] *See* J.S. App. 7a n.10.

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No. 93-44

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLANT DANIELS CABLEVISION, INC.

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QUESTION PRESENTED

May the Congress, consistent with the First Amendment, make a content-based (but viewpoint-neutral) law that targets a private medium of communication and, over the owner's objection, selectively discriminates between "equally protected" speakers by mandating special distribution-enhancements for the messages of a preferred class of persons to the corresponding disadvantage of the other messages and speakers?

A subsidiary Question may be:

Whether this targeted restriction on expression and communicative activity, provided it is characterized as "economic regulation", may be justified pursuant to an interests-balancing analysis in the style of *United States v. O'Brien* and its progeny?

PARTIES TO THE PROCEEDING

A list of the parties to the proceeding in the district court is set forth in appellants' Jurisdictional Statement ii-iii. Daniels Cablevision, Inc., appellant here, was the plaintiff in the district court Civil Action No. 92-2292. The Rule 29.1 disclosure statement of Daniels Cablevision, Inc. is set forth in the Jurisdictional Statement Appendix 115a.

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MISCELLANEOUS	
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Face-Off On Must Pay, Broadcasting, Apr. 2, 1990, at 43	14
Jeannine Aversa, *Inouye Offers Carriage Bill, But No Endorsement*, Multichannel News, Apr. 2, 1990, at 3	13
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Paul Farhi, *Foes of Cable Bill Outspend Its Supporters*, Wash. Post, Sept. 22, 1990, at D1	14
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Tempus Fuquit for Must-Carry/Retransmission Legislation, Broadcasting, May 4, 1992, at 4	14
The Inside-Outside World of CBS's Jay Kriegel, Broadcasting, Apr. 2, 1990, at 44	14
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BRIEF FOR APPELLANT DANIELS CABLEVISION, INC.

OPINION BELOW

The opinion of the three-judge United States District Court for the District of Columbia is reported at 819 F. Supp. 32 (D.D.C. 1993). It is reprinted in the Appendix to appellants' Jurisdictional Statement at 1a-72a.

JURISDICTION

The judgment of the district court was entered on April 8, 1993. Appellant Daniels Cablevision, Inc. ("Daniels") timely filed a notice of appeal in the district court on May 3, 1993. *See* J.S. App. 78a-79a.

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1253, which provides that "[e]xcept as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying . . . an interlocutory or permanent injunction in any civil action required by any Act of Congress to be heard and determined by a district court of three judges." Section 23 of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. § 555(c)(1), requires that challenges to sections 4 and 5 of the Act "be heard by a district court of three judges convened pursuant to [28 U.S.C. § 1253]." Probable jurisdiction was noted by the Court September 28, 1993.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

Relevant provisions of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified in scattered section of 47 U.S.C.) ("Cable Act"), are reprinted in the Appendix to appellants' Jurisdictional Statement ("J.S. App.") at 82a-110a. This appeal challenges the constitutionality of sections 4 and 5 of the Cable Act, 47 U.S.C. §§ 534, 535, the so-called "must-carry" provisions (J.S. App. 88a-108a).

STATEMENT OF THE CASE

This case presents a challenge to the constitutionality of the must-carry provisions of the Cable Act on the single ground that the law, on its face, fatally

conflicts with the First Amendment to the U.S. Constitution. Daniels' claim below, and now here, is that the must-carry provisions of the statute, by their own terms, target and selectively restrain the conduct of constitutionally protected communicative activity by purposefully "abridging the freedom of speech, and of the press", U.S. Const. amend. I, as held by Daniels and by all other cable television operators. Daniels urges that the must-carry law may not constitutionally be applied or enforced relative to *any* cable television communication system. The "facts" supporting this proposition, and relied upon by Daniels, are apparent on the face of the must-carry statute. The three-judge court below, on motions and cross-motions for summary judgment and by a split decision, dismissed Daniels' First Amendment claims, denied its motion to enjoin the law, and declared the must-carry law facially constitutional.

INTRODUCTION AND SUMMARY OF ARGUMENT

Daniels is the owner and operator of a cable television system in San Diego, California, and is subject to the must-carry law. Cable television operators, including Daniels, engage in "speech" and are a part of the "press" within the context of the First Amendment. The purpose of the must-carry law is facially and selectively to supervise the content of fully protected expression circulated over a lawful vehicle of mass media communication and, thereby, to ensure that the messages of a select class of person, *vis-a-vis* other directly affected persons, are distributed on a prefereatial basis. The means chosen by the Congress to implement this objective are to restrict the editorial discretion of cable television operators over the format and content of those communications fur-

nished over the cable circuits, and substantively to discriminate between equally protected speakers. The must-carry law is, on its face, content-based and speaker-partial, and because it is exclusively and narrowly aimed at a component of the press, the law is subject to the most rigorous constitutional review.

Daniels advances two propositions of First Amendment jurisprudence, each independently demonstrating fundamental constitutional error in the judgment of the district court. First, content-based laws that, *on their face*, selectively target and purposefully restrict the conduct of protected "speech" and "press" activities are not subject to "rational basis" review. Second, *O'Brien*'s interests-balancing analysis, by its own terms, is inapposite to review of laws that *facially* confront the command of the First Amendment.[1] Daniels further shows that the must-carry law, which directly affects the exercise of "speech" and "press" liberties, results from a political environment that is, itself, inimical to the First Amendment.

The district court did not purport to justify the must-carry law in a fashion analogous to the "scarcity doctrine" as generally applied in cases involving the licensing of radio broadcasting stations under the public-interest standard of the Communications Act of 1934, as amended (47 U.S.C. §§ 151-613).[2] Nor

[1] *United States v. O'Brien*, 391 U.S. 367 (1968) ("*O'Brien*"). Daniels will further show that the *O'Brien* standard of First Amendment review has undergone no metamorphosis over the past 25 years, as suggested by the district court (J.S. App. 9a, 19a, 22a-23a), that would make it applicable to review of those laws that, on their face, implicate the First Amendment.

[2] *See Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 386-90 (1969); *id.* at 376 ("Without government control, the

did the court create or suggest any new standard of First Amendment review uniquely applicable to communication via closed-circuit cable television lines. Instead, the district court relied upon, but misconstrued and misused, traditional principles of First Amendment law to uphold the must-carry statute as facially constitutional.

ARGUMENT

I. THE MUST-CARRY LAW TARGETS THE CABLE TELEVISION COMPONENT OF THE PRESS AND SELECTIVELY RESTRICTS THE CONDUCT OF CONSTITUTIONALLY PROTECTED ACTIVITY OVER THAT MEDIUM OF MASS COMMUNICATION

Communication via cable television lines is an activity protected, at least in some measure, by the First Amendment.[3] The must-carry law is aimed

medium [of radio] would be of little use because of the cacophony of competing voices, none of which would be . . . heard (footnote omitted)); *National Broadcasting Co. v. United States*, 319 U.S. 190, 216-17, 226-27 (1943). The Court consistently has emphasized the narrowness of the scarcity doctrine, even in its unique application to the federal licensing of radio frequencies. *E.g., Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 74 (1983) ("Our decisions have recognized that the special interest of the Federal Government in regulation of the broadcast media does not readily translate into a justification for regulation of other means of communication" (footnote omitted)).

[3] *See, e.g., Leathers v. Medlock*, 111 S. Ct. 1438, 1442 (1991) ("cable television provides to its subscribers news, information, and entertainment . . . . It is engaged in 'speech' under the First Amendment, and is, in much of its operation, part of the 'press' "); *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986) (a cable operator

exclusively at the cable television element of the mass media press to purposefully restrict the exercise of communicative activity. On its face, the law affects content by selectively limiting the cable television operator's discretion to implement its own content-based judgments.[4] A particular class of speaker, *i.e.*, local broadcast station licensees, is created by the law and officially accorded substantive "speech" preferences over all other "equally protected" speakers. The purpose of the law is to ensure that the messages of the favored class of speaker are included within the content of those communications published via cable television circuits, and that those preferred messages are formatted and distributed in the officially prescribed manner. The statute, by its terms, establishes Government as the authority to mandate

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"exercise[s] editorial discretion [in deciding] which stations or programs to include in its repertoire"). *See also Preferred Communications*, 476 U.S. 495 ("We think that we may know more than we know now about . . . the present uses of the public utility poles and rights-of-way and how [the cable operator] proposes to install and maintain its facilities . . ."); *id.* at 496 (Blackmun, J., concurring) (Court's remand "leaves open the question of the proper standard for judging First Amendment challenges to a municipality's restriction of access to cable facilities"). Unlike that question before the Court in *Preferred*, the instant appeal involves an *ad hoc* law targeting and selectively restricting communicative activity.

[4] The district court found that the must-carry provisions "limit the freedom of cable operators to refuse to carry the signals of local broadcast stations . . .". (J.S. App. 3a.) *See also id.* at 5a ("Every commercial broadcast station having a right to mandatory carriage must be carried by the cable operator, at the station's election, on its current over-the-air channel position, [or] at the channel position it occupied on July 19, 1985, or . . . on January 1, 1992").

content over a private medium of mass communication, albeit in a "viewpoint-neutral" fashion.[5]

The legislative goal is directly achieved by (a) restraining the liberty of the cable operator to exercise content-based discretion over those communications circulated over its communications medium, and (b) infringing on the constitutionally guaranteed freedoms of those other, less favored speakers who seek to distribute their messages over the finite number of available cable television channels.[6] Under the

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[5] Daniels concedes that the content-based, speaker-partial law at issue is "viewpoint neutral" in the limited sense that the Government is not ostensibly engaged in dictating the particular content of any message. Nonetheless, the district court attached a relative value to the expression of the preferred class of speaker, finding that "Congress' solicitousness for local broadcasters' material simply rests on its assumption that they have as much to say of interest or value as the cable programmers . . . ." (J.S. App. 20a). This, in the lower court's view, is appropriate legislative action and all that is necessary for the Congress to create, and substantively favor, an elite class of First Amendment speaker at the direct expense of other speakers. We question whether legislatively established "speaker" classification geared to, for example, income levels, land ownership, educational credentials or, more apropos to the case at hand, ownership of other outlets of mass media communication—each "viewpoint neutral" in the identical sense as is the must-carry law—would be adjudged compatible with the First Amendment.

[6] *See, e.g., Quincy Cable TV, Inc. v. F.C.C.*, 768 F.2d 1434, 1441, 1451 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986) ("Almost without exception, the must-carry rules only mandate carriage of [broadcast] signals that can already be picked up off the air" (footnote omitted)) ("Under the protective aegis of [must-carry] rules, local broadcasters are guaranteed the right to convey their messages . . . while cable programmers must vie for a proportionately diminished number of channels").

law, the broadcast licensee, already a privileged occupant of the public airwaves able to reach the masses with its messages and commercial announcements, is afforded a still greater, constitutionally unique privilege, an official speech preference *vis-a-vis* those other speakers who have not been awarded broadcast licenses and who must depend upon cable distribution to reach their audience.[7] Unless the cable operator carries the messages of the preferred class of speaker, and in the officially prescribed manner, it may not conduct its communications business at all.

Under First Amendment challenge, and on these undisputed facts, the must-carry law was justified by the district court as a rational exercise of legislative power (J.S. App. 13a (must carry "is simply industry-specific antitrust and fair trade practice regulatory legislation")). The court ruled that must carry was "essentially economic regulation", holding that the "provisions are, in intent as well as form, unrelated . . . to the content" of these messages distributed over the medium of cable television. *Id.*[8] The district court's central thesis is the determination that *ad hoc* laws that target the press, facially restrain communicative activity, substantively and selectively discriminate between speakers, and directly bear on the content of the communications in

[7] *See, e.g., Quincy Cable TV*, 768 F.2d at 1452-53 ("must-carry rules transfer control [of the cable system] to local broadcasters who already have a delivery mechanism granted by the government without cost and capable of bypassing the cable system altogether").

[8] *Cf. Riley v. National Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 790 (1988) (rejecting the "State's almost talismanic reliance" on the assertion that a law which selectively burdens speech is "simply an economic regulation").

question, need be "strictly scrutinized only if it appears that the government has prescribed the content—either the message or the subject matter of the speech to be spoken" (J.S. 16a; footnote omitted).

The court below held that a law mandating "[s]peaker partiality", unless it "is related to what the speakers are saying, is insufficient to trigger strict scrutiny" (J.S. App. 18a, footnote omitted). According to the district court, Government, consistent with the First Amendment, may (i) target purely communicative activity, (ii) countermand the communicative judgments and information offerings of those persons primarily engaged in the business of mass media expression, (iii) classify equally protected speakers, and (iv) selectively favor designated classifications over others, the lone proviso being that the restrictions are "content-neutral" (J.S. App. 19a) and deemed, on balance, to serve the public interest. In the district court's judgment, content-related restraints on the press avoid strict-scrutiny review if there is no intent by Congress to mold, or unduly influence, the viewpoint of the prescribed or proscribed message.[9] The essence of the court's ruling is that Congress, the First Amendment notwithstanding, is relatively free to make laws selectively intruding upon the "press" to burden or curb "speech"

[9] Under the lower court's theory, *The Washington Post* could be ordered, for example, to provide preferential space in its pages to persons on the basis of geographical distinction or to those persons holding governmental authorizations to express themselves via other vehicles of mass communication, and the only constitutional inquiry would be a subjective balancing of the given governmental interest in enacting the speech-restrictive regulation *vis-a-vis* the newspaper's interest in publishing free of the content-based intrusion.

activity, even to the extent of content-based supervision, and that such restrictions "are to be strictly scrutinized only if it appears that the government has prescribed the content—either the message or the subject matter—of the speech. . ." (J.S. App. 16a). That proposition—essential to the lower court's judgment—is unprecedented and in manifest error. *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 502 (1981) ("Government has legitimate interests in controlling the noncommunicative aspects of the medium . . . but the First and Fourteenth Amendments foreclose a similar interest in controlling the communicative aspects").

The district court reasoned that the targeted, content-based restrictions before it "will pass constitutional muster if they satisfy the criteria established in *O'Brien* and its progeny" (J.S. App. 15a), that the "record in support of the 1992 Cable Act . . . was made by Congress", and because "Federal Courts do not ordinarily review the adequacy of the record before Congress to support the laws it enacts" (*id.*), the must-carry law is presumptively constitutional. In sum, the court, reviewing a statute that it acknowledges "to limit the [speech] freedom of cable operators" (J.S. App. 3a), accepts at face value those "findings" made by the Congress to justify its conscious circumvention of the constraint by which the First Amendment limits legislative powers.[10] At

[10] *Cf. Sable Communications of California v. F.C.C.*, 492 U.S. 115, 129 (1989) ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake" (citation and internal quotation marks omitted)); *Thomas v. Collins*, 323 U.S. 516, 530 (1945) ("the usual presumption supporting legislation is balanced by the preferred

the same time, the district court pays but scant attention to the command that constitutionally forecloses the legislature's foray into the specially guarded preserves of speech and press.[11] In that fashion, not only do legislators bootstrap themselves into making the very laws that the First Amendment forbids, but the "duty" of judges to review legislative enactments for constitutional infraction or consistency, as exclusively entrusted by Article III of the Constitution, is largely made a sham.[12] Under the lower court's rationale, the command of the First Amendment, if not altogether muted, is reduced to a less-than-binding advisory.[13]

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place given in our schemes to the great, the indispensible democratic freedoms secured by the First Amendment").

[11] *Cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) ("The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time be passed by those intended to be restrained?").

[12] *Cf. Marbury*, 5 U.S. (1 Cranch) at 180 ("the particular phraseology of the constitution . . . confirms and strengthens the principle . . . that a law repugnant to the constitution is void; and that courts . . . are bound by that instrument"). *See also id.* at 177-178 ("It is emphatically the province and duty of the judicial department to say what the law is . . . [and it is] the constitution [that] must govern"). Yet the court below is openly hesitant even to question the relevant "findings" of the Congress (J.S. App. 15a).

[13] *Cf. Houchins v. KQED, Inc.*, 438 U.S. 1, 13 (1978) (courts "must not confuse what is 'good,' 'desirable,' or 'expedient' with what is constitutionally commanded by the First Amendment. To do so is to trivialize constitutional adjudication"). *See also West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943), ("Freedoms of speech and of the

The one reality that the Court, above all else, must recognize here is that a particular component of the press, television broadcasting as an industry, using its considerable tools to shape public opinion and influence elective politics, has persuaded a legislative body affirmatively to enhance its communicative and commercial interests by correspondingly diminishing the constitutionally guaranteed freedoms of other "equally protected' speakers and "press" outlets. For whatever Congress' motivation or rationale, the must-carry law purposefully abridges the freedoms of speech and press of some of the people for the special benefit of those who so ably lobbied its enactment.[14]

In *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943), this Court said: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy,

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press . . . may . . . be infringed only to prevent grave and immediate danger to interests which the state may lawfully protect").

[14] Does the nation need, or want, a political system in which Government, with relative impunity, may economically reward or punish the various factions of the press, and in which those interests are continuously beholden to the political establishment, either to perpetuate their commercial advantages or to mitigate the relevant burdens? *Cf. Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring) ("Recognizing the occasional tyrannies of governing majorities, [the Framers] amended the Constitution so that free speech . . . should be guaranteed"). Is the tenor of the First Amendment to maintain an independent, "vigilant and courageous press", *Near v. Minnesota*, 283 U.S. 697, 720 (1931), or a press that is subservient and readily intimidated into "self-censorship" as the best course of doing business? *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757-58 (1988).

to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." The history of the must-carry controversy belies this fundamental teaching.[15] The must-carry regime grew out of a classic political confrontation over "turf" waged between influential industry trade associations, their respective "PACs" and their "Hill" lobbyists.[16] Must carry is about dollars, special interests and, most of all, the effective use of political power, all of which would be "business as usual", *except* for one crucial fact: the victors' spoils have *facially* taken shape as a legislative restraint on the losers' exercise of their constitutionally guaranteed freedoms of speech and press.[17]

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[15] For the 30-year history of must-carry regulation, *see Quincy Cable TV*, 768 F.2d at 1439-1445; *see also Century Communications Corp. v. F.C.C.*, 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988); *Home Box Office, Inc. v. F.C.C.*, 567 F.2d 9, 45 n.80 (D.C. Cir.) (per curiam), *cert. denied*, 434 U.S. 829 (1977).

[16] *See, e.g.*, Sheila Kaplan, *Lobby Talk, Cable Bill Mobilizes Lobbyists*, Legal Times of Wash., Sept. 21, 1992, at 5. None of this is to fault any person or industry group. Indeed, all have been playing in the same game, some more productively than others. Its relevance here is only to show that the Congress has been "persuaded", the Constitution notwithstanding, to enhance the stature and commercial interests of some speakers by abridging the constitutionally guaranteed freedoms of others.

[17] The politics of must carry are well documented. *See, e.g.*, Jeannine Aversa, *League Offers Carriage Bill, But No Endorsement*, Multichannel News, Apr. 2, 1990, at 3 ("The bill . . . was hatched out of a proposal created by the National Association of Broadcasters . . . . [It] has been dubbed 'if carry, must pay,' and is supported by the Association of Independent Television Stations"); *NAB to Push for Manda-*

This overt politicalization of "speech" liberties notwithstanding, the district court insists that the must-carry law, if it implicates the First Amendment at all, does so only in the most minimal or insignificant manner (J.S. App. 13a, 20a, 28a). The concurring opinion in the split decision below (Sporkin, D.J., concurring (J.S. App. 36a)) actually chastises the cable operator and programmer plaintiffs there (appellants here) for even mounting their constitutional challenges to the must-carry law. *Id.* at 42a ("Plaintiffs have come before this Court, not because their

tory Retransmission Fees, Communications Daily, Jan. 17, 1990, at 8 ("Comm. Dly."); *id.* at 9 ("Attention of Congress 'is beginning to be riveted' on regulation of cable, said Rep. Tauzin (D-La.) . . . at NAB legislative forum . . ."); *Broadcasters Unite on If-Carry/Must-Pay Plan to be Sent to Inouye for Introduction*, Comm. Dly., March 26, 1990, at 1; *The Inside-Outside World of CBS's Jay Kriegel*, Broadcasting, Apr. 2, 1990, at 44 ("If broadcasters succeed in winning must pay, Larry Tisch's right-hand man will get major credit; he's become a major force in company, in industry, and in Washington"); *Face-Off On Must Pay*, Broadcasting, Apr. 2, 1990, at 43 ("CBS President Laurence Tisch was on Capitol Hill last week plugging the [if carry/must pay] legislation"); *Tempus Fugit for Must-Carry/Retransmission Legislation*, Broadcasting, May 4, 1992, at 4 ("Washington broadcasting industry lobbyists are still confident of final enactment of cable bill with must-carry/retransmission consent"); Ann Devory, *Gore Slams President on Cable TV Bill*, Wash. Post, Sept. 29, 1992, at A6. *See also* Paul Farhi, *Foes of Cable Bill Outspend Its Supporters*, Wash. Post, Sept. 22, 1990, at D1. None of the foregoing is intended to demonstrate the truth or falsity of these press reports but only to show the general political climate in which the must-carry legislation was conceived, debated and enacted. To say that the "speech" liberties of cable operators and programmers have suffered "the vicissitudes of political controversy", *Barnette*, *supra*, is grossly to understate the premise.

freedom of speech is seriously threatened, but because their profits are; to dress up their complaint in First Amendment garb demeans the principles for which the First Amendment stands . . .").[18]

The court below has simply overlooked or ignored the substance of the must-carry law, especially in its overt classification of, and discrimination among, speakers. Daniels is unaware of any other court that knowingly has endorsed a legislative scheme that, on its face, is content-based and feudalizes the rights of "equally protected" speakers by extending the "guaranteed" freedom to a privileged class and diminishing it for others.

II. THE MUST-CARRY LAW, BECAUSE IT TARGETS "SPEECH" AND "PRESS" ACTIVITY AND PURPOSEFULLY RESTRICTS THE EXERCISE OF THOSE CONSTITUTIONALLY GUARANTEED LIBERTIES, IS NOT SUSTAINABLE UNDER THE RULE OF RATIONALITY

In a mode substantially similar to that of other publishers and editors in the complex of mass-media communications, cable television operators (unlike "soda vendors") are primarily involved "in the business of expression". *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 761 (1988).[19] That fact, alone, constitutionally distinguishes the permissible regulation of their business from that of persons whose principal vocation is *not* "expression."

[18] This gratuitous characterization is all the more extraordinary in light of the D.C. Circuit's prior rulings in *Quincy Cable TV*, 768 F.2d 1434, and *Century Communications Corp. v. F.C.C.*, 835 F.2d 292, 298 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1632 (1988), each of which struck down previous administrative versions of the must-carry regime as unconstitutional.

[19] *See also supra* n.3.

Id. For example, while a manufacturing business or telephone utility may generally be subjected to rational-basis regulation, the press is not fair game for the legislature's targeted supervision. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943) ("The right of a State to regulate, for example, a public utility may well include . . . power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press . . . may not be infringed on such slender grounds"); *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 120 (1973) (there is a "basic distinction" between selective regulation of the communications media and a "utility that itself derives no protection from the First Amendment").[20] Far more intrusive than that ordinance at issue in *City of Lakewood*—which involved only the licensing of a limited few newspaper vending boxes on public property—the must-carry law is "directed narrowly and specifically at expression or conduct commonly associated with expression: the circulation of [speech]". *City of Lakewood*, 486 U.S. at 760-61.[21] As such, the must-carry restraint, at a minimum, is subject to facial First Amendment challenge. *Id.* at 755-57.[22]

[20] *See also* 47 U.S.C. § 541(c) ("any cable system shall not be subject to regulation as a common carrier or utility").

[21] In *City of Lakewood*, the newspaper publisher was hardly prohibited, or even meaningfully inhibited, from distribution of, or control over, its publication by the ordinance there in question. Here, failure by the cable operator to adhere to the content-based restrictions in the must-carry law would result in termination of the cable television business.

[22] The licensing ordinance before the Court in *City of Lakewood* raised no content-based implications nor did the record there contain any evidence or suggestion of an effort by public officials to use the ordinance in a content-related fashion. Nonetheless, the Court struck down the ordinance as facially unconstitutional because it possibly could "intimidate[] parties into censoring their own speech". *City of Lakewood*, 486 U.S. at 757. In the case of the must-carry law, the content-based nature of the restriction is self-evident.

Nearly 60 years ago in *Nebbia v. New York*, 291 U.S. 502 (1934), this Court, rejecting constitutional claims, upheld the right of the state to fix prices for the sale of milk. The "power [of government] to promote the general welfare is inherent", 291 U.S. at 524, "except in so far as it has been restricted by the Constitution of the United States." *Id.* This long-established principle was recently, and unanimously, reiterated in *Planned Parenthood of Southeastern Pa. v. Casey*, 112 S. Ct. 2791, 2806-07 (1992), where the Court said:

> It is conventional constitutional doctrine that where reasonable people disagree the government can adopt one position or the other. That theorem, however, assumes a state of affairs in which the choice does not intrude upon a protected liberty (citations omitted).[23]

In the instant case, the lower court sees no difference between the regulation of milk production or other similarly unprotected activities, and a content-based law that targets a part of the press to selectively restrict speech-related activity and mandate content (*i.e.*, must carry). *See, e.g.*, J.S. App. 12a-13a. The

[23] *See also Planned Parenthood*, 112 S.Ct. at 2874 (Scalia, J., concurring in the judgment in part and dissenting in part) (joining in the above-quoted passage and observing that "[t]he issue [then] is whether [the law under review intrudes on] a liberty protected by the Constitution").

difference, of course, is that the latter, on its face, "intrude[s] upon a protected liberty", *Planned Parenthood, supra*, while the former does not. While so-called "industry specific" regulation generally enjoys wide acceptance, that label is not license for the *ad hoc* supervision of speech or the press. *See infra* 21-22.

A cable television operator is in no manner immunized by the First Amendment from governmental supervision. Most certainly, its business and other activities, including those of a communicative character, are comprehensively subject to the generally applicable laws, even when the particular regulation in question may limit the exercise of "speech" freedoms or inhibit "press" activity. *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513, 2518 (1991) ("generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news"); *Associated Press v. NLRB*, 301 U.S. 103, 132 (1937) ("The publisher of a newspaper has no special immunity from the application of general laws"); *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (upholding application of the general antitrust laws to the press on ground that the "First Amendment affords not the slightest support for the contention that a combination [in restraint of trade] has any constitutional immunity").

At the same time, however, the media of mass communication are constitutionally afforded protection from *ad hoc* regulations "that single out the press" for imposition of special restrictions or burdens. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Rev.*, 460 U.S. 575, 585, 592 (1983); *accord Grosjean v. American Press Co.*, 297 U.S. 233, 250-51

(1936); *Leathers*, 111 S. Ct. at 1442; *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 112 S. Ct. 501, 509 (1991).[24] Especially offensive to the First Amendment is any law selectively aimed at the press and imposing, or even creating the possibility for, content-based supervision. *Leathers*, 111 S. Ct. at 1442-43. Whenever regulations target "speech" or "press" activity and, as is the case with the must-carry law, facially and purposefully impact on the content-related judgments and practices of editors or speakers, the scheme consistently has been declared unconstitutional.[25]

If, as the Court has held, a "tax" selectively applied to the press presumptively conflicts with the First Amendment, *Minneapolis Star & Tribune Co.*, 460 U.S. 575; *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987), then an *ad hoc* law that targets

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[24] *See also Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) (The "liberty of the press is not confined to newspapers and periodicals" but rather pertains to "every sort of publication which affords a vehicle of information and opinion"); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (First Amendment protects "not only the right to utter or to print, but the right to distribute [and] the right to receive"); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952) (The "basic principles of freedom of speech and the press, like the First Amendment's command, do not vary"); *Quincy Cable TV*, 768 F.2d at 1448 ("the core values of the First Amendment clearly transcend the particular details of the various vehicles through the messages are conveyed").

[25] *See, e.g., Riley v. National Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988), where professional fundraisers are accorded substantially more protection from content-based regulation of their solicitations, even in the face of "fraud" allegations, than the district court would afford the cable television component of the press. *See also id.* at 791, 795-97, and cases cited therein.

one component of the press to purposefully limit the communicative judgments and distribution practices of private editors is, at minimum, highly suspect.[26] At the very least, the tax law starts out on the right foot, U.S. Const. art. I, § 8, cl. 1 ("The Congress shall have Power to lay and collect Taxes"), while the must-carry restraint, out of the starting gate, collides with the constitutional command that Congress "make no law . . . abridging the freedom of speech, or of the press". A "tax" statute that targets the press implicates the First Amendment *only* because it implies a legislative motive, or creates the opportunity, to affect content. In contrast, must carry "is directed narrowly and specifically at expression or conduct commonly associated with expression: the circulation of [protected speech]", *City of Lakewood*, 486 U.S. at 760. It imposes, on its face, a content-based condition on the flow of fully protected communications over a private medium of expression. Far more than that licensing ordinance at issue in *City of Lakewood*, these "two features . . ., at least in combination, justify

[26] *See Leathers*, 111 S. Ct. 1438, where the Court sustained, against First Amendment challenge, Arkansas' "tax of general applicability" because the State had not "targeted cable television in a purposeful attempt to interfere with its First Amendment activities". *Id.* at 1444. In contrast, the must-carry law, whatever its legislative motive and however labeled (*e.g.*, "consumer protection" or "economic regulation"), is a highly focused, "purposeful attempt to interfere with [a cable operator's] First Amendment activities". *Id.* Yet, the decision below (J.S. App. 18a, n.22) urges the proposition that while tax assessments targeting the press must be strictly scrutinized, the must-carry law, content-based on its face, avoids that demanding examination.

the allowance of a facial [First Amendment] challenge". *Id.* at 759.[27]

Just this past term, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217 (1993), the Court reiterated the familiar principle that a "law burdening religious practice [protected by the First Amendment] that is not neutral or not of general application must undergo the most rigorous of scrutiny". *Id.* at 2233; *see also id.* at 2226-27, 2233-34. The Court further observed that the "principle that government . . . cannot in a selective manner impose burdens only on conduct [subject] to the protection of . . . the Free Exercise Clause . . . has parallels in our First Amendment jurisprudence [under the Speech and Press Clause]". *Id.* at 2232.[28] *Church of the Lukumi Babalu Aye* demonstrates that laws selectively restraining the exercise of freedoms guaranteed by the First Amendment, whether they be

[27] In contrast to that generally applicable tax before the Court in *Leathers*, 111 S. Ct. at 1445 ("There is nothing in the language of the [Arkansas] statute that refers to the content of mass media communications"), the theme of the must-carry law is the preferential distribution of the messages of an officially favored class of speaker over a privately owned vehicle of expression and, to that extent, to maintain governmental control over the *content* of those communications delivered via that medium. Nonetheless, the court below held that the "must-carry provisions are [barely] content-related at all" (J.S. App. 20a). The holding contravenes simple reality.

[28] The constitutional command that "Congress shall make no law" is common, and equally applicable, to the Speech and Religion Clauses of the First Amendment. This restraint on legislative power is not dulled because the Congress, in the instant circumstances, has elected to invade the realm of expression rather than that of religion.

of the "religion" or "speech" genre, are facially unconstitutional if not, *inter alia*, shown necessary to achieve a compelling governmental purpose. *See id.* at 2226.[29] In the case of the must-carry restraint, neither the Congress nor the court below has suggested that the law furthers a compelling interest. Absent extraordinary grounds, *ad hoc* incursions by the Congress on the press—especially those that are content-based—are unconstitutional.

The must-carry law extends far beyond those "public funding" cases before the Court in *Regan v. Taxation With Representation Of Washington*, 461 U.S. 540 (1983), and *Rust v. Sullivan*, 111 S. Ct. 1759 (1991), where Congress' authority selectively to underwrite "certain activities it believes to be in the public interest" was affirmed on the ground that " '[a] refusal to fund [constitutionally] protected activity, *without* more, cannot be equated with the imposition of a 'penalty' on that activity' ". *Rust*, 111 S. Ct. at 1772 (quoting *Harris v. McRae*, 448 U.S. 297, 317 n.19 (1980) (emphasis added)). Must-carry, of course, is not just the selective appropriation of public funds. It is a great deal "more". *Id.* Must-carry is a content-based "penalty", affirmatively restraining the cable operator's conduct of fully protected communicative activity.

The egregious nature of the must-carry restraint is perhaps best illustrated by the Public Broadcasting Stations who actually argued below, through their trade associations, that because their operations had

[29] If the limitations that the Constitution fixes on the lawmaking powers of government, and the freedoms it guarantees to the people, may be cast aside through the use of labels (*e.g.*, "simply industry-specific antitrust and fair trade practice regulatory legislation" (J.S. App. 13a)), then the First Amendment is little more than rhetoric.

been financed to the extent of billions of dollars of public appropriations, Congress had the further, special warrant to protect the taxpayers' investment by limiting the First Amendment freedoms of other persons. In short, public broadcasting stations, under the laws, now receive from the Government *both* a cash subsidy and a helping-hand by way of a prior restraint on the communicative judgments and activities of third persons; and, understandably, they want to retain both.[30]

While the capacity of government to advance its own speech, or specially to promote that of select persons, is unfettered by the First Amendment, the *one* thing, to that end, that it *may not* do is affirmatively to abridge the protected freedoms of other equally protected speakers. And that, precisely, is the legislative scheme of must carry. The constitutional command notwithstanding, Congress, targeting cable operators and cable programmers, has made a content-based "law . . . abridging the freedom of speech, [and] of the press"; and that enactment, on its face, is unconstitutional.

III. *O'BRIEN*'S INTEREST-BALANCING ANALYSIS IS INAPPOSITE TO FIRST AMENDMENT REVIEW OF LAWS THAT, ON THEIR FACE, LIMIT THE EXERCISE OF "SPEECH" OR "PRESS" FREEDOMS

In *United States v. O'Brien*, 391 U.S. 367, 377 (1968), the Court, reaffirming a four-prong test for review of regulations alleged *incidentally* to restrict

[30] As a matter of constitutional law, the public broadcasters, subject only to the legislature's discretion, are clearly entitled to their appropriations. Equally manifest, the must-carry restraints on the "speech" and "press" freedoms of cable operators and programmers, however beneficial to the public broadcasters or to the commonweal, are unconstitutional.

the exercise of "speech" freedoms, held that a "governmental regulation is sufficiently justified [i] if it is within the constitutional power of the Government; [ii] if it furthers an important or substantial governmental interest; [iii] if the governmental interest is unrelated to the suppression of free expression; [iv] and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to furtherance of that interest." On at least two of these four counts, the must-carry law fails to qualify for an *O'Brien* analysis. At the threshold, the must-carry restraint is not "within the constitutional power of the Government" because, as the district court, itself, held, the law "limit[s] the freedom of cable operators to" distribute what their best judgment says ought to be circulated (J.S. App. 3a). Second, *O'Brien* is inapposite to examination of the must-carry law because it *directly* and *purposefully* restrains communicative activity, thereby *facially*, instead of "incidentally", abridging the exercise of freedoms protected by the First Amendment. *See, e.g., Quincy Cable TV*, 768 F.2d at 1453 ("our examination of the purposes that underlie the must-carry rules, the nature and degree of the intrusions they effect, and prior judicial treatment of analogous regulations leaves us with serious doubts about the propriety of applying the standard of review reserved for incidental burdens on speech").[31]

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[31] That the *O'Brien* standard is typically characterized by this Court as "less stringent," "relatively lenient," or "less demanding" (as in *Texas v. Johnson*, 491 U.S. 397, 403, 407 (1989)), is solely because it is inapposite to review of regulations that facially or selectively limit communicative activity. The very predicate of *O'Brien*, as articulated by the Court, is that the draft-card law there in question "plainly [did] not abridge free speech on its face . . . . [Such law] on its face deals with conduct having no connection with speech." *O'Brien*, 391 U.S. at 375. *Compare O'Brien*, 391 U.S. at 375 ("A law prohibiting destruction of Selective Service certificates no more abridges free speech on its face than a motor vehicle law prohibiting the destruction of drivers' licenses, or a tax law prohibiting the destruction of books and records") *with Johnson*, 491 U.S. at 403 ("If the . . . regulation is not related to expression, then the less stringent standard we announced in *United States v. O'Brien* for regulations of noncommunicative conduct controls. [Otherwise, we must apply] a more demanding standard").

In contrast to that Selective Service law before the Court in *O'Brien*, content-based regulation of the cable television press confronts the express provisions of the First Amendment. Must carry not only targets the cable press to selectively regulate the distribution of speech, the particular means chosen by the Congress to accomplish that questionable goal is facially to abridge the communicative freedoms of persons who publish fully protected expression via cable distribution circuits. That a law having a concededly or presumptively constitutional purpose (*e.g.*, making it a crime knowingly to destroy one's draft card or tax records),[32] and a regulation which facially implicates the First Amendment (*e.g.*, placing content-related restrictions on the distribution of protected speech),[33] are not subject to the same, or even similar, First Amendment analysis, would seem elementary.[34] While

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[32] *O'Brien*, 391 U.S. at 375.

[33] *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

[34] *Compare Tornillo v. Miami Herald Pub. Co.*, 287 So. 2d 78, 82 (Fla. 1973) (where Florida's highest court, faced with the viewpoint-neutral law there at issue, applied considerations of "broad societal interest in the free flow of information to the public" to find the access regulation constitutional)

the former may be justified pursuant to a relatively forgiving interests-balancing test (in which the rival interests are subjectively weighted and valued by the decision-maker), the latter must undergo strict scrutiny.[35]

The proposition that a law crafted to limit the freedoms of speech and press, and a regulation enacted to govern noncommunicative (*i.e.*, "unprotected") conduct (but which, when enforced in a particular circumstance, is "alleged incidentally" to inhibit the exercise of a protected "speech" freedom), are subject to the same deferential examination, not only ignores *O'Brien* and the extensive body of law developed thereunder, but also relegates the First Amendment to an inferior status.[36] The must-carry statute

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with Miami Herald Pub. Co., 418 U.S. at 258 (where this Court, reversing without so much as an allusion to societal interest or principles of rationality, held the State's "access" law *facially* to offend the First and Fourteenth Amendments). Because the Florida law was press-specific and content-based, the Court never found it necessary, or even appropriate, to venture into the morass of whether the *ad hoc* restrictions were intended to advance societal goals.

[35] *See, e.g., Boos v. Barry*, 485 U.S. 312, 319-21 (1988) (content-based, viewpoint-neutral regulation subject to exacting scrutiny). The must-carry law, the only purpose of which is to confer a distribution preference on the speech of certain licensees of television broadcast stations, can hardly be characterized as "neutral"—certainly not in a "speaker" sense. *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (The "concept that government may restrict the speech of some elements of society in order to enhance the relative voice of others is wholly foreign to the First Amendment"). Yet, the district court sees only inconsequencial constitutional implication in the law.

[36] *Marbury v. Madison*, 5 U.S. (1 Cranch) at 177 ("The constitution is either a superior paramount law, unchangeable

was not challenged below on the allegation that enforcement of a presumptively constitutional law "incidentally" limits the exercise of First Amendment freedoms. Rather, must-carry was contested on the ground that it *targets and deliberately abridges* the cable operator's freedom of speech; and that thereby, the law *facially contradicts* the First Amendment's command.[37] Whatever question may arise as to the

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by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it . . . . [T]he theory of . . . [American] government must be, that an act of the legislature, repugnant to the constitution, is void").

[37] While the Congress is foreclosed by the First Amendment from making laws that selectively abridge the liberties of speech and press, there is no similar limitation on the enactment of generally applicable laws that, in a particular circumstance, may "incidentally" burden the exercise of those freedoms. For example, the Court has considered many laws, under First Amendment challenge, where the provision itself is facially free of constitutional implication. *See, e.g., O'Brien*, 391 U.S. at 377 (a statute "to raise and support armies"); *Clark v. Community For Creative Non-Violence*, 468 U.S. 288, 290-91 (1984) (regulations to maintain order in public places); *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (an ordinance to abate a public nuisance by "control[ing] noise" levels); *United States v. Albertini*, 472 U.S. 675, 689 (1985) (an anti-trespass law to maintain security on military bases); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984) (laws to reduce "visual clutter") ("It is well settled that the state may legitimately exercise its police power to advance aesthetic values."); *Wooley v. Maynard*, 430 U.S. 705, 707 (1977) (quoting N.H. Rev. Stat. Ann. § 262:27-c (Supp. 1975)) (a law to prohibit one from "knowingly [obscuring] . . . the figures or letters on any [automobile license] plate"). The distinguishing feature between the must-carry law and those laws at bar in the foregoing cases (and indeed in *all* of those cases where the Court,

wisdom of, or rationale for, the Government's communicative restraint, there can be no doubt but that the goal and *modus operandi* of the must-carry law is selectively to limit the cable operator's exercise of a constitutionally guaranteed freedom and, thereby, to affect content.[38] No law that is aimed at the press,

confronting First Amendment claims, has applied an interests-balancing test), is that must-carry selectively targets the press with a communicative restriction, thereby facially implicating the First Amendment, while the others do not. In every case where *O'Brien*'s less-demanding test is properly made the standard of First Amendment review, the law under examination is one of general application as well as being presumptively constitutional. *See, e.g., Barnes v. Glen Theatre*, 111 S. Ct. 2456, 2460 (1991) (Indiana "has not banned nude dancing as such, but has proscribed public nudity across the board."); *id.* at 2463-67 (Scalia, J., concurring) (Public nudity is not a right protected under the First Amendment and therefore the challenge does not give rise to a constitutional question.).

[38] *See City of Lakewood*, 486 U.S. at 755-57; *id.* at 774-75 (White, J., joined by Stevens and O'Connor, JJ., dissenting) (facial challenge appropriate only when conduct sought to be regulated is explicitly protected by First Amendment). In *City of Lakewood*, the difference among the justices was confined to the "'technical' question: What is the scope of the peculiar doctrine that governs facial challenges to local laws in the First Amendmnet area?" *Id.* at 773 (White, J., dissenting). Contesting the majority's more expansive view, the dissent urged: "The doctrine . . . applies only when the specific conduct which the locality seeks to license is protected by the First Amendment." *Id.* at 774. Here, there can be no doubt but that the making of communicative judgments by a cable television editor and the distribution of fully protected speech over closed-circuit cables are activities squarely protected by the First Amendment. Thus, whether one follows the rationale of the Court or that of the dissent in *City*

and that so intrusively, selectively, and deliberately restricts activity *fully protected* by the First Amendment, has been justified by this Court on the basis of a "forgiving" or "less demanding" test.[39]

Instead of supervising a nonspeech element of the cable operator's conduct, the must-carry law suppresses the operator's exercise of editorial discretion.[40] Instead of "incidentally" or unintentionally affecting "speech" freedoms, abridgement of those liberties is the *raison d'etre* of the regulation.[41] By the must-carry statute, Congress has purposefully made a "law . . . abridging the freedom of speech, [and] of the press", U.S. Const. amend. I, thereby facially

of Lakewood, content-based regulation of the cable television "press" confronts the First Amendment, is subject to facial challenge and is unconstitutional.

[39] *See Preferred Communications*, 476 U.S. at 496 ("Where a law is subjected to a colorable First Amendment challenge, the rule of rationality which will sustain legislation against other constitutional challenges typically does not have the same controlling force").

[40] *Cf. O'Brien*, 391 U.S. at 376 ("on the assumption that the alleged communicative element in [Mr.] O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity"). Thus, while deliberately burning one's draft card (or dancing nude) may well not be "speech" in the constitutional sense, communication over cable television circuits is.

[41] *See Webster's Third New International Dictionary, Unabridged* 1142 (1976) (defining "incidental" as "subordinate, nonessential, or attendant in position or calculation . . ."); *see also Quincy Cable TV*, 768 F.2d at 1450-52. A press-specific, regulation designed to restrain communicative activity, as is the must-carry law, cannot be said to limit the exercise of First Amendment freedoms only incidentally.

overriding the constitutional command and making *O'Brien*'s interests-balancing formula inapposite to its review. Yet, the court below, applying "*O'Brien* and its progeny" (J.S. App. 15a), held the law's confrontation with the First Amendment to be, on balance, benign because must-carry, in its view, is "essentially economic regulation" calculated to produce results in the public interest (J.S. App. 13a). According to the district court, Congress, with one exception (*viz.*, viewpoint supervision), may selectively regulate speech and the press whenever the restriction or burden is accompanied by a plausible finding that the enactment will further a useful governmental interest. That is the paradigm of the "end justifies the means" school of constitutional theory.

O'Brien is not a talisman by which legislators or reviewing judges may make facially unconstitutional laws constitutional. As *O'Brien*, itself, so pointedly recognized, "both the government interest and the 1965 [draft-card law] are limited to the noncommunicative aspect of [Mr.] O'Brien's conduct." *O'Brien*, 391 U.S. at 381-82. Yet *O'Brien*'s forgiving analysis was invoked by the court below to constitutionally justify a law that is aimed at, and purposefully abridges, liberties guaranteed to all of the people. So used, *O'Brien*'s "relatively lenient" or "less demanding" test is made a ready instrument for judicial repeal of the First Amendment. *See, e.g., Reid v. Covert*, 354 U.S. 1, 14 (1957) ("The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written

Constitution and undermine the basis of our Government").

The court below urges the startling proposition that the *O'Brien* standard of First Amendment review was "refined" by this Court's latter opinion in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), so as to expand the interests-balancing test to include review of those laws that facially implicate the First Amendment (J.S. App. 9a; *see also id.* at 19a, 22a-23a). *Ward*, of course, effects no such revolutionary change in the constitutional jurisprudence. Nor does *Ward* suggest, in these circumstances, any relevant departure from the basic parameters of the Court's earlier *O'Brien* decision.

First, *Ward* considered only "the legal standard applicable to governmental regulation of the time, place and manner of protected speech". 491 U.S. at 789; *see also id.* at 798. Neither the district court nor the Congress has suggested that the must-carry restraint is "time, place or manner" regulation. Second, the *Ward* Court repeatedly emphasized that the single purpose of the law before it was "to regulate the volume of amplified music [to protect] those who . . . live [in the] vicinity". *Id.*; *see also id.* at 785, 786, 788, 792, 796 (each reiterating the lone objective of the law—"to avoid excessive noise," *id.* at 795 n.5). Third, *Ward* held that "it can no longer be doubted that government has a substantial interest in protecting its citizens from unwelcome noise." *Id.* at 796 (internal quotation marks and citation deleted). Fourth, *Ward* held that the "limitations on volume" there at issue "ha[ve] no effect on the quantity or content of . . . expression beyond regulating the extent of amplification." *Id.* at 802.

In contrast to that regulation at bar in *Ward*, the must-carry law has a direct, substantial and intentional effect on the make-up of those communications published via the cable television media. It purposefully impacts content by facially discriminating between the comunicative rights and freedoms of a variety of persons (*e.g.*, cable editors, broadcast station licensees, cable programmers, and public viewers) each of whom is presumably entitled to the full and equal protection of the First Amendment.[42] Unlike that "volume control" ordinance in *Ward*, the must-carry law confers greater First Amendment "rights" on a favored few speakers at the reciprocal costs of other, directly affected speakers. It mandates content.

Placing the lid on the lower court's suggestion that *Ward* expands the "less demanding" test of *O'Brien* to include review of laws that openly clash with the First Amendment's command, is the separate opinion of Justice Kennedy (author of the Court's *Ward* opinion), as subsequently rendered in *Simon & Schuster*, 112 S. Ct. at 512-13 (Kennedy, J., concurring):

> [Where] a law is directed to speech alone [,] where the speech in question is not obscene, not defamatory, not words tantamount to an act otherwise criminal, not an impairment of some other constitutional right, not an incitement to

[42] If instead of that noise-abatement regulation before the Court in *Ward*, it had been a law giving "local" or "federally-licensed" musicians a substantive preference over their counterparts in the performance or distribution of the musical works, we question whether the Court would have concluded that it was merely "time, place and manner" regulation.

> lawless action, and not calculated or likely to bring about imminent harm the State has the substantive power to prevent [,n]o further inquiry is necessary to [hold the law unconstitutional].

See also id. at 514 (Even a "compelling [governmental] interest" may not sustain a law " 'restrict-[ing] expression because of its message, its ideas, its subject matter, or its content' " (quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)).[43] Here, of course, no one—neither the Government nor the private beneficiaries of the special-interests legislation—has suggested that the must-carry restraint is supported by a "compelling" governmental interest that would justify suspension of the First Amendment. In the absence of such a claim, the must carry law exceeds the legislative power of the Congress as limited by the First Amendment, infringes on the guaranteed rights and freedoms of fully protected speakers, and is, on its face, unconstitutional.

[43] *See also Church of the Lukumi Babalu Aye*, 113 S. Ct. 2217 (Kennedy, J., for the Court) (laws selectively restricting the exercise of individual freedoms guaranteed by the First Amendment are facially unconstitutional if not, *inter alia*, shown necessary to further a compelling government interest).

CONCLUSION

The Court should reverse the judgment of the court below, declare the must-carry provisions of the 1992 Cable Act facially unconstitutional, and enjoin enforcement of the law.

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OCTOBER TERM, 1993

TURNER BROADCASTING SYSTEM, INC., ET AL.,
APPELLANTS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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QUESTION PRESENTED

Whether Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. 534 and 535 (to be codified at Supp. IV 1992), which require cable system operators to devote a portion of their channel capacity to the carriage of certain commercial broadcast stations and noncommercial educational broadcast stations, violate the First Amendment.

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Buckley v. *Valeo*, 424 U.S. 1 (1976) 15, 45
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Barron, *On Understanding the First Amendment Statutes of Cable: Some Obstacles in the Way*, 57 Geo. Wash. L. Rev. 1495 (1989) 43

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Brenner, *Cable Television and the Freedom of Expression*, 1988 Duke L.J. 329 34
Cable TV Consumer Protection Act of 1991: Hearing on S. 12 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation, 102d Cong., 1st Sess. (1991) 23, 24, 41
Cable Television Regulation: Hearings on H.R. 1303 and H.R. 2546 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce, 102d Cong., 1st Sess. (1991) 23, 24
Cable Television Regulation (Part 2): Hearing Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce, 101st Cong., 2d Sess. (1990) 24
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Media Ownership—Diversity and Concentration: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation, 101st Cong., 1st Sess. (1989) 4, 6, 23, 24
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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-44

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APPELLANTS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE FEDERAL APPELLEES

OPINION BELOW

The opinion of the district court (J.S. App. 1a-72a) is reported at 819 F. Supp. 32.

JURISDICTION

These consolidated cases were heard by a three-judge district court convened pursuant to 47 U.S.C. 555(c)(1) (to be codified at Supp. IV 1992) and 28 U.S.C. 2284. The judgment of the district court was entered on April 12, 1993. On May 3, 1993, notices of appeal were filed pursuant to 47 U.S.C. 555(c)(2) (to be codified at Supp. IV 1992). This Court noted probable jurisdiction on September 28, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law * * * abridging the freedom of speech, or of the press."

The relevant provisions of the Cable Television Consumer Protection and Competition Act of 1992 are reprinted in the Joint Appendix at pages 3 through 33.

STATEMENT

Congress enacted the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, §§ 4, 5, 106 Stat. 1471-1481, after concluding that anti-competitive practices in the cable industry threaten to limit the availability of broadcast television. The 1992 Cable Act seeks to preserve the vitality of broadcast television by requiring cable operators to devote a limited portion of their channel capacity to commercial and educational broadcast stations. The Act does not punish, suppress, or promote any particular programming based on its content. The so-called "must-carry" requirements, enacted pursuant to detailed congressional findings made after hearings spanning several years, were specifically aimed at promoting the First Amendment interests of viewers—interests this Court has described as "paramount." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969). After concluding that the 1992 Cable Act "is simply industry-specific antitrust and fair trade practice regulatory legislation," J.S. App. 13a, the three-judge district court sustained the must-carry provisions in the face of appellants' claim that they infringe free speech interests.

A. Statutory Background

1. The Federal Communications Commission began to regulate cable television in the 1960s, in the absence of express statutory authority relating to cable television,

on account of cable television's potential to harm broadcast television.[1] This Court held that the FCC had authority to regulate cable television because the Court agreed that cable television may " 'seriously degrade the service offered by a television broadcaster' * * * and thus ultimately deprive the public of the various benefits of a system of local broadcasting stations." *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 175 (1968), quoting *First Report & Order in Docket Nos. 14895 & 15233*, 38 F.C.C. 683, 700 (1965). The Court also noted the FCC's concern that cable television "might, by dividing the available audiences and revenues, significantly magnify the characteristically serious financial difficulties of UHF and educational television broadcasters." 392 U.S. at 176. Congress later affirmed the FCC's authority over cable television by enacting the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779.

From the outset, the FCC required cable operators "to transmit to their subscribers the signals of any station into whose service area they have brought competing signals." *Southwestern Cable*, 392 U.S. at 166. The FCC's broad must-carry regulation was invalidated on First Amendment grounds in 1985 by the D.C. Circuit in *Quincy Cable TV, Inc.* v. *FCC*, 768 F.2d 1434, cert. denied, 476 U.S. 1169 (1986). The parties in *Quincy Cable* focused their arguments on whether the FCC's must-carry rule should be analyzed under the rationale of *United States* v. *O'Brien*, 391 U.S. 367 (1968), which provides that content-neutral restraints on speech that further significant governmental interests are permissible

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[1] Congress's concern that cable systems might harm broadcasters, particularly those serving smaller communities, dates to 1958, when the Senate Committee on Interstate and Foreign Commerce heard testimony that local stations had been hurt financially by the introduction of cable. *Television Inquiry: Hearings Before the Senate Comm. on Interstate and Foreign Commerce*, 85th Cong., 2d Sess. 3636-3643, 3708-3715 (1958); see also S. Rep. No. 923, 86th Cong., 1st Sess. 7-8 (1959).

if they are narrowly tailored, or under the strict scrutiny standard of *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974). The court of appeals did not decide that issue in *Quincy Cable*, but invalidated the FCC's must-carry regulation on the ground that, due to a lack of administrative record support, the must-carry regulation could not pass muster under either the *Tornillo* or *O'Brien* standard.[2]

2. Congress began studying the effects of the *Quincy Cable* decision in 1989.[3] Its hearings included much debate about the economic imbalances created in the telecommunications industry by the invalidation of the FCC's must-carry rules, and proponents of must-carry rules sought to meet anticipated First Amendment objections.[4] Because the court of appeals in *Quincy Cable* had based its decision on the lack of findings to support the FCC's must-carry rule, Congress enacted detailed factual findings supporting its must-carry rules.

Specifically, Congress found that "[f]or a variety of reasons, including local franchising requirements and the extraordinary expense of constructing more than one cable

[2] Following *Quincy Cable*, the FCC commenced further rulemaking proceedings and subsequently adopted a more limited must-carry rule that would have been in effect for five years. However, that regulation was invalidated in *Century Communications Corp.* v. *FCC*, 835 F.2d 292 (D.C. Cir. 1987), cert. denied, 486 U.S. 1032 (1988).

[3] See S. Rep. No. 92, 102d Cong., 1st Sess. 3-4 (1991) (describing cable hearings); H.R. Rep. No. 628, 102d Cong., 2d Sess. 74 (1992) (same); see also J.S. App. 10a (describing the legislative history of the 1992 Cable Act).

[4] See *Must Carry: Hearing Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 101st Cong., 1st Sess. 1-4 (1989) (opening statements of Senators Inouye, Gore, and Burns, discussing *Quincy Cable*, *Century Communications*, *O'Brien*, and *Tornillo*). See also *Media Ownership—Diversity and Concentration: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 101st Cong., 1st Sess. 5 (1989) [hereinafter *Media Ownership Hearings*] (remarks of Sen. Gorton).

television system to serve a particular * * * area, most cable television subscribers have no opportunity to select between competing cable systems." § 2(a)(2), 106 Stat. 1460. In fact, the "[e]vidence received by Congress indicated that less than 1% of the cable operators in the nation face competition from other operators." J.S. App. 11a n.16. Congress also determined that there had been an "effective subsidy" of cable systems by local broadcasters since cable operators could carry broadcast signals subject only to the compulsory license provisions of the copyright laws. § 2(a)(19), 106 Stat. 1462; see J.S. App. 6a n.6.

Congress also found that the cable industry has become "highly concentrated," resulting in greater "barriers to entry for new programmers and a reduction in the number of media voices available to consumers." § 2(a)(4), 106 Stat. 1460. And because of increasing vertical integration in the industry, cable operators have an incentive to favor affiliated programmers, making it "more difficult for noncable-affiliated programmers to secure carriage on cable systems." § 2(a)(5), 106 Stat. 1460-1461. Congress based those findings on evidence showing that many cable programmers are owned by cable operators. For example, one of the owners of appellant Turner Broadcasting, a cable programmer, is Time Warner, the parent of appellant Time Warner Entertainment, which is both a cable operator and the owner of Home Box Office, another cable programmer. S. Rep. No. 92, 102d Cong., 1st Sess. 25 (1991); see also J.S. App. 111a, 112a. And while more detailed evidence was presented, it was summarized by the statement that "[y]ou don't need a Ph.D. in Economics to figure out that the guy who controls a monopoly conduit is in a unique position to control the flow of programming traffic to the *advantage* of the program services in which he has an equity investment and/or in which he is selling advertising availabilities, and to the *disadvantage* of those services, including local Independent broadcasting stations, in which he does *not* have an equity position."

S. Rep. No. 92, *supra*, at 26, quoting testimony of Preston Padden (INTV) in *Media Ownership Hearings* 308.

Further evidence showed that cable operators had "denied carriage of local television stations in approximately 3,600 instances," and that "[b]y far the most frequent replacement for a dropped local television station is a basic cable network—the program services in which cable operators often own equity interests and/or profit from local advertising sales." S. Rep. No. 92, *supra*, at 43. The evidence also showed that cable operators had shifted broadcast stations to less desirable channels, and that "[i]n almost every instance, the stations shifted have been replaced by a cable program service in which the system operator is selling advertising or in which the operator has an equity interest or both." *Id.* at 44.

At the same time, Congress found that more than 60% of all households with televisions have cable television, making cable television "a dominant nationwide video medium." § 2(a)(3), 106 Stat. 1460. Congress further found that "[m]ost subscribers to cable television systems do not or cannot maintain antennas to receive broadcast television services, do not have input selector switches to convert from a cable to antenna reception system, or cannot otherwise receive broadcast television services." § 2(a)(17), 106 Stat. 1462.

After studying the problem, Congress reached a number of conclusions, two of which are particularly relevant here. First, Congress concluded that there is a "substantial governmental and First Amendment interest" in the availability of a diversity of programming. § 2(a)(6), 106 Stat. 1461. Congress found that the interest in diversity is promoted by assuring that cable subscribers have access to local commercial and educational programming. § 2(a)(7)-(9), 106 Stat. 1461, since "[b]roadcast television stations continue to be an important source of local news and public affairs programming." § 2(a)(11), 106 Stat. 1461. Second, Congress concluded that there is "a substantial governmental interest in promoting the continued availability of * * * free television programming," § 2(a)(12), 106 Stat. 1461, but that the evidence it had reviewed showed that "the economic viability of free local broadcast television" may be "seriously jeopardized," § 2(a)(16), 106 Stat. 1462.

In short, when Congress examined the cable industry it found that almost all cable operators had monopolies on the provision of cable services. Furthermore, it found that some of those monopolies had been sanctioned by local governments and that most of the cable operators had been subsidized by broadcasters as a result of federal law. Congress further found that an increasing majority of American households subscribe to cable; that most cable households do not have the capability to receive broadcast stations over the air; that cable operators have not only the capability but also the incentive to discriminate against broadcasters; and that cable operators had dropped a large number of broadcast stations and assigned many others to less desirable channels. Congress decided to take steps to ensure that the availability of broadcast television would not be threatened by further cable penetration and discrimination by cable operators.

3. Congress enacted the 1992 Cable Act over President Bush's veto. See 28 Weekly Comp. Pres. Doc. 1860 (Oct. 3, 1992). Sections 4 and 5 of the Act replace the must-carry rule that had been invalidated in *Quincy Cable* with a more limited set of requirements. Section 4 pertains to local commercial broadcast stations. It provides that a cable system with more than 300 subscribers but 12 or fewer active usable channels must carry "the signals of at least three local commercial television stations." § 4, 106 Stat. 1471; 47 U.S.C. 534(b)(1)(A).[5] For systems with more than 300 subscribers and more than 12 active usable channels, a cable operator must devote

[5] Unless otherwise specified, citations to the United States Code relating to the provisions of the 1992 Cable Act refer to the place in Supp. IV 1992 where those provisions are to be codified.

up to one-third of its channel capacity to local commercial broadcast stations. § 4, 106 Stat. 1471; 47 U.S.C. 534(b)(1)(B).[6] In general, a cable operator must retransmit, in its entirety, the programming of a broadcast station carried to fulfill must-carry obligations. § 4, 106 Stat. 1471-1472; 47 U.S.C. 534(b)(3). And absent an agreement to the contrary, a commercial broadcast station must be carried in its over-the-air position or on certain other specified channels. § 4, 106 Stat. 1472; 47 U.S.C. 534(b)(6). Finally, with some exceptions, a cable operator may not charge a fee for carrying broadcast signals in fulfillment of the must-carry provisions. § 4, 106 Stat. 1473; 47 U.S.C. 534(b)(10).

Section 5 of the 1992 Cable Act imposes similar requirements with respect to local noncommercial educational stations. A cable system with 12 or fewer channels must carry "one qualified local noncommercial educational television station." § 5, 106 Stat. 1478; 47 U.S.C. 535(b)(2)(A). A system having between 13 and 36 channels must carry between one and three such stations, and a system with more than 36 channels must carry "each qualified local noncommercial educational television station requesting carriage." § 5, 106 Stat. 1478; 47 U.S.C. 535(b)(3)(A) and (D). The 1992 Cable Act requires a cable operator, in certain circumstances, to import distant signals (§ 5, 106 Stat. 1478; 47 U.S.C. 535(b)(3)(B)), but provides protection against substantial duplication of local noncommercial educational stations that are carried. § 5, 106 Stat. 1479; 47 U.S.C. 535(e). As with commercial stations, the 1992 Cable

[6] If there are not enough full power local commercial broadcast stations to fill the requirements of the must-carry provisions, a cable operator with up to 35 active channels must carry one qualified low power station and an operator with more than 35 channels must carry two such stations. See § 4, 106 Stat. 1473-1474; 47 U.S.C. 534(c)(1); see also § 4, 106 Stat. 1476-1477; 47 U.S.C. 534(h)(2) (defining "qualified low power station").

Act requires cable operators to carry the entire programming schedule of noncommercial educational stations and specifies channel positioning requirements. See § 5, 106 Stat. 1479-1480; 47 U.S.C. 535(g) and (i).

Thus, the must-carry rules "require cable operators to set aside just over a third of their channels for local broadcast stations." J.S. App. 50a (dissenting opinion). In addition, Section 6(2) of the 1992 Cable Act also provides that commercial broadcast stations may elect not to invoke the uncompensated must-carry requirements and instead may withhold consent to retransmit their programming in the absence of compensation. See 106 Stat. 1482-1483; 47 U.S.C. 325(b)(1) and (3). As the three-judge district court explained, Congress realized that "cable operators will want to carry the signals of larger, viewer-popular broadcasters and will pay for the privilege." J.S. App. 6a. Congress also prohibited the granting of exclusive franchises. § 7(a)(1), 106 Stat. 1483; 47 U.S.C. 541(a)(1).

B. The Proceedings In This Case

1. Soon after the 1992 Cable Act was enacted, the appellants—cable operators and cable programmers—filed these five consolidated actions challenging the constitutionality of the must-carry requirements. Their must-carry claims were heard by a three-judge district court convened under 28 U.S.C. 2284. See 1992 Cable Act, § 23, 106 Stat. 1500; 47 U.S.C. 555(c)(1). A divided court ruled that the must-carry provisions of the 1992 Cable Act comply with First Amendment requirements.

a. The district court concluded that in enacting the must-carry provisions, Congress was seeking merely "to impose order upon a market in dysfunction." J.S. App. 12a. In the court's view, the 1992 Cable Act "is simply industry-specific antitrust and fair trade practice regulatory legislation." *Id.* at 13a. It described the must-carry requirements as "essentially economic regulation designed

to create competitive balance in the video industry as a whole, and to redress the effects of cable operators' anti-competitive practices." *Ibid.*[7]

The court rejected the appellants' contention that the must-carry obligations are subject to strict scrutiny under this Court's cases condemning compelled speech or interference with editorial discretion. See J.S. App. 16a-19a. Those decisions, the court reasoned, call for strict scrutiny only if "it appears that the government has prescribed the content—either the message or the subject matter—of the speech to be spoken." *Id.* at 16a. Thus, finding that the aim of the must-carry provisions is "to restore competitive balance and assure a functional market in the distribution of video signals, whatever might be said with those signals," the court concluded that the rules do not prescribe the content of speech. *Id.* at 19a.[8]

The court found unpersuasive appellants' contention that the 1992 Cable Act's policy—to "promote the availability to the public of a diversity of views and information through cable television and other video distribution media" (§ 2(b)(1), 106 Stat. 1463)—is indicative of a content-based statute. J.S. App. 19a & n.23. The court acknowledged that "Congress may have presumed, on a

[7] The court paid "respect to the factual findings made by Congress," but gave "no deference to Congress" with respect to "whether the facts present the need for special First Amendment treatment." J.S. App. 22a n.25.

[8] As the court explained, "[a]ll parties agree * * * that the must-carry provisions are not *viewpoint*-based; must-carry rights are conferred upon all full-power local broadcasters, and the obligations upon most cable operators, regardless of any views expressed in the programming of either." J.S. App. 15a-16a. Hence, "[t]he provisions do not compel the carriage of any particular messages nor do they impose any burden on operators or programmers on the basis of the messages they or the broadcasters propose to transmit." *Id.* at 16a. The court added that "the must-carry provisions hardly evince the type of nefarious governmental activity guarded against by the First Amendment generally and the strict scrutiny standard in particular." *Id.* at 20a.

very nonspecific (and unarticulated) level, that there would be some content differences between the subject matter and/or emphasis of the video signals emitted by local broadcasters and those produced by cable programmers." *Id.* at 20a. But the court concluded that "the must-carry provisions are, in intent as well as form, unrelated (in all but the most recondite sense) to the content of any messages that these embattled cable operators, broadcasters, and programmers have in contemplation to deliver." *Id* at 13a. It added that "if the must-carry provisions are content-related at all, they are only marginally so, to the point of *de minimis*." *Id.* at 20a.

The court then sustained the must-carry provisions under the intermediate scrutiny standard prescribed in *United States* v. *O'Brien*, *supra*, and *Ward* v. *Rock Against Racism*, 491 U.S. 781 (1989). First, the court concluded that the must-carry provisions further the significant governmental interest of "promot[ing] fair competition among video 'speakers' in order to assure the survival of local broadcasting for the benefit of both those who subscribe to a cable service and for those who do not." J.S. App. 23a; see *id.* at 23a-26a. Second, in ruling that the must-carry provisions are narrowly tailored to serve that interest, the court emphasized Congress's finding that input-selector switches are not an effective means of preserving local broadcasting and that the must-carry requirements do not unnecessarily burden the appellants' freedom of speech. *Id.* at 26a-28a. The court also noted that "the burdensomeness of the must-carry provisions is illusory in the potentially significant number of cases in which a cable operator receives a carriage request from an operator it would have carried even in the absence of the request." *Id.* at 27a n.29.

b. Judge Sporkin filed a concurring opinion to emphasize that "any burden imposed by the 1992 Cable Act on speech is * * * remote and incidental to the purpose and effect of the 1992 Cable Act." J.S. App. 36a. In his view, Congress acted permissibly to rei[n] in cable

companies' growing economic might and to restore competitive balance in the telecommunications industry." *Ibid.* He concluded that "this case is not about protecting free speech and the First Amendment," but instead "is about market domination and control." *Ibid.*

c. Judge Williams dissented. He recognized that Congress confronted the "very real problem" that "cable systems control access 'bottlenecks' to an important communications medium." J.S. App. 50a. At the same time, Judge Williams disagreed with Congress's conclusion that broadcast television was potentially in jeopardy: "So long as local broadcast programs continue to be so popular, it appears that cable simply cannot afford to drop broadcast signals to any significant degree." *Id.* at 66a. He also recognized that "a relatively large number of channels is available (ranging from the teens up to 40, 50 and more)" to cable programmers despite the must-carry rules, and that "the channels are discrete, so that viewers will be less likely to attribute all speech on all channels to the cablecaster." *Id.* at 59a. But he concluded that "the proper test is strict scrutiny" (*id.* at 57a) because "the statute is content-based" in that it "require[s] cablecasters to carry the speech of local broadcast stations" (*id.* at 54a). The flaw Judge Williams perceived in the statute could be remedied, in his view, by expanding the leased access provisions added by the 1984 Cable Act (see 47 U.S.C. 532), coupled with subsidies that would ensure that broadcast stations would be able to lease the additional cable channels that would be set aside. J.S. App. 51a, 61a. Since that approach would constitute a less restrictive alternative, in Judge Williams' view, he would have held the statute as written unconstitutional.

2. The district court denied the appellants' request for an injunction pending appeal. 4/14/93 Order 1-2. The Chief Justice also denied appellants' application to enjoin the enforcement of Sections 4 and 5 during the pendency of this appeal. *Turner Broadcasting System, Inc.* v. *FCC*, 113 S. Ct. 1806 (1993) (Rehnquist, C.J., in chambers).

SUMMARY OF ARGUMENT

A. In our view, the district court, while reaching the correct result, applied too demanding a standard. Rather than the intermediate standard of *United States* v. *O'Brien*, 391 U.S. 367 (1968), or the more exacting standard of *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), the court should have applied the less demanding standard of *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969). The *Red Lion* standard, which does not require content-neutrality (but does require viewpoint-neutrality), is applicable to cases where Congress acts to correct dysfunction in a market whose commodity is speech, and requires the government to show that reasonable steps were taken to correct that dysfunction.

This is such a case, and the must-carry rules are reasonable. The cable market is clearly a market that is dysfunctional at this time. Less than one percent of cable operators face competition from other cable operators, in part on account of exclusive franchise arrangements previously sanctioned by local governments. At the same time, cable operators serve a majority of households, and broadcasters—cable operators' primary competitors—are effectively shut out of cable households unless they are carried by the cable operator. Moreover, cable operators often have a financial interest in cable programmers and they compete with broadcasters for advertising, thus giving cable operators multiple incentives to discriminate against broadcasters. And, in fact, cable operators have dropped thousands of broadcasters and relegated thousands more to undesirable channels. S. Rep. No. 92, 102d Cong., 1st Sess. 25, 43-44 (1991).

The must-carry obligations enacted by Congress are a reasonable attempt to correct the market dysfunction Congress identified. In arguing to the contrary, the cable operators suggest that there is no real basis for Congress's concern—they claim that they will carry almost all broadcast stations in any event, so that cable viewers will have access to those stations and the availability of free televi-

sion will not be diminished significantly for those who either are not served by cable television, cannot afford to subscribe to cable television, or choose not to subscribe. See, *e.g.*, Time Warner Br. 42. That factual argument is contrary to the argument advanced by the cable programmers, who claim that in the absence of must-carry rules they would replace a significant number of broadcast stations. See, *e.g.*, Turner Broadcasting Br. 17. It is also belied by the record compiled by Congress. In any event, to the extent that the cable operators are right in arguing that Congress overestimated the potential threat to free broadcast television because they would carry most broadcast stations anyway, their argument shows that any harm to First Amendment interests is correspondingly limited.

Thus, although cable television is not affected by the scarcity of the broadcast spectrum, this case is comparable to *Red Lion*, where the Court upheld the FCC's fairness doctrine and its personal attack rule, rules with much more extensive impact on the content of programming and editorial judgment than the must-carry rules. Spectrum scarcity was not the sole basis for the Court's decision in *Red Lion*, as is shown by the Court's reliance on *Associated Press* v. *United States*, 326 U.S. 1 (1945), which upheld an antitrust decree requiring a news gathering operation to provide its services to newspapers that it did not choose to serve. The key similarity is that in all three cases—*Red Lion*, *Associated Press*, and this case—the challenged rules advance First Amendment interests threatened by market dysfunction.

B. Although the *O'Brien* standard is more stringent than the standard that ought to apply, the district court correctly concluded that the must-carry rules pass muster under that standard as well. The must-carry rules are content-neutral under *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989), since the government has not "adopted a regulation of speech because of disagreement with the message it conveys." Congress's purpose of ensuring that cable viewers have access to local broadcasters, if "content-related at all," is "only marginally so, to the point of *de minimis*," as the district court held. J.S. App. 20a. And Congress's goal of ensuring that viewers who do not subscribe to cable have access to a vital broadcast market is not content-related at all.

The must-carry rules are also not "substantially broader than necessary" to achieve Congress's legitimate purposes. *Ward*, 491 U.S. at 800. Sections 4 and 5 of the 1992 Cable Act require cable operators to devote only about one-third of their channels to commercial broadcast stations and a few more channels to educational stations. Thus, the must-carry rules apply to fewer than half of the channels available for cable programming—and the cable operators claim they would carry most of those stations in any event.

C. The must-carry rules are not comparable to the right-to-reply law invalidated in *Tornillo*. That statute exacted a penalty based on the viewpoint expressed by a newspaper, and threatened to chill the speech of newspaper editors, who might choose not to print editorials critical of a candidate if forced to print a reply. Any intrusion by the must-carry rules on whatever editorial discretion is exercised by cable operators plainly is minimal in comparison with the authentic infringement of First Amendment interests caused by the right-to-reply statute. Nor is this case comparable to *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam). Like *Tornillo*, that case involved a restriction on speech at the core of the First Amendment, since the statute at issue directly limited speech intended to persuade others to vote for particular candidates for public office. The must-carry rules, in contrast, merely require cable operators to carry a limited number of broadcast stations. This case is more similar to *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74 (1980), which upheld a law requiring shopping center owners to allow speech on their property. As in this case, the law at issue did not dictate the content or the subject

matter of any message, and the shopping center owners, like cable operators, may distance themselves from the message conveyed by any particular speaker.

Moreover, the alternative proposed by Judge Williams is not less restrictive than the alternative chosen by Congress. A system under which Congress expanded the leased access channels and subsidized broadcasters to ensure that they used them would be little different in practice from the must-carry rules, except that the taxpayers would have to support broadcasters. Thus, even if strict scrutiny applied, it is not apparent that the must-carry rules would be invalid.

ARGUMENT

THE MUST-CARRY RULES ENACTED BY CONGRESS DO NOT VIOLATE THE FIRST AMENDMENT

This case is not about a governmental effort to regulate speech, but is about Congress's effort to prevent anti-competitive practices by those who exercise monopoly power in the market for the *delivery* of television programming to American homes. As Congress expressly found in passing the 1992 Cable Act, cable television operators exercise undue market power in what has become a dominant medium for the delivery of video signals and thereby are jeopardizing the continued availability of free broadcast services to viewers in many localities. The arguments of the appellants, if accepted, would mean that Congress is powerless to correct the monopolistic practices of cable operators.

A. The Must-Carry Rules Should Be Upheld As Limited, Viewpoint-Neutral Measures That Reasonably Protect Viewers' Interests From The Adverse Effects Of Market Dysfunction

The three-judge district court looked at the question presented as requiring it to decide whether to apply the intermediate standard of *O'Brien* or the stricter standard of *Tornillo*. But while we agree with the district court's analysis of the issue when considered within that framework, we think this case should be analyzed under a different framework—this Court's precedents governing legislative efforts to correct market failure in a market whose commodity is speech. That framework is particularly applicable where, as here, First Amendment interests lie on both sides of the dispute.

1. *Congress may enact reasonable, viewpoint-neutral regulations to regulate a market whose commodity is speech*

The must-carry provisions are valid under a straightforward application of this Court's cases recognizing that when market failure threatens to drown out the speech of some, Congress may take reasonably limited and viewpoint-neutral measures to protect the "paramount" First Amendment interests of viewers (*Red Lion*, 395 U.S. at 390) by ensuring that a diversity of programming and information will be available. The proper framework for evaluating the First Amendment issues in this case is found in *Associated Press* v. *United States*, 326 U.S. 1 (1945). There, this Court rejected a First Amendment challenge to the application of the Sherman Act to a news gathering organization. Although the judgment in *Associated Press* required the organization to deal with certain newspapers that it would otherwise have excluded from its membership, this Court held that the resulting obligation to speak was permissible under the circumstances. The Court said that it would be "strange indeed" if "the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom." *Id.* at 20. It explained:

> The First Amendment * * * rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. * * * Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing

> is not. Freedom of the press from government interference under the First Amendment does not sanction repression of that freedom by private interests.

Ibid.

Similarly, *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951), concerned a newspaper's refusal to accept advertisements from merchants who also advertised on the local radio station. This Court sustained an injunction compelling the newspaper to carry the advertisements. The Court said that this government prohibition of the newspaper's anti-competitive practice imposed "no restriction upon any guaranteed freedom of the press." *Id.* at 155.

Appellants attempt to distinguish *Associated Press* and *Lorain Journal* on the ground that they arose under the Sherman Act, a statute of general applicability. To be sure, that consideration was part of the rationale of both *Associated Press* and *Lorain Journal*. But it was not, and could not have been, the entire rationale of those cases. Neither case involved a facial attack on the application of the antitrust laws to the media. Rather, each case involved an as-applied challenge to a particular decree enforcing the Sherman Act in a way that directly altered the defendant speaker's communicative activity. The judgment in *Associated Press* ordered the news organization to share its collective information (*i.e.*, to speak) with some entities with which it otherwise would not do business, and the injunction in *Lorain Journal* required a newspaper to carry advertisements that it would not otherwise have carried.

Moreover, in attempting to distinguish those cases on the ground that they involved applications of a statute of general applicability, the appellants rely on a distinction that has nothing to do with the extent of any infringement on First Amendment interests. That is, the extent of First Amendment injury does not depend at all on whether an injury is caused by the application of a general statute

or a more specific statute. It might be appropriate, when evaluating the constitutionality of a statute directed to some part of the press, for a court to consider whether such a statute is intended to punish or suppress a speaker. See, *e.g.*, *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936). But in this case, there is no suggestion that Congress was up to anything "nefarious." J.S. App. 20a. Accordingly, it should not matter that the minor infringement on First Amendment interests in this case results from a statute directed to the cable industry rather than from a specific decree implementing a general statute. If anything, there should be greater justification for that minor infringement because it results from a statute specifically designed to protect other First Amendment interests that have been jeopardized by the particular monopolistic practices the statute addresses.

Furthermore, in *Teleprompter Corp.* v. *CBS*, 415 U.S. 394, 414 (1974), after noting that the copyright legislation at issue had been enacted before broadcast television or cable television had been conceived, the Court decided that "[d]etailed regulation of these relationships, and any ultimate resolution of the many sensitive and important problems in this field, must be left to Congress." *Ibid.* Thus, the Court envisioned specific legislation directed to the commercial relationship between cable television and broadcast television, and hardly suggested that such legislation would be subjected to more exacting scrutiny than would decrees issued by courts interpreting more general statutes.

The reasoning of *Associated Press*—that First Amendment interests are served when the government takes reasonable steps to correct market failure in a market whose commodity is speech—has been applied to the regulation of radio and television broadcasting, an area closely related to the cable industry. For more than half a century, Congress and the FCC have regulated broadcasting "so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-

wide, and world-wide wire and radio communication service." 47 U.S.C. 151 (1988). To that end, Congress has charged the FCC, *inter alia*, with encouraging "the larger and more effective use of radio in the public interest" (47 U.S.C. 303(g) (1988)) and with awarding broadcast licenses so that the "public convenience, interest, or necessity" will be served and "a fair, efficient, and equitable distribution of radio service" will be provided to all the Nation's communities (47 U.S.C. 307(a) and (b) (1988)).[9]

In numerous cases, this Court has sustained against First Amendment challenge the FCC's reasonably limited and viewpoint-neutral implementation of its authority to correct market failure that interfered with the wide dissemination of programming and information to listeners and viewers. Moreover, this Court has sustained such regulation even when the resulting rules were designed to affect the content of programming carried by broadcasters. See, *e.g.*, *NBC* v. *United States*, 319 U.S. 190, 198-201, 226-227 (1943) (sustaining FCC rules that, *inter alia*, prohibited networks from entering contracts forbidding network affiliates from carrying programs of another network and forbidding a network from selling its programs to another station in the affiliate's territory); *Red Lion*, 395 U.S. at 392-401 (sustaining the FCC's personal attack rule and the fairness doctrine as applied to broadcasters); *FCC* v. *National Citizens Comm. for Broadcasting*, 436 U.S. 775, 801 (1978) (FCC may prohibit co-ownership of a newspaper and broadcast station located in a single community; the "purpose and effect [of the regulations] is to promote free speech, not

[9] Newspapers are also subject to special marketplace regulation designed to enhance diversity. The Newspaper Preservation Act, 15 U.S.C. 1801-1804, permits "Joint Operating Agreements" that, by preserving a newspaper operation that otherwise would fail, arguably burden the speech of smaller newspapers that would have benefited from such failure. The constitutionality of the Act has been upheld. *Committee for an Independent P-I* v. *Hearst Corp.*, 704 F.2d 467, 482-483 (9th Cir.), cert. denied, 464 U.S. 892 (1983).

to restrict it"); *Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547, 567 (1990) (sustaining minority preferences in licensing and distress sales; "the interest in enhancing broadcast diversity is, at the very least, an important governmental objective"); see also *CBS* v. *FCC*, 453 U.S. 367, 396 (1981) (upholding a law requiring "reasonable access" to broadcast time for federal electoral candidates, and noting that the statute makes a "significant contribution to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process"). Thus, the Court has approved regulation that is not entirely "content-neutral" where the regulation advanced the interests of viewers or listeners.

As the Court explained in those cases, the free market does not function properly in the context of broadcasting because the radio spectrum is not large enough to accommodate everyone wishing to broadcast. Consequently, broadcast regulation, including the licensing of broadcasters, has been "as vital to its development as traffic control was to the development of the automobile." *NBC*, 319 U.S. at 213. Congress and the FCC may not use their regulatory authority to favor speakers "upon the basis of their political, economic or social views" (*id.* at 226); to silence, discriminate against, censor, or promote particular viewpoints (*Red Lion*, 395 U.S. at 396); or to adopt requirements that are not "limited" and "reasonable" in scope (*CBS* v. *FCC*, 453 U.S. at 396 (emphasis omitted)). But within those boundaries, this Court has found considerable latitude for federal regulation designed to promote a broad diversity of programming and information. Thus, like *Associated Press* and *Lorain Journal*, *Red Lion* recognizes that such regulation directly serves "the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." *Red Lion*, 395 U.S. at 390.

2. *The cable market is a dysfunctional market that is comparable to the broadcast market*

Although cable companies frequently use the airwaves to transmit their offerings, see *Teleprompter Corp.* v. *CBS*, 415 U.S. 394, 399 n.4 (1974), the cable industry is not characterized by the same kind of physical scarcity as broadcasting. Salient features of that industry nevertheless similarly justify governmental regulation to correct market failure and promote diversity of programming and information.

a. In passing the 1992 Cable Act, Congress relied on numerous factual findings, many of which it incorporated into the text of the statute. Those findings show that although the cable industry is not characterized by the same kind of physical scarcity as broadcasting, it nevertheless is marked by the same sort of market failure that justifies corrective congressional action. Market dysfunction in the cable industry is caused by the monopoly power of cable operators, which the operators can exploit via anti-competitive practices that harm broadcasters and deprive viewers of diverse viewing choices. Market dysfunction also stems from other governmental action in the marketplace that favors cable operators.

First, Congress accurately determined that various circumstances, "including local franchising requirements and the extraordinary expense of constructing more than one cable television system to serve a particular geographic area," have given rise to bottlenecks controlled by cable operators. 1992 Cable Act, § 2(a)(2), 106 Stat. 1460; see J.S. App. 13a ("[t]he regulation is justified by the existing structure of the cable business itself, and by the market peculiarities resulting from the technological differences in the manner in which different video signal distributors deliver their products to their viewers' receivers"); cf. *FCC* v. *Beach Communications, Inc.*, 113 S. Ct. 2096, 2104 (1993) (because of the fixed costs incurred in installing the receiving antenna and the associated transmission equipment, the first cable operator in a market will enjoy substantial cost advantages in providing service to additional, unserved subscribers). As a result of those circumstances, virtually all cable operators enjoy a local monopoly on the provision of cable services.[10]

Congress also found that (1) cable companies serve more than 60% of American households with televisions;[11] (2) the cable industry is highly concentrated;[12] and (3) the industry is vertically integrated and its members have a powerful incentive to favor affiliated cable programmers over unaffiliated broadcasters.[13] § 2(a)(3)-(5), 106

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[10] See, *e.g.*, *Media Ownership Hearings* 685 (statement of Edward O. Fritts, President, National Association of Broadcasters (NAB) (20 multiple system operators (MSOs) serve 70% of subscribers; fewer than 1% face competition).

[11] See *Cable Television Regulation: Hearings on H.R. 1303 and H.R. 2546 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 755 (1991) [hereinafter *1991 House Cable Hearings*] (statement of NAB) (93% of American homes are passed by cable, and more than 60% subscribe to cable); *Cable TV Consumer Protection Act of 1991: Hearing on S. 12 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 102d Cong., 1st Sess. 118 (1991) [hereinafter *1991 Senate Cable Hearing*] (statement of James P. Mooney, President, National Cable Television Association) (60% of homes have cable).

[12] See, *e.g.*, *Media Ownership Hearings* 343 (statement of Bob Phillips, National Rural Telecommunications Cooperative) (noting that the 25 biggest MSOs serve 72% of the 49.5 million cable subscribers); *id.* at 97 (statement of Michael A. Salinger, Columbia University) (one company owns 82% of second largest MSO and owns first and third largest pay services); *id.* at 85 (statement of Ben H. Bagdikian, University of California at Berkeley) (three cable firms serve one-third of all subscribers). As a result of this concentration, broadcasters typically lack bargaining power comparable to that of cable operators.

[13] See, *e.g.*, *Media Ownership Hearings* 99 (statement of Michael A. Salinger, Columbia University) (describing research showing that "vertically integrated systems give preference to the services they own and tend to exclude competing services"); *1991 Senate Cable Hearing* 214 (statement of James Hedlund, President, Association of Independent Television Stations, Inc. (AITS)) (same);

Stat. 1460-1461. In addition, cable companies compete with broadcasters for advertising revenues,[14] giving the cable operators a strong economic incentive to drop the broadcasters' signals or reposition them unfavorably.[15] § 2(a)(14)-(15), 106 Stat. 1462. Finally, the concerns relating to that potential unfair competition cannot be addressed effectively through technology allowing subscribers to switch between cable transmissions and over-the-air broadcasting; Congress found that most cable subscribers do not or cannot receive broadcast television other than through their cable company.[16] Accordingly, Congress found that, in the absence of a must-carry requirement, the incentive for cable operators to engage in anti-competitive behavior will seriously jeopardize the economic viability of local broadcasters and their ability to

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see also *Media Ownership Hearings* 29, 31-32, 41 (statement of John C. Malone, President, Telecommunications, Inc.) (describing holdings of cable companies in cable programmers).

[14] See, *e.g.*, *Cable Television Regulation (Part 2): Hearing Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 101st Cong., 2d Sess. 103 (1990) (statement of NAB) (advertising on cable rose from $58 million in 1980 to approximately $2 billion in 1989); *1991 Senate Cable Hearing* 351-352 (statement of Association of National Advertisers, Inc.) (must-carry requirements "are essential to ensure that cable systems do not misuse their 'gate-keeper' position to exclude or financially penalize broadcast competitors"); *1991 House Cable Hearings* 755 (statement of NAB) (cable sold $963 million in advertising in 1987; in 1991 estimated cable advertising revenues were between $2 and $3 billion; and revenues are estimated to reach $9 or $10 billion by the end of the decade).

[15] See, *e.g.*, *1991 Senate Cable Hearing* 214-215 (statement of James Hedlund, President, AITS) (discussing incentive of cable companies to drop broadcasters and reduce competition for viewers and advertising revenues).

[16] See, *e.g.*, *1991 Senate Cable Hearing* 246 n.86 (statement of James Hedlund, President, AITS) ("both the broadcasting and cable industries agreed that the A/B switch was not a viable solution to the problem" of cable access).

originate quality local programming. § 2(a)(16)-(17), 106 Stat. 1462. The must-carry requirements therefore directly address economic market dysfunction by ensuring that cable operators do not use their market power to engage in unfair competition to the detriment of viewers who depend upon or wish to receive full-service local broadcasting.

Congress's findings concerning the effect on broadcasters of anti-competitive behavior by cable operators are hardly surprising, since this Court's cable television precedents have recognized that cable and broadcast television are integrally related, and that the objectives of broadcast regulation adopted by Congress and the FCC and approved by this Court could not be accomplished if the cable industry may not be regulated to advance the purposes of such regulation. Prior to 1984, the Commission lacked explicit authority to regulate cable. But it adopted cable regulations—including a must-carry rule—pursuant to its authority under the Communications Act of 1934, 47 U.S.C. 151 *et seq.* See *First Report & Order in Docket Nos. 14895 & 15233*, 38 F.C.C. 683, 697, 741-742 (1965); see also 47 U.S.C. 151, 303(b) and (g) (1988).[17]

In *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968), this Court sustained the FCC's exercise of authority over cable—including its authority to promul-

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[17] The D.C. Circuit decisions invalidating the FCC's must-carry rules (*Quincy Cable* and *Century Communications*) do not speak to the validity of the must-carry provisions of the 1992 Cable Act. In each case, the court of appeals relied heavily on the absence of a sufficient record to support the FCC's conclusion that an unregulated cable industry posed a serious threat to local broadcasting. See *Century Communications*, 835 F.2d at 304; *Quincy Cable*, 768 F.2d at 1455-1459. Because the must-carry provisions enacted in the 1992 Cable Act are supported by an extensive legislative record, reduced to congressional findings of fact, the reasoning of *Quincy Cable* and *Century Communications* would suggest a contrary result here.

gate must-carry rules. In so doing, the Court emphasized that "Congress has imposed upon the Commission the 'obligation of providing a widely dispersed radio and television service,' with a 'fair, efficient, and equitable distribution' of service among the 'several States and communities.' " 392 U.S. at 173-174 (footnote omitted). The Court also noted that Congress and the FCC had concluded that "these obligations require for their satisfaction the creation of a system of local broadcasting stations, such that 'all communities of appreciable size [will] have at least one television station as an outlet for local self-expression.' " *Id.* at 174. Relying on the Commission's reasonable determination that the importation of distant signals by cable operators threatened to divide the "available audiences and revenues" and to "deprive the public of the various benefits of a system of local broadcasting stations," the Court found that the FCC could not discharge its responsibilities regarding broadcasting without also asserting authority over cable. *Id.* at 174-176; see also *United States* v. *Midwest Video Corp.*, 406 U.S. 649 (1972) (upholding FCC regulation requiring cable systems with 3,500 or more subscribers to originate local programs to assure diversified programming).[18]

Congress's findings accompanying the 1992 Cable Act indicate that the must-carry provisions rest on the same rationale as the cable regulations upheld against statutory challenge in *Southwestern Cable* and *United States* v. *Midwest Video Corp.* As Congress specifically found,

[18] See, *e.g.*, *FCC* v. *Midwest Video Corp.*, 440 U.S. 689, 697 (1979) (" 'successful performance' of [the FCC's] duty to ensure 'the orderly development of an appropriate system of local television broadcasting' depended on regulation of cable operations"); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 714 (1984) ("[t]here can be little doubt that the comprehensive regulations developed over the past 20 years by the FCC to govern signal carriage by cable television systems reflect an important and substantial federal interest").

enactment of the must-carry requirements was necessary not only to preserve "the economic viability of free local broadcast television," but also to ensure that broadcasters retain their "ability to originate quality local programming." § 2(a)(16), 106 Stat. 1462. Even where market dysfunction in the cable industry does not jeopardize the existence of local broadcasting altogether, it nevertheless threatens to weaken the local broadcasters' ability to provide full-service programming to local communities. See H.R. Rep. No. 628, *supra*, at 51-52, 64; S. Rep. No. 92, *supra*, at 59. At the same time, broadcasters' programming "remains the most popular programming on cable systems, and a substantial portion of the benefits for which consumers pay cable systems is derived from carriage of [broadcasters'] signals." § 2(a)(19), 106 Stat. 1462. Accordingly, as the Court recognized in *Southwestern Cable* and *United States* v. *Midwest Video Corp.*, because of the similarity and interrelatedness of cable and broadcast television, a comparable regulatory approach is appropriate for each. *United States* v. *Midwest Video Corp.*, 406 U.S. at 669 (plurality opinion) (cable regulation seeking to assure that "viewers are provided suitably diversified programming" has "the same objective underlying [the broadcast] regulations sustained in *National Broadcasting Co.* v. *United States, supra*").

Second, governmental conduct has substantially contributed to the market power of cable. Cable systems traditionally have used public rights-of-way (see *Leathers* v. *Medlock*, 111 S. Ct. 1438, 1441 n.1 (1991); *Beach Communications*, 113 S. Ct. at 2100), and that use justifies the imposition of licensing requirements by local authorities. Moreover, the federal government has required cable systems to obtain state or local franchises. See 47 U.S.C. 541(b) (1988). Until the 1992 Cable Act prohibited franchise authorities from doing so (§ 7(a)(1), 106 Stat. 1483; 47 U.S.C. 541(a)(1)), most local authorities made exclusive franchises available to cable operators. See

J. Goodale, *All About Cable* § 4.02[1], at 4-7, to 4-8 (1991) (discussing prevalance of exclusive cable franchises); 47 U.S.C. 541(a)(1) (1988) (authorizing franchise authorities to determine the number of cable operators in its jurisdiction).

In addition, in the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779, Congress sharply limited franchise fees (47 U.S.C. 542 (1988)); restricted rate regulation (47 U.S.C. 543 (1988)); and substantially limited franchise authorities' ability not to renew franchises, while also requiring compensation when franchises were not renewed (47 U.S.C. 546 and 547 (1988)).[19] Finally, Congress provided substantial benefits to cable operators by enacting the Copyright Act of 1976, 17 U.S.C. 111, which adopted a system of compulsory licensing for the retransmission of broadcast programming by cable operators.[20]

As this Court has made clear, where government regulation has given certain speakers "a preferred position" in the marketplace of ideas and enables them to monopolize an important means of communication, the government may act to ensure that such speakers provide a diversity of programming to their listeners and viewers. See *Red Lion*, 395 U.S. at 400; cf. *Austin* v. *Michigan*

[19] The 1992 Cable Act imposes significant rate regulation on cable operators that are not subject to effective competition. § 3(a), 106 Stat. 1464-1471; 47 U.S.C. 543.

[20] Time Warner argues (Br. 37 n.36) that cable operators were better off prior to the enactment of Section 111, because this Court held in *Teleprompter Corp.*, 415 U.S. at 414, that "copyright legislation enacted more than half a century ago, when neither broadcast television nor CATV was yet conceived," did not require them to pay royalties. But the scope of copyright protection in broadcast signals is plainly a matter for Congress to decide, and cable operators had no right to expect that the rule under which broadcasters had no control over their signals would continue. By allowing cable operators to retransmit signals in the absence of an agreement, Section 111 benefited cable operators.

State Chamber of Commerce, 494 U.S. 652, 659-660 (1990) (because "state-conferred corporate structure * * * facilitates the amassing of large treasuries," the State has a compelling interest in ensuring that corporations do not use the resources to obtain an "unfair advantage in the political marketplace"). Even where changed circumstances create a "present possibility for new entry by competing" entities, that possibility is "not enough, in itself, to render unconstitutional the Government's effort" to assure a wide availability of programming and information in the public interest. *Red Lion*, 395 U.S. at 400.

b. The appellants attack the factual findings of Congress in various ways that are to some degree contradictory. The cable operators, who complain that they are forced to carry broadcast stations they otherwise would drop, simultaneously emphasize their claim that the record does not support Congress's conclusion that broadcast television is in jeopardy. Time Warner, for example, notes (Br. 42) that a 1988 study on which Congress relied suggested that 80% of cable operators did not drop any broadcast stations during the period in which no must-carry rules applied, and argues from that evidence that there is no basis for Congress's conclusion that cable operators might exploit their control over broadcasters' access to cable viewers. The cable programmers, on the other hand, claim that "[n]ewer cable program services, such as The Sci-Fi Channel, The Cartoon Network, and The Learning Channel, are finding it especially difficult to obtain access to audiences because of the must-carry provisions." Turner Broadcasting Br. 17. The programmers contend, in effect, that in the absence of must-carry rules cable operators would drop numerous broadcast stations and carry their programming instead.

Both the cable programmers and the cable operators cannot be right about the effect of the must-carry rules. If the programmers are right, then broadcast stations would be in serious jeopardy in the absence of must-carry

rules, as Congress concluded. That is, if, in fact, networks such as The Sci-Fi Channel, The Cartoon Network, and The Learning Channel would have access to significantly more cable viewers in the absence of must-carry rules, then a significant number of broadcast stations would be dropped to make room for them. If a broadcast station is available only over-the-air, and hence practically unavailable to the increasing majority of households that subscribe to cable television, then that broadcast station may be in danger, since the audience available to it will be reduced by more than half. If the operators are right, on the other hand, then any First Amendment injury is minimal. That is, if, in fact, 98% of the broadcast stations that are entitled to be carried under Sections 4 and 5 of the 1992 Cable Act would be carried in any event, as Time Warner states (Br. 42 n.46), then (a) the programmers would have no significantly greater access to cable systems in the absence of must-carry rules and (b) the burden imposed on cable operators by the must-carry rules is insubstantial, since they would carry almost all of the broadcast stations anyway. Hence, if Congress's concerns about the unfair use of market power by cable operators are overstated, as the cable operators contend, then the appellants' claims of First Amendment injury are correspondingly overstated.

In our view, the district court properly declined to substitute the appellants' various judgments concerning the need for must-carry rules for that of Congress. This Court has admonished that it "must afford great weight to the decisions of Congress and the experience of the Commission." *CBS* v. *Democratic National Comm.*, 412 U.S. 94, 102 (1973). It is particularly appropriate to respect the predictive judgment of Congress and the FCC when they address the relationship between two technical, rapidly changing, and closely interdependent industries—broadcasting and cable. Indeed, even in cases in which heightened scrutiny was applied, this Court has

emphasized that it must "pay close attention to the expertise of the Commision and the factfinding of Congress," because "[t]he special attribute [of Congress] as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue." *Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547, 569, 572 (1990) (internal quotation marks omitted). While Congress cannot "predict with certainty the consequences of unregulated [cable]," its responsibilities to viewers "demand that it 'plan in advance of foreseeable events, instead of waiting to react to them.'" *Southwestern Cable*, 392 U.S. at 176-177, quoting *First Report & Order*, 38 F.C.C. at 701. The district court in this case properly respected Congress's reasonable predictive judgment, which rested on substantial evidence that cable operators have, and will use, substantial market power to the detriment of local broadcasters and of the paramount First Amendment interests of their viewers.[21]

Accordingly, it is appropriate for this Court to pay deference to Congress's conclusions that cable subscribers

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[21] We are not asking this Court to "defer to Congress' conclusion about an issue of constitutional law." *Sable Communications of California, Inc.* v. *FCC*, 492 U.S. 115, 129 (1989). Nor are we asking this Court to defer to "conclusory statements." *Ibid.* In this case, no one disputes Congress's estimates that "approximately 1,700 cable systems have denied carriage of local television stations in approximately 3,600 instances" and that "974 of the cable systems responding" to an FCC survey "admitted that they had shifted positions of one or more local stations in almost 3,000 instances"—which suggests, by projection, that nearly 6,000 broadcast stations had been moved to unfavorable channel locations, since only about half of the country's cable systems responded to the survey. S. Rep. No. 92, *supra*, at 43, 44. The parties disagree primarily about the likely pace of such discrimination as cable penetration advances beyond 60% of television households. As the district court concluded, Congress's findings with respect to such matters are entitled to a "level of deference befitting a co-equal branch of government that is well-equipped to take evidence and make findings." J.S. App. 23a.

might lose access to commercial and educational broadcast television and that "the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized" without must-carry rules. 1992 Cable Act, § 2(a)(16), (17), 106 Stat. 1462.[22] As the district court concluded, Congress's predictive judgments are supported by the legislative record. Indeed, Congress's predictions are corroborated by the appellant cable programmers' claims in this case that but for the must-carry rules many cable operators would, for example, drop an educational broadcast station and replace it with The Cartoon Network.

3. *Dysfunction in the cable market justifies the must-carry rules*

Under the applicable standards, Sections 4 and 5 of the 1992 Cable Act easily pass muster. As discussed, the must-carry provisions require cable operators to set aside only a limited portion of their channel capacity for local broadcasting. Moreover, "must-carry rights are conferred upon all full-power local broadcasters, and the obligations upon most cable operators, regardless of any views expressed in the programming of either." J.S. App. 15a-16a. Particularly when measured against broadcast regulations

[22] In evaluating Congress's conclusion that broadcast television would be jeopardized in the absence of must-carry rules, it is not appropriate to ask, as some of the appellants seem to think, whether the evidence shows that broadcast television is likely to be totally eliminated. Rather, the question is whether the broadcast services available to viewers who do not subscribe to cable television are likely to be reduced to a significant extent, because of either loss of some stations altogether or curtailment of service by others. In that respect, this case is the converse of *United States* v. *Edge Broadcasting Co.*, 113 S. Ct. 2696, 2707 (1993), in which this Court upheld a ban on lottery advertising and noted that "the Government may be said to advance its purpose by substantially reducing lottery advertising, even where it is not wholly eradicated."

sustained by this Court—including the explicitly content-related fairness doctrine (*Red Lion*)[23] and right of reasonable access for federal political candidates (*CBS* v. *FCC*)[24] —the reasonably limited and viewpoint-neutral must-carry provisions of the 1992 Cable Act plainly constitute a permissible effort to promote the viewers' paramount First Amendment interest in a wide diversity of programming and information. Indeed, they are far more limited than the must-carry rules this Court found reasonably ancillary to the legitimate objectives of broadcast regulation in *Southwestern Cable*. See 392 U.S. at 166 (under the must-carry rules then in effect, cable systems were required "to transmit to their subscribers the signals of any station into whose service area they * * * brought competing signals" and were forbidden "to duplicate the programming of such local stations for * * * 15 days before and after a local broadcast").

[23] The "fairness doctrine" required broadcasters "to provide adequate coverage of public issues and to ensure that this coverage fairly and accurately reflects the opposing views." *FCC* v. *League of Women Voters*, 468 U.S. 364, 378 (1984). The fairness doctrine also spawned the "personal attack rule," under which broadcasters had to provide reply time to anyone criticized over-the-air. See *Red Lion*, 395 U.S. at 370. The FCC has since eliminated the fairness doctrine (see *Syracuse Peace Council* v. *FCC*, 867 F.2d 654 (D.C. Cir. 1989), cert. denied, 493 U.S. 1019 (1990)), which intruded far more upon programming discretion than a requirement that cable operators devote a limited portion of their channel capacity to local broadcasting, without regard to the programming of the broadcasters to be carried or that which the cable operator would otherwise place on the channels set aside.

[24] The statute upheld in *CBS* authorized the FCC to revoke the license of any station "for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy." 453 U.S. at 374, quoting 47 U.S.C. 312(a)(7) (1988).

Appellants contend that because the cable industry is not characterized by spectrum scarcity, cable regulation cannot be evaluated under standards comparable to those governing broadcasting regulation. For two reasons, that contention is unpersuasive. First, as is the case with broadcasting, part of the bottleneck in the cable industry is attributable to the physical characteristics of cable itself. Although cable is not characterized by spectrum scarcity, it "involves another type of interference—interference with other users of telephone poles and underground ducts." *Omega Satellite Products Co.* v. *City of Indianapolis*, 694 F.2d 119, 127 (7th Cir. 1982). Cable operators typically (although not invariably) transmit their signals "through cables strung over utility poles and through underground conduits." *Leathers*, 111 S. Ct. at 1441 n.1; see *Beach Communications*, 113 S. Ct. at 2100 (a traditional cable system "delivers video programming to a large community of subscribers through coaxial cables laid under city streets or along utility lines"). The practical difficulty and expense of constructing a competing cable system can therefore be very great, particularly in urban areas. See, *e.g.*, J. Goodale, *supra*, § 4.02[1], at 4-7; Brenner, *Cable Television and the Freedom of Expression*, 1988 Duke L.J. 329, 332. Thus, there is typically some physical constraint on the development of multiple competing cable systems, and a concomitant need for the government to exert a form of "traffic control" where traditional cable systems are concerned. *NBC*, 319 U.S. at 213.

Second, the concept of physical scarcity is not essential to invoke the framework applicable here. To be sure, the concept of spectrum scarcity played a significant role in the development of this Court's rationale for sustaining broadcast regulation. But the critical factor has not been the physical phenomenon of spectrum scarcity as such, but the resulting inability of the broadcasting market to function successfully. We see no reason to exclude from

the Court's approach cases in which comparable market dysfunction occurs for other reasons. To limit the Court's approach to the physical spectrum, moreover, would be contrary to this Court's precedents.

For example, in articulating the First Amendment justification for the broadcast regulation at issue in *Red Lion*, the Court relied heavily on its precedents in *Associated Press* as well as other newspaper cases having to do not at all with the scarcity of the electromagnetic spectrum, but with economically driven market failure. See *Red Lion*, 395 U.S. at 387, 390. The Court in *Red Lion* also made clear that its analysis applied even where factors other than spectrum scarcity gave some broadcasters the ability to monopolize the market for programming and information:

> Even where there are gaps in spectrum utilization, the fact remains that existing broadcasters have often attained their present position because of their initial government selection in competition with others before new technological advances opened new opportunities for further uses. Long experience in broadcasting, confirmed habits of listeners and viewers, network affiliation, and other advantages in program procurement give existing broadcasters a substantial advantage over new entrants, even where new entry is technologically possible. These advantages are the fruit of a preferred position conferred by the Government. Some present possibility for new entry by competing stations is not enough, in itself, to render unconstitutional the Government's effort to assure that a broadcaster's programming ranges widely enough to serve the public interest.

Red Lion, 395 U.S. at 400.

In short, the power of private entities to silence others' speech justifies government intervention to promote a diversity of programming and information, whether that market power derives from physical limitations on the

medium of delivery (as in *Red Lion*); from economic monopoly (as in *Associated Press*); from advantages secured through government (as in *Red Lion* and *Austin*); or from a combination of the three (as in this case). Where Congress acts to address such market failure in a reasonably limited and viewpoint-neutral way designed to provide viewers the widest dissemination of programming and information, this Court's cases instruct that First Amendment interests are served, not offended, by such legislation.

The appellants contend that we have read *Red Lion* and *Associated Press* too broadly, and offer a host of hypotheticals, primarily involving newspapers, designed to show that there is some dysfunction in other communications markets but that solutions that are allegedly comparable to the must-carry rules plainly would be unacceptable in those other markets. None of appellants' hypotheticals is comparable to the problem addressed by Congress through Sections 4 and 5 of the 1992 Cable Act. A newspaper is not comparable to a cable operator merely because it is the only daily newspaper in the area. A newspaper would be comparable to a cable operator only if, by subscribing to a newspaper, a person was practically unable to obtain written information from any other source unless the newspaper chose to deliver it. In addition, the cases would be comparable only if the newspaper had both the ability and an economic incentive, on account of competition for advertising, to eliminate other sources of written information. Thus, appellants' hypotheticals are inapposite because newspapers do not have control over access to other sources of written information, while cable operators have control over most viewers' access to their chief competitors, free local broadcasters. Indeed, in *Lorain Journal*—where a newspaper had both sufficient market power and an economic incentive to attack a rival by refusing to carry certain advertisements—this Court held that the newspaper could be required to carry the advertisements.

B. The Must-Carry Rules Also May Be Upheld As Content-Neutral Provisions That Are Narrowly Tailored To Further Substantial Government Interests

Although the district court recognized that Congress sought "to impose order upon a market in dysfunction" (J.S. App. 12a), the district court did not uphold the must-carry rules on the basis of this Court's decisions, such as *Associated Press* and *Red Lion*, approving measures taken to correct market failure that threatens to impair the speech of some. Rather than relying on those cases, the district court upheld the must-carry rules under the more general framework applied by this Court in cases that do not involve market failure that endangers some speakers. The standard applied in *Associated Press* and *Red Lion* is not as stringent as this Court's general standard—as is appropriate since the provisions at issue in those cases (and this case), while burdening speech to some extent, also promote speech. In particular, the general standard is more stringent in that it requires the government to show that the provision at issue is content-neutral (or that it survives strict scrutiny because it is the least restrictive means of satisfying an important governmental objective). Although the district court tested the must-carry rules under a more exacting standard than is appropriate, it correctly concluded that the must-carry rules satisfy that standard as well.

1. The must-carry rules are content-neutral

Although the must-carry provisions, like any law designed to promote diversity of information, may alter the content of programming to some extent, they are content-neutral in the crucial constitutional sense. "The principal inquiry in determining content neutrality * * * is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989). However, "the First Amendment's hostility to content-based regulation extends not only to a restriction on a

particular viewpoint, but also to a prohibition of public discussion of an entire topic." *Burson* v. *Freeman*, 112 S. Ct. 1846, 1850 (1992).

When measured against the standards articulated by this Court, the must-carry provisions are not content-related for First Amendment purposes. As the district court explained, the must-carry provisions "do not compel the carriage of any particular messages nor do they impose any burden on operators or programmers on the basis of the messages they or the broadcasters propose to transmit." J.S. App. 16a. The provisions thus are not designed to express disagreement with the message of cable operators or programmers. Nor do the must-carry provisions single out any topic that cable operators may or may not discuss. Compare, *e.g.*, *Simon & Schuster, Inc.* v. *Members of the New York State Crime Victims Bd.*, 112 S. Ct. 501, 508 (1991) (speech about crime); *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U.S. 530, 537 (1980) (prohibition against discussion of nuclear power).

The district court recognized that one of Congress's purposes in enacting the must-carry provisions was to ensure that cable subscribers would have access to local broadcast television. But as it stated, "Congress' solicitousness for local broadcasters' material simply rests on its assumption that they have as much to say of interest or value as the cable programmers who service a given geographic market audience, not on any recognition that there is a discrete 'local' subject-matter." J.S. App. 20a. That view is supported by the fact that the 1992 Cable Act confers must-carry rights upon all full power local broadcasters regardless of the programming they carry. Thus, "if the must-carry provisions are content-related at all, they are only marginally so, to the point of *de minimis*." *Ibid.*[25]

[25] Section 5 of the Act might be characterized as favoring educational speech over entertainment. However, to the extent that such a characterization is accurate, Section 5 favors all sorts of educational speech, regardless of content.

Moreover, Congress's goal of preserving access to broadcast television for those who are not served by cable or who do not want to subscribe to cable is entirely content-neutral. That is, that goal has nothing at all to do with the content of local broadcasting, but is premised on Congress's desire to ensure the continued availability of "free television programming, especially for viewers who are unable to afford other means of receiving programming." § 2(a)(12), 106 Stat. 1461.

2. *The must-carry rules are narrowly tailored to accomplish significant government interests*

The must-carry rules satisfy both parts of the intermediate scrutiny standard established in *United States* v. *O'Brien*, 391 U.S. 367 (1968), which generally applies to content-neutral speech restrictions. First, there is an "important or substantial governmental interest" (391 U.S. at 377) in addressing unfair competition in the video communications market and in preserving the local broadcast industry. As Congress found in the 1992 Cable Act, the local broadcast industry provides "educational and informational programming to the Nation's citizens, thereby advancing the Government's compelling interest in educating its citizens," and serves as an "important source of local news and public affairs programming and other local broadcast services critical to an informed electorate." § 2(a)(8)(A) and (11), 106 Stat. 1461; see H.R. Rep. No. 628, *supra*, at 50; see also *CBS* v. *FCC*, 453 U.S. at 396 (citing cases). It is particularly important to maintain a vital broadcast market for viewers who are not served by cable or cannot afford cable service. At the same time, broadcast television would be less attractive to advertisers if the primary viewers of broadcast television were families that cannot afford cable, which would tend

to send broadcasters into a downward spiral.[26] As discussed, moreover, if Congress lacked authority to regulate cable television it would effectively lose its ability to assure "a fair, efficient, and equitable distribution" (47 U.S.C. 307(b) (1988)) of broadcasting services, a feature of broadcast regulation for more than half a century. See S. Rep. No. 92, *supra*, at 58. Accordingly, "an important and substantial federal interest" is served by a regulatory scheme that, like the must-carry provisions, "strike[s] a balance between protecting noncable households from loss of regular television broadcasting service due to competition from cable systems and ensuring that the substantial benefits provided by cable of increased and diversified programming are secured for the maximum number of viewers." *Capital Cities Cable*, 467 U.S. at 714.[27]

Second, the must-carry requirements are narrowly tailored, as required by *O'Brien*, 391 U.S. at 377, because they are not "substantially broader than necessary" to achieve legitimate governmental ends. *Ward*, 491 U.S.

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[26] In addition, cable technology is the only economically viable method for broadcasters to improve the quality of their picture, as is particularly important in rural areas. See J.S. App. 37a n.2 (concurring opinion) (recounting cable's origination in Mahanoy City, Pennsylvania).

[27] The appellants, by and large, do not contend that there is no substantial government interest in preserving local broadcasting, but instead argue that the evidence presented to Congress does not support Congress's conclusion that free television is in jeopardy. See, *e.g.*, Discovery Communications Br. 38. As we have stated, however, the record before Congress was more than adequate for it to conclude that cable operators have both the ability and the incentive to discriminate against broadcasters. The record also showed that cable operators had dropped more than 3,600 broadcast stations and had moved a larger number of broadcast stations to undesirable channels. Moreover, as we have also stated, to the extent that Congress's fears were inflated, so is any claim of impact on First Amendment interests. See pp. 29-32, *supra*.

at 800. As Congress found after lengthy hearings on the cable industry, the deployment of technology to allow viewers to switch between cable and over-the-air television is not a viable alternative. 1992 Cable Act, § 2(a)(17), 106 Stat. 1462; see *1991 Senate Cable Hearing* 246 n.86. And as noted in the legislative history, the must-carry obligations themselves are carefully confined: a cable operator is required to devote only one-third of its channel capacity to local commercial programming; an operator has discretion to choose which broadcasters it will carry when there are more local broadcasters than the operator must carry; and there is nonduplication protection. S. Rep. No. 92, *supra*, at 61. In short, cable operators have considerable control over which stations will be carried.

In addition, the must-carry rules, by themselves, do not bar any cable network from being carried by any cable operator. Even if a typical 40-station cable operator devotes 40% of its channels to local commercial and educational broadcasters pursuant to the must-carry rules, 24 channels remain for use by cable networks. Accordingly, if a particular cable network cannot gain access to a "full" cable operator, that seems to be due more to that network's failure to displace other cable networks than to its failure to displace local broadcast stations being carried pursuant to Sections 4 and 5. Moreover, the programmer also may gain access to cable viewers by persuading a broadcast station to carry its programming.[28]

Moreover, the effect of the must-carry rules on programmers should be evaluated in light of all of the steps Congress took in the 1992 Cable Act, and two of the

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[28] At the same time, Sections 4 and 5 do not force cable operators to carry broadcast stations that lack audiences. If a commercial station lacks an audience, it eventually will fail, whether or not it is available to cable as well as non-cable households. An educational network is also unlikely to find continued financial support in the absence of an audience, whatever its availability.

provisions Congress enacted at that time are of particular assistance to cable programmers. First, through Section 12 of the Act, 106 Stat. 1488, 47 U.S.C. 536, Congress added a provision that prohibits cable operators from discriminating against nonaffiliated programmers. Second, through Section 9(b), 106 Stat. 1484-1485, Congress amended 47 U.S.C. 532(c) to allow the FCC to determine the rates that may be charged for leased access. Thus, while some cable channels are reserved for broadcasters under Sections 4 and 5, cable programmers may compete on a more level playing field for other channels under Section 12 and, if necessary, may lease a channel pursuant to Section 9(b) and pay only a reasonable rate as determined by the FCC, rather than a rate determined by the cable operator.

C. The Must-Carry Rules Are Not Invalid Under *Tornillo* Or Other "Compelled Speech" Cases

In arguing that the must-carry rules should be scrutinized strictly, the cable operators rely heavily on this Court's decision in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974). There, the Court invalidated a state law giving political candidates a right to equal space in a newspaper to reply to attacks on their records by the newspaper. For several reasons, *Tornillo* does not govern here. First, as discussed, for purposes of First Amendment analysis, cable shares many similarities with broadcast television, and the constitutional analysis of *Red Lion* rather than *Tornillo* supplies the relevant framework here. Second, the state statute at issue in *Tornillo* represented a very serious incursion into the editorial discretion of newspapers. The reply statute was strongly viewpoint-based and struck at the core of First Amendment speech —political discourse. When a newspaper expressed a critical opinion of a political candidate, it was compelled by state law to print the opposite viewpoint as well. As the Court explained, the statute "exact[ed] a penalty on the

basis of the content of a newspaper." 418 U.S. at 256. For that reason, editors might self-censor in order to avoid the reply duty imposed by the statute. *Id.* at 257. No such concerns are present in this case. The must-carry provisions are not triggered by any particular programming carried by the cable operator, and therefore serve First Amendment interests without any intent to punish, suppress, or promote the message being conveyed by the broadcaster, the cable operator, or the cable programmer.[29]

Third, although cable operators exercise some "editorial discretion over which stations or programs" to carry (*City of Los Angeles* v. *Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986)), they primarily serve as passive conduits retransmitting the programming of others, rather than originating programming of their own. Cf. *Teleprompter Corp.*, 415 U.S. at 404-405.[30] Thus, viewers are far less likely to attribute views expressed on one of the dozens of cable channels to the cable operator than readers are likely to attribute views printed on an editorial page to the editor of a newspaper. If national news-

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[29] Appellants emphasize *Tornillo*'s statement that the government may not compel publishers to print that which " 'reason' tells them should not be published." 418 U.S. at 254 (quoting *Associated Press*, 326 U.S. at 20 n.18). *Tornillo*'s observation, however, does not undermine the constitutionality of the must-carry rules. Where a law is specifically designed to require a publisher to print a rebuttal to a view it has taken, the very essence of the law is to compel that publisher to print what reason tells him not to print. The must-carry rules have no such purpose, but are designed to assure that cable operators do not exercise their market power to silence other speakers and thereby to deprive viewers of competing services.

[30] Moreover, while "[n]ewspapers usually have an editorial policy[,] [c]able operators may not see themselves as editors at all." Barron, *On Understanding the First Amendment Status of Cable: Some Obstacles in the Way*, 57 Geo. Wash. L. Rev. 1495, 1504 (1989).

papers monopolized the local distribution systems in a city (*i.e.*, owned all the newsstands and newsracks), and the city passed an ordinance requiring such newspapers to make a limited percentage of space on their newsstands available to local newspapers (without regard to content), the effect on the newspapers' "editorial discretion" would be far less intrusive than that of a law requiring them to print replies to their editorials. And it would be analogous to the intrusion on cable operators resulting from the must-carry provisions. The concerns underlying *Tornillo* thus do not apply to the must-carry provisions at issue here.

Nor are the appellants assisted by the other "compelled-speech" cases on which they rely. The must-carry provisions can hardly be equated with the viewpoint-based requirement in *Pacific Gas & Elec. Co.* v. *Public Utilities Comm'n*, 475 U.S. 1, 13 (1986) (plurality opinion), that a utility include in its mailings materials submitted by those who disagree with the views expressed in the utility's own newsletter. The utility's mailings did not prevent others from using the mails to reach consumers, but consumers whose television is connected to a cable system find it difficult to receive broadcast signals over the air, thus giving cable operators undue market power that Congress may correct. Nor are appellants correct in contending that Congress's reasonable accommodation of the First Amendment interests of viewers, broadcasters, and cable operators is inconsistent with the principle that a charity cannot be required to disclose facts that might interfere with its ability to obtain political donations, when the disclosure is unnecessary to protect the potential donor's interests. See *Riley* v. *National Fed'n of Blind, Inc.*, 487 U.S. 781, 795-800 (1988).

Appellants also err in relying on *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam). In *Buckley*, the Court struck down statutory limitations on political expenditures, noting that the right of some to speak may not be

secured by suppresing the rights of others. Unlike this case, however, *Buckley* involved no danger that unfair economic competition would deprive viewers of local broadcast services. Moreover, the Court in *Buckley* explicitly distinguished the "fairness doctrine" sustained in *Red Lion*. In so doing, the Court reasoned (1) that restrictions on the broadcast media present different concerns from restrictions on individual speakers and (2) that "the presumed effect of the fairness doctrine is one of 'enhancing the volume and quality of coverage' of public issues." *Buckley*, 424 U.S. at 50 n.55 (per curiam). For the reasons discussed above, those considerations confirm that the must-carry provisions of the 1992 Cable Act are consistent with First Amendment principles. Moreover, the restriction at issue in *Buckley* directly limited speech at the core of the First Amendment—speech designed to influence others to vote for a particular candidate. In this case, in contrast, the limitation at issue merely restricts, to a limited extent, the channels available to a wide variety of cable networks, such as The Cartoon Network and The Sci-Fi Channel, while preserving cable access for local commercial and educational broadcast stations.

This case is more closely analogous to *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74, 87-88 (1980), which upheld a state law mandating public access to shopping centers for speech-related activities. First, the views expressed by broadcasters are not likely to be associated with the cable company that carries broadcasting stations among many other channels. Second, the government is not dictating that a cable operator convey any particular message. Third, a cable company may insert appropriate disclaimers of responsibility for material broadcast pursuant to the must-carry requirements. Thus, there is no risk that viewers will believe that cable operators are "affirm[ing] their belief" in a position or view carried pursuant to the must-carry provisions of the 1992 Cable Act. *PruneYard*, 447 U.S. at 88.

Judge Williams suggested that while "Congress confronted a very real problem," it also had "an easy remedy entirely consistent with the First Amendment"—expanding the leased access provision, 47 U.S.C. 532, and subsidizing broadcasters to ensure that they may obtain carriage through the leased access provision. J.S. App. 50a, 51a, 61a. Neither group of appellants has embraced that alternative, presumably since it is at least as objectionable, from their points of view, as the must-carry rules. That is, an expanded leased access provision would intrude on whatever editorial discretion cable operators exercise just as much as the must-carry rules. And the cable programmers would not be better off if Congress subsidized broadcasters to ensure that they could purchase leased access. Moreover, from the public's perspective, adoption of Judge Williams' alternative would have serious drawbacks. It is very difficult to refine a subsidy program so that only parties who need subsidization obtain it, and so that they obtain subsidization only to the extent needed. In this context, that would mean limiting the subsidies to those broadcast stations that would otherwise be dropped, and limiting the amount of the subsidies to the amount needed to ensure that, together with the station's resources, the station could obtain carriage under the leased access provisions. Plainly, that would not be simple. There is a good chance that the public would end up subsidizing some broadcast stations that would be carried in any event and subsidizing other stations to a greater extent than necessary. In short, Judge Williams' alternative has little to offer.[31]

At the same time, Judge Williams' alternative is entirely consistent with our view that Congress may re-

[31] Judge Williams' hypotheticals are also inapt. The hypothetical in which local residents, but only local residents, are allowed to leaflet in a shopping center (J.S. App. 52a-53a) is quite unlike the must-carry rules, which provide that only a limited portion of a cable operator's channel capacity must be devoted to carrying broadcast stations. The hypothetical involving the "paper-springer" (*id.* at 52a) is also quite unlike this case. Once again, the must-carry rules do not limit cable access to broadcast stations, but only set aside a minority of channels for broadcasters. At the same time, to the extent the "paper-springer" hypothetical is based on the theory that the cost of an A/B switch and an antenna is the only reason cable households do not receive broadcast stations that are not carried by cable, that assumption seems questionable, since it overlooks the difficulties in maintaining and operating those devices in conjunction with cable boxes, televisions, and VCRs.

quire cable operators to devote a limited number of channels to certain viewpoint-neutral purposes. And as we have shown, the must-carry provisions closely fit the problems confronting Congress—the dropping of broadcast stations and their assignment to undesirable cable channels. Indeed, since the must-carry rules Congress adopted are no more restrictive than the alternative hypothesized by Judge Williams, he should have concluded that Sections 4 and 5 are not unconstitutional even if subjected to strict scrutiny.

* * * * *

In sum, Congress enacted Sections 4 and 5 in light of an extensive legislative record and findings showing that cable operators had the market power and the incentive to discriminate against their primary competitors, broadcasters—and that such discrimination was jeopardizing the continued availability of full broadcast service. The must-carry rules are narrowly tailored to address the anti-competitive behavior that Congress perceived, burden speech only minimally, and promote the First Amendment interests of viewers. The must-carry rules are constitutional.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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Supreme Court of the United States

OCTOBER TERM, 1993

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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BRIEF OF APPELLEE NATIONAL ASSOCIATION OF BROADCASTERS

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BRIEF OF APPELLEE NATIONAL ASSOCIATION OF BROADCASTERS

Appellee National Association of Broadcasters ("NAB"), representing commercial broadcast stations nationwide, submits this brief in support of the three-judge district court's judgment upholding Section 4 of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. §§ 531 *et seq.* (the "1992 Cable Act").

STATEMENT

Section 4 of the 1992 Cable Act, one of the Act's "must carry" provisions, is based on Congress' considered judgment that cable television's bottleneck monopoly control over access to a majority of video consumers jeopardizes free local broadcast television. Cable's anticompetitive use of its monopoly against local broadcasters harms all consumers of video programming, and particularly threatens the 40% of Americans without cable, who depend on local broadcast television for access to information.[1]

Section 4 is a viewpoint-neutral and content-neutral response to these anticompetitive threats. Section 4 does not restrict, deter or burden the dissemination of any point of view or any subject matter. It leaves cable operators free to disseminate whatever they choose on most of the cable conduit and free to expand their capacity to accommodate any and all programmers of their choice.[2] Section 4's must carry rules do *not* depend on the programming content of local television broadcasters or of nonbroadcast programmers carried on the cable conduit.

[1] Section 4 is codified at 47 U.S.C. § 534. The other "must carry" provision—Section 5, 47 U.S.C. § 535—requires cable operators to carry the signals of certain *noncommercial* educational television stations.

[2] Many of the appellants have announced plans to substantially expand channel capacity in the near future through use of innovations such as fiber optic cable and compression technology. In the near future, typical cable systems will have a capacity of 500 channels or more. J.A. 109-20, 311-18.

Whatever their content, locally originated broadcast signals are eligible for carriage on the portion of the conduit Section 4 sets aside for broadcasters. For these reasons, Section 4 serves vital national interests and, as the district court properly found, poses no danger to First Amendment freedoms.

A. Background

Cable television operators are the dominant distributors of video information to American households, more than 60% of which obtain their video programming through cable. Unlike broadcasters or newspapers, cable operators are not principally engaged in the *generation* of news, information or entertainment. Rather, more like telephone companies, cable operators function principally as conduits. They "simultaneously receive and channel to their subscribers a variety of signals from many sources without [having] advance notice about the . . . content of" the programming provided.[3] Performance of this conduit function involves "editorial discretion" only in the limited sense that cable operators choose—from among local and distant broadcast signals as well as cable programming—an overall package of offerings designed to maximize the operator's profits. As a leading cable lawyer has acknowledged, the "editorial aspects" of this function are "almost entirely theoretical." [4]

Virtually none of the cable systems across the country faces effective competition; a single company owns the conduit in virtually every community. An extraordinarily concentrated group controls this dominant medium. A small number of multiple system operators (MSOs) own the cable systems serving most of the nation, and dictate

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[3] *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 707 (1984).

[4] Daniel Brenner, *Cable Television and the Freedom of Expression*, 1988 Duke L.J. 329, 339 (1988); *see also id.* ("For the most part, cable personnel do not review any of the material provided by cable networks. . . . [C]able systems have no conscious control over the program services provided by others."); *id.* at 342 ("[i]n this capacity [cable] operates as a conduit").

which cable programmers gain access to those systems. The largest, Tele-Communications, Inc. (TCI), alone controls more than 12,000,000 households, or 22.5% of all homes receiving cable. The five largest MSOs control approximately half the nation's cable households, and the 20 largest control more than three-quarters. TCI and many other MSOs are, in turn, controlled by single individuals or families.[5] Thus, a handful of individuals and corporations dictate which video programmers will be available to the large majority of American households, and which will be excluded.

B. The 1992 Cable Act.

Against this backdrop, Congress investigated the need for regulation of the cable industry in lengthy committee hearings in 1988, 1989, 1990, and 1991,[6] compiling a

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[5] Affirmation of Jack N. Goodman, ¶¶ 8-11; J.A. 92-93.

[6] *E.G., H.R. 1303 (Consumer Protection and Competition) and H.R. 2546 (Communications Competitiveness and Infrastructure Modernization): Hearings before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce*, 102d Cong., 2d Sess. (March 20, June 18, June 26, June 27, 1991); *S.12: Hearing before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation*, 102d Cong., 1st Sess. (March 14, 1991) [hereafter *1991 Cable Act Hearing*]; *S. 1880: Hearings before the Senate Committee on Commerce, Science and Transportation*, 101st Cong., 2d Sess. (March, April 1990); *Oversight of the 1984 Cable Telecommunications Act: Hearing before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation*, 101st Cong., 1st Sess. (November 16-17, 1989) [hereafter *Oversight Hearing*]; *"Must-Carry": Hearing before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation*, 101st Cong., 1st Sess. (October 25, 1989) [hereafter *Must Carry Hearing*]; *Commercial Time on Children's Cable T.V.: Hearing before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation*, 101st Cong., 1st Sess. (October 18, 1989); *Media Ownership: Diversity and Concentration: Hearing before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation*, 101st Cong., 1st Sess. (June 14, 21 and 22, 1989); *Hearings before the Subcommittee on Antitrust, Monopolies and Business Rights of the Senate Committee on the Judiciary*, 100th Cong., 2d

voluminous empirical record.[7] The "must-carry" provisions alone were the subject of two separate hearings, and hundreds of pages of testimony. The 1992 Cable Act was the product of this exhaustive legislative scrutiny.

Congress set forth its justifications for the Act in unusually detailed and comprehensive statutory findings. Congress expressly found that "[a]s a result of the growth of cable television, there has been a marked shift in market share from broadcast television to cable television services." 1992 Cable Act, § 2(a)(13). Cable now reaches approximately 60% of all American households with television sets, § 2(a)(3), and has effectively replaced over-the-air broadcast television as the primary provider of video programming for those households. §§ 2(a)(17). Cable has become the "dominant nationwide video medium." § 2(a)(3).[8]

Sess. (March 17, 1988); *Cable Television: Hearings before the Subcommittee on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 100th Cong., 2d Sess. (May 11, 1988) [hereafter *Cable Television Hearings*].

See generally 138 Cong. Rec. S635 (daily ed. Jan. 30, 1992) (statement of Senator Inouye) (1992 Cable Act "is the result of 13 days of hearings and 113 different witnesses . . . [and] [w]e have conferred with, in addition to the 113 witnesses, at least 500 knowledgeable citizens"). Congressional attention to these issues dates back more than 3 decades. *See* Brief Amicus Curiae of the United States Senate, filed in the district court in this case. (Copies have been lodged with the Clerk of this Court).

[7] Congress also considered the records compiled in several FCC proceedings relevant to cable regulation. *See, e.g., Competition, Rate Regulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 FCC Rcd. 4962, 5038 (1990) [hereafter *FCC 1990 Cable Report*]; MM Docket No. 88-138; "Cable System Broadcast Signal Carriage Survey," Staff Report by the Policy and Rules Division, Mass Media Bureau, Sept. 1, 1988; *Report and Order*, FCC MM Docket 85-349 (November 28, 1986); *Second Report and Order*, 2 FCC 2d 725 (1966); *First Report and Order*, 38 FCC 683, 716-19 (1965). These records were themselves voluminous.

[8] The rapid growth of cable systems exceeded even the most optimistic expectations. Just fifteen years ago in *Home Box Office,*

Furthermore, Congress concluded that "local franchising requirements and the extraordinary expense of constructing more than one cable television system" in any single location prevent effective competition in the provision of cable television services to consumers. § 2(a)(2).[9] In 99% of the communities receiving cable service, the cable operator owning the franchise faces no meaningful competition.[10] "The result," Congress found, "is undue market power for the cable operator as compared to that of consumers and video programmers." § 2(a)(2).

This bottleneck monopoly power gives cable operators both the ability (through exclusion of broadcasters or manipulation of their channel positions) and the incentive to harm broadcast competitors. *See* § 2(a)(5). Cable operators have the incentive because "cable television systems and broadcast television stations *increasingly* compete for television advertising revenues." § 2(a)(14) (emphasis added). A cable operator thus faces a choice: it can "assist[] the broadcaster to increase its viewership, and thereby attract additional advertising revenues," or it can deny access and seek to capture those revenues for itself by diverting them to channels occupied by cable programmers. § 2(a)(15).[11]

Inc. v. FCC, 567 F.2d 9, 24 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977), the D.C. Circuit found it inconceivable that cable would become available to even *half* of all television households.

[9] *See Omega Satellite Products Co. v. Indianapolis*, 694 F.2d 119, 127-28 (7th Cir. 1982) (Posner, J.).

[10] *See Oversight Hearing* at 191 (Testimony of the Honorable Sharpe James on behalf of The National League of Cities and the U.S. Conference of Mayors).

[11] Vertical integration within the cable industry exacerbates the risk of anticompetitive harms. Congress found that "[t]he cable industry has become vertically integrated; cable operators and cable programmers often have common ownership." § 2(a)(5). As a result, cable operators have an incentive to favor cable programming in which they own an equity share over programming offered by broadcast stations, irrespective of consumer preferences or the relative quality of the programming. *See id.* Indeed, Congress separately took steps to prevent discrimination by cable programmers not affiliated with cable operators. 1992 Cable Act § 12.

Congress determined that these structural conditions threatened over-the-air broadcasting and, hence, effective competition in the market for video programming. Congress noted that the "marked shift in market share" from broadcast to cable, § 2(a)(13), is accompanied by an accelerating erosion of the advertising revenue that sustains free broadcast television. *See* § 2(a)(14). Congress found that anticompetitive exclusion of broadcast stations from cable had already occurred, and that "[t]here is a substantial likelihood that . . . additional broadcast signals will be deleted, repositioned, or not carried." § 2(a)(15). These risks are so substantial, Congress concluded, that "the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized," absent remedial legislation. § 2(a)(16).[12]

In particular, Congress identified three interests of the highest order that were at risk:

First, the 40% of American households without cable were at risk of losing all video programming. Congress sought to ensure that this 40% of the public—principally "viewers who are unable to afford other means of receiving programming" § 2(a)(12)—retain access to local broadcast television. *See* S. Rep. No. 92, 102d Cong., 1st Sess. 42 (1991) [hereinafter "1991 Senate Report"]. Congress made straightforward findings explaining its substantial interest in preserving free local commercial television for this huge population without cable. *See* 1992 Cable Act, § 2(a)(9); § 2(a)(10); § 2(a)(11).

Second, Congress sought to preserve the intrinsic benefits of competition in the video programming market: lower advertising prices and improved product quality. In this respect, Congress simply applied well-established general principles of competitive relations to the familiar problem of a bottleneck monopoly. *See* H.R. 628, 102d Cong., 2d Sess. 63 (1992) [hereinafter 1992 House Report].

[12] *See generally,* FCC 1990 Cable Report.

Third, Congress sought to ensure that the goals of the Communications Act of 1934 would not be frustrated in an era of increasing cable dominance. *See* 1991 Senate Report at 41-42. In the 1934 Communications Act, and in FCC decisions interpreting that Act, two objectives were clearly articulated—that broadcasting would reflect diversity and would serve local needs. Broadcast licenses have been allocated in a manner designed to ensure that there will be a wide diversity of control over broadcast stations and hence a diversity of "voices" in each community. Section 307(b) of the Communications Act requires the FCC to allocate licenses to maximize service to local communities. Congress found that both of these objectives are threatened by the power of cable systems to discriminate against local television broadcasters. 1992 House Report at 50-51; 1991 Senate Report at 42-43.[13]

C. The Empirical Record Before Congress.

Congress' conclusions are based on a legislative record replete with evidence of cable's bottleneck power, and of its abuse of that power.[14] Congress recognized that

[13] Congress also made specific findings as to the need for Section 6 of the Act, the "retransmission consent" provision. Congress found that "a substantial portion of the benefits for which consumers pay cable systems is derived from carriage of the signals of" commercial broadcast television. § 2(a)(19). Because, under prior law, cable systems were not required to compensate broadcasters for use of their signals, "[t]his has resulted in an effective subsidy of the development of cable systems by local broadcasters." *Id. See* 1991 Senate Report at 41. The retransmission consent provision, which give commercial broadcasters the option of requesting compensation for carriage of their signals on a cable system, is intended to redress this imbalance.

[14] *See* 1991 Senate Report at 55 n.161 (citing Comments and Reply Comments of NAB in FCC MM Docket No. 89-600 (March 1, 1990) (containing, *inter alia,* Malarkey-Taylor Associates, Economic Analysis of Cable Overbuilds (1987); Noam, Economies of Scale in Cable Television: A Multiproduct Analysis, in *Video Media Competition: Regulation, Economics and Technology* (Colum. U. Press 1985); *Hearings before the Subcommittee on Antitrust, Monopolies and Business Rights of the Senate Committee on the Judiciary,* 100th Cong., 2d Sess. (March 17, 1988) (testimony of Milton Maltz))).

> "[T]he central dilemma of cable is that it has unlimited capacity to accommodate as much diversity and as many publishers as print, yet all of the producers and publishers use the same physical plant. . . . If the cable system is itself a publisher, it may restrict the circumstances under which it allows others also to use its system." [15]

The legislative record demonstrates that cable has become the essential gateway for access to consumers of video programming.[16] The 1991 Senate Report noted "considerable evidence that once individuals subscribe to cable it is rare for them ever to switch to receive an over-the-air signal." [17] Congress specifically found that an "A/B switch," which would theoretically permit consumers to switch back and forth between cable and over-the-air broadcast services, was "not an enduring or feasible method of distribution and is not in the public interest." § (2)(a)(18). There was overwhelming support for that finding. For example, ninety-eight percent of cable homes do not have a roof antenna.[18] Fewer than 1% of the homes of cable subscribers have both the A/B switch and the outdoor antenna, or suitable indoor antenna, necessary for off-air reception. *See* 1991 Senate Report at 45; 1992 House Report, at 54-55. Even those with the

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[15] 1992 House Report at 60, *quoting* I. de Sola Pool, *Technologies of Freedom* 168 (1983) (internal quotation omitted).

[16] *See* 1991 Senate Report at 51; *Must Carry Hearing* at 38-39 (Testimony of Edward Fritts and sources cited therein); *Oversight Hearing* at 191 (Testimony of the Honorable Sharpe James on behalf of the National League of Cities and the U.S. Conference of Mayors).

[17] 1991 Senate Report at 45. *See id.* at 45 n.115 (citing information filed by both broadcasting *and* cable interests in FCC MM Docket 85-349 (Dec. 17, 1986)).

[18] *See* 1991 Senate Report at 45 n.116 (citing ELRA Group, Inc. "Outdoor Antennas, Reception of Local Television Signals, and Cable Television" (January 28, 1986)). *See also* NAB Comments and Reply Comments in FCC MM Docket 88-138, *contained in* NAB Comments in FCC MM Docket 89-600, *cited in* 1991 Senate Report at 55 n.161.

necessary equipment find it difficult to operate. *See id.* The FCC had affirmatively found that the cable industry actively "encouraged its subscribers to take down their antennas and to eliminate their capability to receive signals off-air." [19] On behalf of the cable industry, appellant NCTA acknowledged that A/B switches would not work. *See* 1992 House Report at 54 & n.60. Thus, for the 60% of households now receiving cable, local broadcast television cannot gain over-the-air access. As the 1991 Senate Report explained, "[e]vidence demonstrates that market factors, absent government regulation, are unable to cure cable's bottleneck problems." [20]

The legislative record documents the threat cable's market power poses to over-the-air broadcast television service.[21] The evidence before Congress identified significant and increasing incentives for cable operators to deny carriage or otherwise disadvantage broadcast signals: (i) increasing local cable advertising revenues; (ii) increasing pay subscriptions on cable; and (iii) increasing viewership of national cable programming in which the operator owns an equity stake.[22]

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[19] 1991 Senate Report at 45.

[20] 1991 Senate Report at 51. Congress also relied on the view of FCC Commissioner Quello that "[c]able, once installed, is a geographic bottleneck." *Id.* at 40 (quoting views of Commissioner Quello in FCC Mem. Op. and Order, MM Docket 85-349 (May 1, 1987)).

[21] In the 1992 House Report, Congress relied on the FCC's view that "the lack of must carry obligations . . . creates an imbalance between broadcasting and cable television[,] . . . [t]he nature and effects of [which] are a matter of immediate public policy concern and need to be addressed expeditiously." 1992 House Report at 57 (quoting FCC 1990 Cable Report, 5 FCC Rec. at 5041. (1990)).

[22] *See Hearing before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce*, 100th Cong., 2d Sess. (May 11, 1988) (Testimony of Commissioner Quello) ("There is an *increasingly strong incentive* for cable to drop local broadcast signals. Cable operators are now aggressively competing with broadcasters for the advertising dollars that support free programming available to the public on TV stations. Carriage

Congress also identified "substantial objective evidence" that cable operators had *already* abused thier market power to damage their broadcast competitors. 1991 Senate Reports, at 42. In particular, "cable operators have [denied] and will continue to deny local broadcasters carriage on their systems.' *Id.* Congress both relied on a comprehensive survey conducted by the FCC,[23] and concluded that "the free local off-air broadcast system is endangered, thereby threatening diversity of choice not only for cable subscribers, but also for those who do not subscribe to cable." 1991 Senate Report at 42-43.[24]

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is no longer an issue of having sufficient channel capacity. The incentive not to carry local stations is purely economic." (emphasis added)). *See also* 1992 House Report at 51 ("ability to sell ads on cable-only channels is perhaps the major incentive for cable operators to drop carriage of broadcasting signals . . . and . . . that incentive *can only grow larger*") (Testimony of Thomas L. Goodgame, Chairman of the Television Board of NAB (emphasis added)); *1991 Cable Act Hearing* at 214 (Testimony of James B. Hedlund (describing the decision of TCI to drop the Learning Channel in favor of a program service in which TCI had an ownership interest); NAB comments in MM Docket 88-138. *See also* NAB Reply Comments in FCC MM Docket 88-138 (July 8, 1988); Michael O. Wirth, *The Economic Impact of Cable on Broadcasting* (1988); Gary M. Fournier, *An Economic Analysis of The Appropriateness of a New "Must-Carry" Rule for Broadcast Stations and Cable Operators* 25-26 (1986); 1992 House Report at 51-52 (citing NAB Reply Comments in FCC MM Docket No. 90-4).

[23] *See* Policy and Rules Division, Mass Media Division, FCC Staff Report, "Cable System Broadcast Signal Carriage Survey" (Sept. 1, 1988) [hereafter "FCC Survey"]. Congress also heard substantial direct evidence concerning the denial of cable carriage to local broadcast television stations. *See, e.g., Must Carry Hearing* at 161-74 (Statement of Brian Holton, General Manager, KTSF (TV), San Francisco); 1992 House Report at 52-53 (citing NAB Comments and Reply Comments in FCC MM Docket 90-4). *See generally* Affirmation of Jack N. Goodman, J.A. 99-106.

[24] *See also Must Carry Hearing* at 176-79 (Statement of the City of New York, Bureau of Franchises) (explaining that, without cable carriage, viewing declines, it becomes impossible to finance local programming and no video programming remains for people in the low-income brackets who do not have cable); *id.* at 79 (Testimony of Preston Padden); *1991 Cable Act Hearing* at 206 (Testimony of James B. Hedlund).

Half of the nation's cable systems responded to the FCC Survey. 869 systems admitted refusing carriage of a total of 704 stations in 1820 instances. In 241 instances, cable operators had denied carriage to three or more local stations, and 113 cable operators had denied carriage to four or more local stations.[25] In the overwhelming number of cases, the replacement for a dropped local television station was a basic cable service in which the cable operator had an equity stake.[26]

The FCC Survey also identified 974 cable systems admitting more than 3,000 instances of repositioning broadcast signals from an established channel to a less desirable channel.[27] "In almost every instance, the stations shifted have been replaced by a cable program in which the system operator is selling advertising or in which the operator has an equity interest or both." 1991 Senate Report at 44 (describing findings of FCC Sur-

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[25] A study submitted by NCTA similarly found "205 cable systems were not carrying, and 2.5 million subscribers were denied access to, all local broadcast stations." 1991 Senate Report at 43 (describing study).

[26] *See* 1991 Senate Report at 43 & n.107 (citing FCC Survey at Table 8); *see also* 1991 Senate Report at 43 & n.110 (citing testimony of Edward Fritts in *Must Carry Hearing; id.* at 55 & n.161 (citing Comments and Reply Comments of NAB in FCC MM Docket No. 89-600 (referring to FCC Comments and Reply Comments of NAB in FCC MM Docket No. 88-138, which document instances of cable operators replacing broadcast signals with cable programming in which the operator owns an equity interest)). *See also 1991 Cable Act Hearing* at 218-221 (testimony of James B. Hedlund). The House Report also documents numerous incidents of cable operators using their market power anticompetitively to disadvantage local broadcast competitors. *See* 1992 House Report at 52-53 (citing NAB Comments in FCC MM Docket 90-4).

[27] Repositioning confounds established viewer expectations and typically relocates local broadcast programming to higher numbered channels that are generally viewed less frequently. *See Must Carry Hearing* at 41 (Testimony of Edward Fritts) (citing an A.C. Nielsen survey).

vey).[28] Typically, the disfavored broadcast signal was *more popular* than the cable programming replacing it.[29] Other studies documented hundreds of instances of similar anticompetitive conduct.[30] As Congress found: "cable operators who carry local broadcast stations have shifted the placement of these stations on their systems," with the "effect of stifling competition." [31]

Based on this record, Congress concluded that cable's bottleneck monopoly power, and its increasing willingness and ability to use that power to disadvantage its only real competitor, placed commercial broadcasting's future in jeopardy. Congress also concluded that those anticompetitive trends were likely to accelerate. 1991 Senate Report at 41-42; 1992 House Report at 52. Cable's share of advertising revenues continues to increase at the expense of broadcast stations, and Congress credited predictions that this tendency would quicken in coming years. *See* § 2(a)(14); 1991 Senate Report at 44. Because "[b]roadcast television programming is supported by revenues generated from advertising," § 2(a)(12), this revenue drain could seriously threaten the "economic viability of free local broadcast television."

[28] *See also* 1992 House Report at 55 (citing testimony of Preston Padden, Pres., of Indep. Television Stations, Inc., *Cable Hearings* at 531 (emphasis omitted)); *Must Carry Hearing* at 222 (Testimony of James B. Hedlund) (INTV's sampling of TCI repositioning showed that 65 of 70 repositionings replaced local broadcast stations with cable networks in which TCI had an equity interest).

[29] *See* NAB Comments in FCC MM Docket 90-4, at 8-9 (least watched broadcast station typically has larger audience than most watched cable channel), *discussed in* 1992 House Report at 53 n.59; 1991 Senate Report at 44; *Must Carry Hearing* at 214 (Testimony of James B. Hedlund) (Cable operators favor programmers in which they own an interest and exert influence against others, such as CNBC and the Learning Channel) & 225 (in most every instance, the higher rated service was shifted).

[30] *See* INTV, Free Television Under Siege, *cited in* 1991 Senate Report at 43 n.110. For example, there is widespread evidence that cable operators have repositioned broadcast stations without notice during "sweeps" periods, in order to maximize the adverse impact on advertising revenues. On one system, one broadcast station was repositioned every year. *See* NAB Comments in FCC MM Docket 90-4 (Sept. 25, 1992); Comments of Chris-Craft Industries in FCC MM Docket 89-600 (March 1990).

[31] 1991 Senate Report at 43.

Thus, Congress made a predictive judgment based on largely uncontroverted facts, including the historical trend favoring cable at the expense of local commercial television, the anticompetitive structural incentives inherent in cable's bottleneck monopoly position, the large volume of statistical and anecdotal evidence that cable operators had already exploited their power in anticompetitive ways, and the evidence that cable's incentive and ability to damage local broadcasting would increase in the future. Based on that evidence, Congress concluded that structural remedies were needed to ensure the long-term survival of local commercial television broadcasting.

D. The Operation of Section 4.

The must carry requirement in Section 4 of the Act is a carefully tailored and narrowly focused structural remedy designed to further these substantial interests. Section 4 imposes a limited obligation on cable operators to set aside up to one-third of their channels for carriage of local commercial television broadcast signals. This access obligation sought to protect only that which Congress found to be particularly at risk: local commercial broadcast television.

The impact of Section 4 is limited. For the large majority of cable systems, the number of local commercial television stations eligible for must carry is substantially less than the number of reserved channels. Stations that have duplicative programming, that have inadequate signals, or that require payment of copyright fees, also need not be carried. After carrying a specified number of stations, the cable operator may refuse to carry additional local commercial television stations.

Commercial television stations may also elect not to exercise their rights under Section 4, choosing instead the right to negotiate with the cable system to be compensated for carriage (the right of "retransmission consent," established by Section 6 of the Act). Section 4 imposes no obligation on cable operators to carry the signals of stations that elect to pursue retransmission consent, but every local signal the cable operator chooses to carry pursuant to the retransmission consent provision counts towards satisfying the operator's must carry obligation. Retransmission consent therefore has the effect of reducing the must carry obligations for commercial stations. 47 U.S.C. § 325(b)(14).

E. The District Court Decision.

Within hours after enactment of the 1992 Cable Act, and well before its effective date, Turner Broadcasting System filed an action in the District Court for the District of Columbia asserting a facial challenge to Sections 4 and 5. Other cable operators and cable programmers filed similar challenges. The cases were consolidated on motions for preliminary relief and summary judgment.

Rejecting these motions, the three-judge district court ruled that the must carry provisions are constitutional under *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) (rejecting a "compelled speech" claim similar to appellants' claim), *Leathers v. Medlock*, 111 S. Ct. 1438 (1991) (rejecting a "discrimination" claim similar to appellants' claim), *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (laws with predominate purposes "unrelated to the suppression of free expression" are *not* subject to strict scrutiny), and *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986) (same).[32]

[32] As the district court correctly held, the D.C. Circuit's decisions in *Quincy Cable Television, Inc. v. FCC*, 768 F.2d 1434, 1463 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986), and *Century Communications Corp. v. FCC*, 835 F.2d 292, 304 (D.C. Cir. 1987); *clarified by*, 837 F.2d 517 (D.C. Cir.), *cert. denied*, 486 U.S. 1032 (1988), are readily distinguishable. J.S. App. 15a. Those cases struck down particular must carry regulations fashioned by the FCC, but each decision stressed that it remained an open question whether *other* must carry regulations would violate the First Amendment. In both cases, the regulations were found unconstitutional on the narrow ground that there was literally *nothing* in the record to support the FCC's conclusion that they were necessary to further the governmental interests asserted there, or that they were narrowly tailored to serve those interests. *See Century*, 835 F.2d at 300-04; *Quincy*, 768 F.2d at 1455-57, 1459, 1462-63. Congress' extensive findings of fact, supported by the record, plainly distinguish the must carry provisions of the Act from the FCC must carry regulations considered in *Quincy* and *Century*. And the governmental interests supporting the must carry provisions are different from the interests the FCC advanced to support the provisions at issue in *Century*.

All three judges agreed that cable's bottleneck monopoly presents "a very real problem," J.S. App. 50a (Williams, J., dissenting), which Congress can constitutionally remedy by compelling cable operators to grant access to speakers they would otherwise choose to exclude. The majority upheld the must carry provisions because they "are essentially economic regulation designed to create competitive balance in the video industry as a whole, and to redress the effects of cable operators' anti-competitive practices." J.S. App. 13a. The majority found that "Congress employed its regulatory powers over the economy to impose order upon a market in dysfunction, but a market in a commercial commodity nevertheless; not a market in 'speech.'" J.S. App. 12a.

The court also rejected appellants' alternative argument that the must carry provisions trigger strict scrutiny because they allegedly favor broadcasters over cable programmers. "[S]peaker partiality alone, the court ruled, "absent evidence that the government's distinction between groups of speakers is related to what the speakers are saying, is insufficient to trigger strict scrutiny." J.S. App. 18a. The court held that must carry does not trigger strict scrutiny because it is "unrelated to the content of [the] expression upon which it may have an effect." J.S. App. 19a, *citing Ward*, 491 U.S. at 791.

Because Section 4 was "*justified* by the existing structure of the cable business itself," the court applied the test fashioned in *United States v. O'Brien*, 391 U.S. 367 (1968), J.S. App. 13a, 22a (emphasis added). The court recognized Congress' interest in "promoting fair competition among video 'speakers' in order to assure the survival of local broadcasting for the benefit of both those who subscribe to a cable service and for those who do not," and found that interest to be substantial. J.S. App. 23a. And the court found Section 4 to be "narrowly tailored" to further that interest, because it does "not unnecessarily burden a substantial amount of [appellants'] speech," and "leaves open adequate—in fact, plentiful—alternative, intra-medium channels of communication for cable speakers to deliver whatever messages they choose." J.S. App. 27a-28a.

Although Judge Williams rejected the legal arguments central to appellants' claims, he dissented based on an argument appellants do not make. He concluded that "consistent with the First Amendment" Congress *can* address the "bottleneck" problem by "compulsory access" for speakers cable operators would otherwise choose not to carry, but asserted that Congress must mandate access for "*all* parties that meet neutral criteria." J.S. App. 50a-51a (emphasis added). *See* J.S. App. 59a, 60a-61a, 66a-67a, and 71a.[33] Thus, the crux of Judge Williams'

[33] The remedy Judge Williams proposed would have been far more burdensome to cable operators than the remedy Congress chose. According to Judge Williams, Congress could "expand the fraction of channels available" for "compulsory access" pursuant to the "leased access" provision of 47 U.S.C. § 532 to the extent necessary to "get broadcast TV into the homes of cable viewers," J.S. App. at 66a, 51a; could "set maximum reasonable rates and other reasonable terms and conditions" for such leased access, J.S. App. at 60a; and, if "broadcasters" could not afford leased access even under those regulated rates, "could subsidize the difference to the extent necessary." J.S. App. at 66a. Under the dissenter's proposal, in order to protect local broadcasters to the extent Congress found necessary while extending "identical" protection to all cable programmers, Congress would have had to impose common-carrier-like carriage obligations over a far *greater* number of channels than are affected by the Act.

concern was that cable *programmers* were not accorded access rights *identical* to those granted local broadcasters.[34]

SUMMARY OF ARGUMENT

Section 4 protects the millions of Americans without cable from losing over-the-air television broadcasting—their sole technological source of video programming—and ensures vigorous competition in the consumer and advertising markets associated with the delivery of video programming. Section 4 prohibits no speech, does not regulate any speech on the basis of its viewpoint or subject matter, and will *increase* the total speech and the diversity of voices available to the public. Thus, Section 4 serves national interests of the highest order and does so in a way that raises no legitimate First Amendment concern. Appellants extravagantly overstate First Amendment doctrine in arguing that Section 4 calls for strict scrutiny.

1. Because Section 4 is *justified* without reference to content, it is subject at most to the less demanding standard of *United States v. O'Brien* and *Ward v. Rock Against Racism*. Point I.A.

2. The First Amendment does not forbid Congress from ensuring access in this context. Like any other content-neutral law, mandatory access laws like Section 4, with purposes unrelated to the content of expression, are reviewed under the rational basis test, *see PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), or at most under *O'Brien/Ward*. The strict scrutiny cases on which appellants rely—such as *Tornillo* and *Riley*—all involved laws that were *justified* by official concern about

[34] Judge Williams failed to consider that the Act gives cable programmers very substantial rights and protections against anti-competitive and unfair practices by cable operators, all of which are designed to ensure that cable programmers will have meaningful access to viewers. *See* 1992 Cable Act §§ 9(b), 11(c), 12, and 19.

the content of speech, and that were triggered by, and prescribed, speech of particular content. Section 4 does not have such infirmities. Furthermore, the First Amendment issues raised when government overrides the editorial discretion of *journalists* simply are not raised by Section 4's regulation of the cable monopoly's anticompetitive economic activity. Appellants should not be permitted, in the name of an attenuated claim of "editorial discretion," to silence other speakers in order to reap monopoly profits. Point I.B.

3. Nor does the First Amendment require Congress to extend an identical access remedy to cable programmers. Unlike local broadcasters, cable programmers do not serve the generally less affluent Americans who do not subscribe to cable; and unlike local commercial broadcasters, cable programmers do not compete with cable operators for local advertising revenues, and thus are not jeopardized by the same anticompetitive incentives. Thus, Congress' content-neutral reasons for protecting the use of local broadcast technology do not apply to cable programmers. This Court has made clear that legislative distinctions among communicative technologies are subject to rational basis scrutiny or—at most—to scrutiny under *O'Brien/Ward*, unless they are "directed at, or present the danger of suppressing, particular *ideas*." *Leathers v. Medlock*, 111 S. Ct. at 1447 (emphasis supplied). Given its content-neutral objectives and operation, no one could credibly claim that Section 4 will suppress any particular ideas. Congress has, in fact, used different, carefully tailored remedies to protect cable programmers from anticompetitive exclusion from local systems, as well. The First Amendment does not deny to Congress the discretion to tailor competitive remedies to the distinct economic circumstances and technological capabilities of different communications technologies. Requiring strict scrutiny for such legislation would disable Congress from responding to the principal policy challenges of the coming era of technological revolution and instability in communications markets. Point I.C.

4. Section 4 plainly satisfies the *O'Brien* test. The governmental interests identified by Congress have already been held to be important and substantial, and Section 4 indisputably furthers those interests. The Congressional judgment that remedial legislation is needed to protect those interests is entitled to substantial deference. Based on a comprehensive and largely undisputed factual record, Congress determined that cable operators exercise bottleneck control over 60% of the market for video programming; that they have already engaged in substantial anticompetitive activity against local commercial television stations; that they have *increasing incentives* to discriminate against local commercial television stations, their only competitors for local video advertising revenues, for which they "increasingly compete"; and that they have *increasing ability* to discriminate. Based on these comprehensive findings, Congress made a *predictive judgment* that, absent remedial legislation, the future health and survival of local commercial television would be seriously jeopardized. That judgment is entitled to respect. Point II.A.

5. Section 4 is adequately tailored because the governmental interests would be achieved less effectively absent the regulation than with it. Congress chose a limited and balanced remedy that aims precisely at the problem Congress identified. Section 4 protects only those local commercial stations most at risk of suffering anticompetitive exclusion. Point II.C.

6. Because Section 4 does not raise a serious First Amendment question, it should be evaluated and upheld under the rational basis test as were similar laws upheld in *PruneYard* and *Leathers*. Point III.

ARGUMENT

I. THE CABLE ACT'S IMPOSITION OF A LIMITED ACCESS REQUIREMENT ON THE CABLE MONOPOLY IS CONTENT-NEUTRAL LEGISLATION.

A. Section 4 Is Unrelated To The Suppression of Expression.

Section 4 prohibits no speech, regulates no speech based on subject matter or viewpoint, and expands the amount and diversity of speech available to the public. Nothing in the intent or operation of Section 4 even remotely suggests a censorial motive on the part of Congress. Section 4 thus poses no threat to freedom of speech.

Because the First Amendment's central function is to prohibit official censorship, "[t]he government's *purpose* is the *controlling* consideration" in ascertaining the proper First Amendment standard of review. *Ward*, 491 U.S. at 791 (emphasis added). Strict scrutiny applies *only* to "regulations enacted for *the purpose of restraining speech on the basis of its content.*" *Renton*, 475 U.S. at 46-47 (emphasis added). But when government regulates for substantial reasons unrelated to official concern over communicative impact, First Amendment freedoms typically are not threatened. Thus, "*O'Brien's* relatively lenient standard" applies "to those cases in which the governmental interest is 'unrelated to the suppression of free expression,'" *Texas v. Johnson*, 491 U.S. 397, 407 (1989) (quoting *O'Brien*, 391 U.S. at 377), or where the legislation is "*justified* without reference to the content of the regulated speech," *Renton*, 475 U.S. at 48 (quotation omitted); *Ward*, 491 U.S. at 791.

Contrary to appellants' arguments,[35] this inquiry is *not* a "secondary analysis" applied only to time, place and manner laws. As the Court explained in *Ward*:

> *The principal inquiry in determining content neutrality in speech cases generally*, and in time, place or manner cases in particular, is whether the government has adopted a *regulation of speech* because of disagreement with the message it conveys. The government's purpose is the *controlling consideration*. . . .

491 U.S. at 791 (emphasis added) (citations and quotations omitted). Thus, *Ward*'s application of the "governmental purpose" test to time, place and manner cases was simply a particular example of the general rule.

Appellants suggest that any law that refers to particular speech or speakers is automatically content-based, no matter how content-neutral the government's justification. That is not nor could it be the law, as this Court's consistent practice makes clear. In *Renton*, the Court declined to apply strict scrutiny to a zoning restriction that directly burdened expression of a particular content—"adult" films—because the government's interest in preventing "secondary effects" was unrelated to suppression of the regulated speech.[36] In *Wooley v. Maynard*, the Court applied *O'Brien* to a New Hampshire law compelling display of the "live free or die" motto on license plates, because the State offered a justification for the compulsion unrelated to the content of the expression. 430 U.S. 705, 715-16 (1975). In *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522 (1987), the Court applied *O'Brien* to a law directly prohibiting certain uses of the word "Olympic," because the government's purpose was unrelated to the suppression of expression. 483 U.S. at 537. In *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978), the Court held that an FCC regulation prohibiting newspapers from operating broadcast stations in their local areas was "not content related" and did not trigger strict scrutiny, because the law was justified without reference to the content of the newspapers' expression, even though it flatly *banned*

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[35] *See, e.g.*, TW Br. at 16-17; NCTA Br. at 26-27; Discovery Br. at 23-25.

[36] *See Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2471 (1991) (Souter, J., concurring) (*Renton* "held that that an ordinance . . . was content-neutral . . . because it was *justified* without reference to the content of the regulated speech.") (internal quotation omitted).

speech in a particular medium. *Id.* at 801.[37] *See Members of the City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 805 (1984); *Procunier v. Martinez,* 416 U.S. 396, 413 (1974). Thus, government's purpose is always the controlling consideration in determining the appropriate level of scrutiny.

Contrary to appellants' claims, this Court's recent decisions in *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993), and *Simon & Schuster, Inc. v. New York State Crime Victims Bd.*, 112 S. Ct. 501 (1991), expressly follow these established principles. *City of Cincinnati* invalidated an ordinance banning commercial publications, but not traditional newspapers, from newsracks, despite the city's claim that the ordinance was justified by content-neutral interests in safety and aesthetics. The Court did *not* reject lenient scrutiny on the ground that, notwithstanding its neutral justifications, the ordinance distinguished between commercial and noncommercial speech. Rather, the Court concluded that these neutral justifications had "absolutely no bearing" on that content-based distinction. 113 S. Ct. at 1516. The *only* justification advanced by the City for the discriminatory treatment was its "assertion that the 'low value' of commercial speech" was "a significant justification" for the ban. *Id.* As the Court explained, "[i]t is the absence of a neutral *justification* . . . that prevents the city from defending its newsrack policy as content-neutral." *Id.* at 1517 (emphasis added). Thus, far from supporting appellants' argument, *City of Cincinnati* reaffirms *Ward. Id.*

Nor did *Simon & Schuster* hold the government's justification to be irrelevant, as appellants incorrectly suggest.

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[37] In a brief recently filed in the Fourth Circuit in *Chesapeake and Potomac Telephone Co. v. United States* (nos. 93-2340, 93-2341), appellant NCTA expressly argued, relying on *NCCB*, that the direct regulation of expression imposed by a cross-ownership ban does not trigger strict scrutiny, because such bans "apply to programming that competes in the television market, regardless of its content or of any government views about its content," Br. at 24-25, and "seek[] to promote media diversity," *id.* at 25. Copies have been lodged with the Clerk of this Court.

See TW Br. at 16, 17. To the contrary, *Simon & Schuster* held that penalizing a person convicted or accused of a crime for "the expression of [his] thoughts, feelings, opinions or emotions regarding such crime," 112 S. Ct. at 505, was so badly tailored to the content-neutral justification of "compensating victims from the fruits of the crime," *id.* at 511, that it could be understood only as a penalty on the content of the speech itself. *Simon & Schuster* made clear that *even* a law that directly, and on its face, "imposes a financial disincentive only on speech of a particular content" might nevertheless be reviewed under the *Ward/Renton* test, rather than under strict scrutiny, if the government could demonstrate that the law was "intended to serve *purposes* unrelated to the content of the regulated speech." *Simon & Schuster,* 112 S. Ct. at 508, 511, n. ** (emphasis added).

In any event, unlike the laws at issue in *City of Cincinnati* and *Simon & Schuster,* Section 4 *operates* without regard to the content of any expression. Application of the ban contained in the ordinance in *City of Cincinnati* was "determined by the content of the publication resting inside th[e] newsrack." 113 S. Ct. at 1516. The penalty in *Simon & Schuster* was imposed "only on speech of a particular content." 112 S. Ct. at 508. But Section 4 imposes carriage obligations based solely on the use of specified *technologies* and on broadcasters' and cable operators' *geographic proximity.* The content of programming is entirely irrelevant, and any effect on programming available to cable viewers is thus entirely *incidental.*

The district court was plainly correct not to apply strict scrutiny to Section 4, because it is "justified without reference to the content of the regulated speech." *Renton,* 475 U.S. at 48; *Ward,* 491 U.S. at 791. Congress, *objective*—safeguarding the interests of the substantial number of Americans who depend on free local broadcast television for video programming—is wholly divorced from content. Almost half the households in America have no access to cable programming. Only local television stations serve that huge segment of the population. Thus,

Section 4's structural remedy is designed to protect the economic vitality of broadcast technology by ensuring local television broadcasters access to a sufficiently large audience to generate necessary revenues. As is suggested by its content-neutral operation, Section 4 is in no sense motivated by official desire to suppress cable programming, or by any official judgment that local television programming is more valuable than cable programming. Even if Congress believed cable programming to be superior in every respect, preservation of free local broadcast television is in the vital interest of the tens of millions of Americans without cable, and therefore in the national interest.

Congress' interest in preserving healthy competition in the marketplace for video programming is also unrelated to content. Section 4 specifically targets a host of familiar anticompetitive incentives, opportunities, and effects inherent in any bottleneck monopolist's control of essential facilities, and aims to prevent predictable exploitation of those opportunities. The public will retain the benefits of effective competition, *regardless* of the content of local broadcasting, so long as cable operators are prevented from destroying "the economic viability of free local broadcast television." 1992 Cable Act § 2(a)(16). Section 4 thus responds to market realities, not to the content of cable or broadcast programming.[38]

These justifications do not lose their content-neutral character merely because Congress made additional findings that broadcast television stations are "an important source" of local programming, *id.* § 2(a)(11), and that absent must carry the ability of broadcast stations "to

[38] This conclusion is reinforced when Section 4 is considered in context. The substantial majority of the 1992 Cable Act—including rate regulation, required improvements in cable customer service, and restrictions on cable operators' ability to exclude unaffiliated cable programmers from their systems—responded directly to the problems caused by the monopoly power of cable operators. Section 4 is simply one part of Congress' comprehensive effort to ameliorate the harms caused by the cable monopoly.

originate quality local programming will be seriously jeopardized." *Id.* § 16. These findings simply recognize that free broadcast television has value for the 40% of American households that depend on it for video programming, and that broadcast technology furthers the purposes of the Communications Act by contributing to the diversity of information sources available to the American people. They do *not* represent a judgment that the content of local television programming is (in the dissenting judge's words) "*especially* worthy," J.S. App. 53a (emphasis added); that any *other* programming is "worse"; or that any programming whatsoever should be suppressed.[39] Nothing in the Act or its extensive legislative history suggests Congress held such a view or had such a goal.[40]

These ancillary findings are not content based.[41] Even if they were in some peripheral sense, that would not trigger strict scrutiny of Section 4 because its "predominate" purposes are plainly unrelated to the suppression of speech. *E.g., Renton,* 475 U.S. at 47-49; *O'Brien,* 391 U.S. at 382-86; *Wooley,* 430 U.S. at 716. It would be an exercise in judicial futility to strike down Section 4 based on these ancillary findings if Congress could simply excise those findings and re-enact a constitutional law. *See O'Brien,* 391 U.S. at 384.

[39] Indeed, the extensive protection Congress provided to *cable* programmers in the 1984 *and* 1992 Cable Acts demonstrates conclusively that Congress entertained no invidious objectives. *See* n.49 *infra.*

[40] Congress also made separate findings, relevant only to the *noncommercial* must-carry provision in Section 5 of the Act, that there is a governmental interest in ensuring that "cable subscribers" have access to noncommercial educational stations, § 2(a)(7), Finding ¶ 7; and that the government has a substantial interest in protecting its, and the public's, investment in noncommercial television. Finding ¶ 8; J.A. 5. Unlike Findings 9-11, Findings 7 and 8 do not pertain to the commercial must carry provision, Section 4.

[41] This Court has upheld the Communications Act objectives of preserving a local broadcast structure. *E.g., National Broadcasting Co. v. United States,* 319 U.S. 190 (1943); *FCC v. Sanders Brothers Radio Station,* 309 U.S. 470 (1940).

B. Section 4 Does Not Invidiously Compel Speech.

Appellants also argue that any law compelling speech a person would not otherwise make necessarily alters the content of speech, and therefore triggers strict scrutiny. NCTA Br. at 17-18. For good reason, this breathtaking assertion is not the law.

Such a principle would subject to strict scrutiny, and doubtless invalidate, an enormous range of federal and state law, including compulsory process, securities disclosure laws, consumer protection disclosure laws, disclosures mandated by tax laws—in fact, *every* governmentally compelled disclosure requirement.[42] The common carrier obligations imposed by the Communications Act on telephone companies would trigger, and likely fail, strict scrutiny because (like Section 4) such laws may compel carriage of unwanted speakers.[43] The telephone companies themselves, participating in this case as *amici*, understand that appellants' "compelled speech" argument is implausible—and have abjured it for that reason. *See* Brief of United States Telephone Ass'n, *et al.*

Under appellants' sweeping theory, strict scrutiny would apply if local cable franchising authorities sought to set levels of channel capacity or demand interactive capability, because such requirements compel cable operators to carry speech they might prefer not to carry. Section 541(a)(3) of the 1984 Cable Act, which requires franchising authorities to "assure that access to cable service is not denied to any group . . . because of the income of the residents," 47 U.S.C. § 541(a)(3), would likewise trigger strict scrutiny because it compels cable operators to speak to an audience they might prefer to exclude.[44]

As the district court correctly ruled, First Amendment limits on "compelled" speech are far narrower. Indeed, *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), on which the district court relied, forecloses appellants' argument. In *PruneYard*, this Court unanimously held that the First Amendment was not even implicated by a California law compelling shopping center owners to permit third parties to use shopping center property to communicate unwanted messages. The Court applied rational basis scrutiny, even though the law frustrated the shopping center owner's choice to "leave unsaid" certain speech. *See* NCTA Br. at 17-18. Appellants do not claim that *PruneYard* was wrongly decided, nor even attempt to argue that *PruneYard* can be harmonized with their extreme position.[45]

PruneYard is precisely parallel to this case. Like the shopping center owner in *PruneYard*, the cable operators here argue that Section 4 forces them to grant access to others whose speech they would prefer to exclude. The cable operators claim they have the right to exercise the same "editorial discretion" the property owner claimed—to prevent certain speakers from using their facilities.[46] But

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[42] Included among the suspect requirements would be the Act's requirement that cable operators carry the same "emergency information" broadcasters are required to carry, Section 16(b); citizens' obligation to testify truthfully pursuant to compulsory process; the tax code's filing and disclosure requirements (26 U.S.C. §§ 6012, 6061); laws requiring disclosure of health statistics (*e.g.*, 42 U.S.C. § 242, 38 U.S.C. § 7332); all disclosure requirements involving publication of periodicals (39 U.S.C. § 3685), employment (*e.g.*, 26 C.F.R. §§ 31.6001-2(a), -4(a)(3)), medical informed consent (*e.g.*, *Marchione v. New York*, 598 N.Y.S.2d 592, 593 (3d Dept. 1992), cash deposits exceeding $10,000 (31 U.S.C. § 5311 *et seq.*), and lobbying activity (2 U.S.C. §§ 261-270).

[43] *E.g.* 47 U.S.C. § 201(a) (wire and radio services); 47 U.S.C. § 11 (telegraph operators).

[44] *See Telesat Cablevision, Inc. v. City of Riviera Beach*, 773 F. Supp. 383 (S.D. Fla. 1991) (rejecting strict scrutiny for universal service requirement). Presumably, appellants' theory would also require strict scrutiny for a law prohibiting cable operators from denying cable service on the basis of a consumer's race or religion.

[45] Appellants argue only that *PruneYard* may be distinguished because "the owner of the shopping center was not itself distributing speech." NCTA Br. at 20. But if, as appellants argue, any compulsion to carry unwanted speech is necessarily "content-based," *id.* at 17-18, this distinction would be entirely irrelevant.

[46] In *PruneYard*, the property owner specifically argued, as do appellants here, that *Wooley v. Maynard* and *Miami Herald Pub.*

here, as in *PruneYard*, appellants' "negative free speech" claims do not implicate the First Amendment, much less trigger strict scrutiny.

This is so because, as *PruneYard* demonstrates, compelled access triggers strict scrutiny only under circumstances not even remotely implicated here. Here, as in *PruneYard*, "no specific message is dictated by" the government, and the obligation to permit third party access is not "trigger[ed] by the owner's speech." 447 U.S. at 87-88. Here, as in *PruneYard*, there is "no danger of governmental discrimination for or against a *particular message*," and no danger that requiring the owner to permit third party speech would "deter" the owner from speaking. *Id.* (emphasis added). Furthermore, here, as in *PruneYard*, the views of those granted access would "not likely be identified with those of the owner," and the owner could "expressly disavow any connection with the message." *Id.* at 87. Like the owner in *PruneYard*, cable operators are not "compelled to affirm [their] belief in any governmentally prescribed position or view," and could readily "dissociate" themselves from views they found objectionable. *Id.* at 88. Moreover, here, as in *PruneYard*, the State's goals are unrelated to the content of speech. For these reasons, as in *PruneYard*, the First Amendment is not even implicated.

As *PruneYard* makes clear, this Court's compelled speech cases simply apply the general rule that the government's justification determines the standard of review. Strict scrutiny applies only if government's purposes are related to communicative impact. This is self-evidently

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Co. v. Tornillo established an absolute right to deny other speakers access to private property to facilitate their speech. *See* Brief for Appellant in No. 79-289, *PruneYard Shopping Center v. Robins*, at 13-14 ("Nor is it persuasive to argue that *Wooley* is inapposite because the patrons of the shopping center may not attribute to [the owner] the views espoused by appellees. . . . What does matter is that [the owner] is being forced by the state to use his private property as a forum for the expression of views, and that he is deprived of the choice guaranteed him by the First Amendment to remain silent or indifferent").

the case when government compels the recitation of an official "orthodoxy" as in *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), and *Wooley v. Maynard*, 430 U.S. at 715-16. It is likewise the case when government compels speech in order to counterbalance or correct the content of what the burdened speaker has to say. The right-of-reply statute struck down in *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974), was properly subject to strict scrutiny for precisely this reason: the stated goal of the statute was "to insure fairness and accuracy" in reporting about elections by requiring replies to speech critical of candidates. *Id.* at 251. The compelled speech law at issue in *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1 (1986), was likewise based on the government's desire to ensure that PG&E's expression of its own views was counterbalanced by opposing views. As the plurality explained, that "interest is not—and does not purport to be—content-neutral." *Id.* at 20; *see id.* at 6. Similarly, strict scrutiny was appropriate in *Riley v. National Fed'n for the Blind*, 487 U.S. 781 (1988), because the disclosure burden there rested on a governmental concern over the content of charitable solicitations. The *Riley* majority noted that "the desired and intended effect of the statute" was to "discourage" solicitations the State considered misleading or harmful. *Id.* at 789 n.5, 790. *See also id.* at 788-89, 798. As Justice Scalia explained, *Riley* rests on the principle that "the dissemination of ideas cannot be regulated to prevent it from being unfair or unreasonable." 487 U.S. at 803 (concurring opinion).

Tornillo, *PG&E* and *Riley* all also involved compulsion to engage in speech of particular content, and compulsion *triggered* by speech of a particular content. The right-of-reply statute at issue in *Tornillo* was triggered by criticism of candidates for public office, and therefore penalized and deterred such speech. *Id.* at 257. As the Court explained in *PruneYard*, it was this inescapable *deterrent* effect on particular speech that the *Tornillo* Court "found to be an 'intrusion into the function of editors.'" 447 U.S. at 88 (quoting *Tornillo*, 418 U.S. at

258). The compelled speech law at issue in *PG&E* was likewise triggered by PG&E's expression of its own views, and thus "penalize[d] the expression of particular points of view," 475 U.S. at 9-10 (plurality opinion); *id.* at 30 (Rehnquist, now C.J., dissenting), and "discriminated on the basis of the viewpoints of the selected speakers." *Id.* at 12 (plurality opinion). *See also Riley*, 487 U.S. at 489 n.5.

Section 4 suffers from none of these infirmities. Section 4 is justified entirely *without* reference to content or suppressive intent. It obviously prescribes no orthodoxy or speech of particular content. Its obligations are not triggered by any particular cable content. Section 4 does not deter or penalize an operator's choice to transmit any particular expression, and does not risk diminishing the total speech available to the public. *See PG&E*, 475 U.S. at 31 (Rehnquist, J., now C.J., dissenting) (First Amendment not implicated where access requirement "bears no relationship" to the compelled speaker's" future conduct"). Thus *Tornillo, Riley* and *PG&E* aid appellants not at all.

Appellants simply misread *Tornillo* as vesting the press with a special First Amendment immunity from any interference with "editorial discretion" irrespective of government's purpose. The proposition that the press enjoys a preferred First Amendment position has been squarely rejected. *See First Nat'l Bank v. Bellotti*, 435 U.S. 765, 781-83 & n. 18 (1978); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 691 (1990) (Scalia, J., dissenting) (citing cases). *Tornillo* simply followed the general First Amendment principle that government may not penalize or deter the expression of controversial views based on a concern about their impact. *See PruneYard*, 447 U.S. at 88.

Any special right of editorial discretion that survives for the traditional press plainly should not extend to cable operators in the exercise of their bottleneck monopoly. The expressed concern in *Tornillo* was protection of

"newspaper or magazine" editors who determine content through "the exercise of editorial control" or "journalistic judgment," 418 U.S. at 258; *id.* at 259 (White, J., concurring). *Tornillo* expressly distinguished editorial discretion in this form from the conduct of those who principally distribute the expression of others—the "passive receptacle[s] or conduit[s] for news, comment, and advertising." *Id.* at 258 (majority opinion).

Cable operators cannot plausibly claim to be exercising editorial discretion of the kind at issue in *Tornillo*. They do not make daily, weekly or even monthly decisions respecting "[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials." *Tornillo*, 418 U.S. at 258. Their discretion typically extends only to deciding which cable programming should go into the "package" offered viewers, and signing multi-year supply contracts with those programmers in the package. Cable operators typically do not review any material provided by programmers and exercise no conscious control over the content of that programming. It is, in short, "economic activity," the "editorial aspects" of which are "almost entirely theoretical" and not real. *See* Brenner, *supra* n.4, at 339.

Furthermore, the purely economic choices appellants seek to immunize as sacrosanct "editorial discretion" are in fact the anticompetitive means by which cable operators inflict harm on their broadcast competitors. Profit maximization provides an ample incentive for cable operators to abuse their control of the conduit in order to deny local broadcasters the ability to reach the 60% of American households with cable.

In exactly this situation, the Court has made clear that even those engaged in expression may be compelled to cooperate with their rivals. In *Lorain Journal Co. v. United States*, 342 U.S. 143, 155-56 (1951), the Court rejected a First Amendment challenge to an antitrust injunction against a newspaper arising out of its failure to carry advertising from entities that also advertised on a

local radio station. Without raising a substantial First Amendment issue, the injunction properly compelled the newspaper to carry expression it would have chosen to exclude. Consistent with these principles, as this Court has clearly recognized, cable's conduit function has long been regulated to ensure that cable's power does not "destroy or degrade" local broadcast television. *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. at 701-02.

At bottom, appellants urge an interpretation of *Tornillo* that would, in the name of an extremely attenuated First Amendment interest, permit them to use their bottleneck control to silence other speakers in order to maximize their own monopoly revenues. The district court correctly ruled that the First Amendment does not require such a result—a result rejected even by Judge Williams in dissent below. The unanimous Court in *Associated Press v. United States* articulated the First Amendment principle that controls here:

> [The First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. . . . *Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.*

326 U.S. 1, 20 (1945) (emphasis added).

C. Section 4 Does Not Invidiously Discriminate Among Speakers.

The only remaining question is whether strict scrutiny applies when Congress grants access to the cable conduit to local users of broadcast technology instead of more broadly mandating access for users of *all* technologies transmitting video programming.

The First Amendment does not require Congress to choose a *more* sweeping remedy than it finds is warranted by the economic and technological circumstances it confronts. Legislative distinctions between communications technologies trigger strict scrutiny only when they are

"directed at, or present[] the danger of suppressing, particular ideas." *Leathers v. Medlock*, 111 S. Ct. 1438, 1447 (1991).[47] *Leathers* expressly rejected the argument that "intermedia and intramedia discrimination, even in the absence of any evidence of intent to suppress speech or of any effect on the expression of particular ideas, violates the First Amendment." *Id.* at 1445. *Accord Regan v. Taxation With Representation*, 461 U.S. 540, 548 (1983).

Section 4 is not "directed at" and does not "present[] the danger" of suppressing particular ideas, and thus it is not subject to strict scrutiny. In operation, Section 4 differentiates based solely on *technologies*, regardless of what is said or who says it. Section 4 protects broadcast signals (whatever they transmit and whoever transmits them), and not cable transmissions (whatever they transmit and whoever transmits them), because *only* broadcast signals are available to the 40% of American households who do not or cannot subscribe to cable, and because *only* broadcast signals are threatened by cable operators' particular anticompetitive incentive to monopolize local advertising revenues. Protection for a particular technology based upon a status unrelated to the content of ideas does not raise a substantial issue under the First Amendment.[48]

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[47] *See also Regan v. Taxation With Representation*, 461 U.S. 540 (1983) (differential treatment of veterans groups and other charitable organizations); *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978) (differential treatment of existing and future media cross-ownership); *Mabee v. White Plains Pub. Co.*, 327 U.S. 178 (1946) (different regulations imposed on small and large newspapers); *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186 (1946) (same). None of those cases applied strict scrutiny.

[48] Tacitly recognizing that without a content-suppressive legislative goal their discrimination claim is meritless, appellants hint darkly that Section 4 separates "two distinct classes of speech—speech carried on local broadcast stations and all other speech available to cable operators." NCTA Br. at 21. They claim that "drawing any distinction between broadcasters and cable speakers on a class basis would lack purpose, unless Congress had weighed the relative value of their speech and found one, but not the other,

Furthermore, the notion that Congress singled out broadcasters for protection while ignoring the needs of cable programmers is entirely without foundation. Congress created tailored remedies for the distinct problems *each* group has experienced in securing carriage. The record before Congress established that cable operators have discriminated in favor of cable programming services in which they hold an equity interest, and have demanded from unaffiliated programmers, as conditions of carriage, ownership interests and changes in program formats to prevent competition. Section 12 of the 1992 Act bars these practices. Moreover, Section 9 of the Act strengthens the "leased access" provisions of the 1984 Act, which permit unaffiliated cable programmers to compel cable operators to grant them access. No claim of invidious discrimination can be made when Congress has sought to tailor narrow, context-sensitive remedies to the particular problems experienced by different types of program providers.[49]

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wanting." TW Br. at 20-21. In fact, as discussed in text, Congress recited compelling, content-neutral policy reasons for protecting local broadcasting from predation by cable operators, reasons having nothing whatever to do with the content of broadcast or cable programming. Appellants reach new depths of groundless speculation when they claim that Section 4 actually fulfills an unexpressed Congressional desire to foist on the American public programming "of a type specified by the government." NCTA Br. at 11 (quoting J.S. App. 54a). Broadcast programming is certainly *not* "specified by the government." The Communications Act explicitly denies the FCC the power of censorship. 47 U.S.C. § 326. Although licensees are expected to serve the needs and interests of their communities, licensees determine in their discretion what those needs and interests are, and how best to address them. Given the substantial content-neutral bases for Section 4, there is no reason to believe that Congress erected this major piece of legislation on such a paltry censorial foundation, particiularly when Congress has done so much to protect *cable programmers* from the cable bottleneck, as well. *See* note 49, *infra*.

[49] Congressional assistance to the cable industry has been and continues to be enormous. Federal law precludes private and public entities that control facilities *cable* companies need in order to gain

Just as Section 4 does not single out broadcasters for any content-based preference, it does not invidiously single out cable operators for a burden. Appellants make much of the fact that Section 4 is not a law of general application, and expressly take the remarkable position that *any* law that visits obligations on information providers is subject to strict scrutiny. True, laws of general application arouse no suspicion of a censorial purpose, and thus are typically not subject to First Amendment review at all. But a content-neutral law does not lose its content-neutrality because it applies to specified categories of information providers.

Quite the contrary, Congress regularly enacts industry-specific laws, and the First Amendment does not carve out a special immunity for communications technologies. If appellants' categorical rule were correct, virtually all

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access to consumers from exploiting their position to deny or unreasonably charge for such access. In 1978, at the request of the cable industry, Congress authorized the FCC to regulate the rates, terms, and conditions that owners of utility poles could charge for access to their poles. *See* Pole Attachment Act of 1978, 47 U.S.C. § 224 (b) (1). The 1984 Cable Act strengthens that protection and guarantees cable operators access to private easements dedicated by utilities. 47 U.S.C. § 541 (a) (2). Federal law also prevents municipal franchising authorities from imposing unreasonable conditions on cable operators, and from exploiting their leverage during the franchise renewal process. 47 U.S.C. §§ 542 (b), 544 (b).

Federal law has also insulated the cable industry from potentially more powerful competitors. By 1970, the FCC imposed cross-ownership rules that prohibited telephone companies and broadcasters from entering the cable market. 47 C.F.R. §§ 63.54 (a), 75.501 (a) (1970). The 1984 Cable Act codified the cross-ownership restrictions. 47 U.S.C. § 533 (a), (b) (3. And federal law grants cable operators compulsory and preferential access to *broadcast* programming by granting them a compulsory copyright license to retransmit broadcast programming either free or upon payment of nominal royalties. *See* Copyright Revision Act of 1976, 17 U.S.C. § 111. The FCC has concluded that, in the absence of must carry rules, the compulsory license scheme "forced the cable television industry and the broadcast television industry into a significantly imbalanced 'contract'," and contributed significantly to cable's "explosive" growth. 1990 FCC Cable Report, at 5038.

of the 1984 and 1992 Cable Acts, virtually all of the Communications Act of 1934 (which specially regulates broadcast and wire communications), all local cable franchising requirements, and a host of other laws would require strict scrutiny. Under appellants' theory, neither Congress nor state or local legislatures could tailor content-neutral regulation to specific public policy problems raised by communications markets or technologies.[50] Appellants offer no rationale for effectively denying to Congress the ability to address regulatory problems in communications industries with sensitivity to their special characteristics and importance.

In fact, the Court has applied strict scrutiny to media-specific statutes *only* if some feature "raise[s] suspicion that" the legislature intended to "interfere with First Amendment activities." *Leathers*, 111 S. Ct. at 1444. Such suspicion is warranted if differential treatment is not "justified by some special characteristic" of the media in question, *Minneapolis Star & Tribune v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983),[51] or if

[50] Were this a case reviewing an executive or judicial order under the general antitrust laws, on the other hand, all would agree that no First Amendment issue would be posed. *Associated Press v. United States*, 326 U.S. 1 (1945); *Sunbelt Television Inc. v. Jones Intercable, Inc.*, 795 F. Supp. 333 (C.D. Cal. 1992). It would be anomalous to hold that Congress may not do by legislation what the other two branches may do by decree. The proper issue in each case is not which branch is acting; it is whether the federal government has acted for economic, or censorial, reasons. Here, as in *Associated Press*, the reasons are solely to promote private competition in the marketplace of ideas.

[51] Appellant Time Warner relies on this portion of *Minneapolis Star*, *see* TW Br. at 29 ("differential treatment . . . suggests that the goal of the regulation is not unrelated to the suppression of expression" (quoting *Minneapolis Star*, 460 U.S. at 585)), but disingenuously elides the critical qualifier that suspicion is warranted *only when* the differential treatment is not "justified by some special characteristic of the press."). Such special characteristics will rarely justify differential tax schemes like those at issue in *Minneapolis Star*, because the neutral goal of raising revenues generally does not apply differently to different media. *Cf. City of Cincinnati*, 113 S. Ct. at 1516 (strict scrutiny applies only where special content-neutral characteristics of differentially regulated speech have "absolutely no bearing on the [content-neutral] interests" asserted by government).

a law singles out a small number of speakers for disfavored treatment, *Leathers*, 111 S. Ct. at 1443-44. In either circumstance, there is reason to fear that the legislature intended to suppress particular ideas. But such fears are *not* warranted here, because non-content-related distinctions between broadcasting and cable justify the differential treatment, and cable speakers are numerous and diverse. *See id.* at 1444-45 (law targeting for disfavor "approximately 100 cable systems" in Arkansas "offering a wide variety of programming" poses no "danger of censorship").[52]

This Court's ruling in *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978), is dispositive of appellants' discrimination claim. The Court upheld the FCC's rules banning cross-ownership of newspapers and broadcast licenses in local markets as a "reasonable means of promoting the public interest in diversified mass communications." *Id.* at 802. Even though the rule singled out users of a single medium (daily newspapers) for an outright *ban* on speech through another medium (broadcasting), the Court squarely ruled that it was "not content-related" and did *not* require strict scrutiny. *Id.* at 801. The Court noted that the cross-ownership ban was "in form quite similar to the prohibitions imposed by the antitrust laws," and that "the application of [such] laws to newspapers is not only consistent with, but is actually supportive of the values underlying

[52] Section 4 is therefore very different from the laws at issue in *Minneapolis Star & Tribune Co.*, and *Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 221 (1987). The tax struck down in *Minneapolis Star* was borne entirely by 13 publishers, and two-thirds of the tax burden fell on the Minneapolis Star-Tribune alone. Likewise, the tax invalidated in *Arkansas Writer's Project* burdened no more than three publications and possibly only one magazine. As this Court found in *Leathers*, the suspicion raised by the tax challenged in those cases is not raised by a regulation affecting all cable operators.

the First Amendment." *Id.* at 800 n.18. Section 4 has similarly content-neutral goals, and similarly supports the values underlying the First Amendment.[53]

Buckley v. Valeo, 424 U.S. 1 (1976), is not to the contrary. There, the Court applied minimal scrutiny in upholding provisions that discriminated between major and minor parties in public election financing, because speaker-based legislative classifications based on content-neutral criteria do not require heightened scrutiny. *Id.* at 97-106. *Buckley* applied strict scrutiny *only* to content-based bans that *intentionally* suppressed all speech conducted with expenditures and contributions in excess of $1,000 per person. The *Buckley* Court stressed that Congress' *purpose* in enacting the expenditure limitations that *Buckley* struck down "involve[d] 'suppressing communication' "; Congress viewed the suppressed speech as "harmful" to the public interest, because Congress believed such speech unfairly skewed the political process in favor of moneyed interests. *Id.* at 17 (quoting *O'Brien,* 391 U.S. at 382).[54]

In contrast, Section 4 is justified by factors wholly unrelated to the content of the speech of broadcasters or cable programmers, and nothing in the legislative history suggests that Congress had any intent to suppress any speech. Moreover, the absolute ceiling on protected expressive activity at issue in *Buckley* "*necessarily reduce*[*d*] *the quantity of expression* by restricting the number of

[53] *Arkansas Writer's Project, Inc. v. Ragland* is also inapposite because Section 4—in contrast to the tax law there at issue—does not require "enforcement authorities [to] necessarily examine the content of the message that is conveyed." *Id.* at 230.

[54] *Riley v. National Fed'n of the Blind,* 487 U.S. 781 (1988), is similarly inapposite. *Cf.* Discovery Br. at 24, quoting *Riley* at 789, n.5. *Riley* applied strict scrutiny to the fee regulation at issue because the regulation was "a direct restriction on the amount of money a charity can spend on fund-raising activity." *Id.* at 788-789. In other words, like the expenditure limit in *Buckley,* the regulation was a content-based *ban* that *intentionally* suppressed all speech conducted with funds beyond the permitted limit.

issues discussed, the depth of their exploration, and the size of the audience reached." *Id.* at 19 (emphasis added). Section 4 does *not* impose a limit on speech; to the contrary, it leaves cable operators free to carry as much speech as they wish, either on existing or expanded channel capacity. In fact, Section 4 is calculated to *increase* the amount and variety of expression available to the American people. The *Buckley* Court expressly distinguished laws, like Section 4 (and the election financing provisions in *Buckley* itself), whose "presumed effect . . . is one of 'enhancing the volume and quality of coverage' of public issues." *Id.* at 48, n.55.[55]

The First Amendment does not prevent Congress from protecting the interests of non-cable households in enjoying continued access to a vital and diverse source of video programming, or from safeguarding from cable operators' anticompetitive activities the broadcast technology that uniquely serves that large group of viewers. Nor does the First Amendment require Congress to extend identical treatment to other technologies that neither serve that population nor face the same anti-competitive risks. As it has done here, Congress may tailor protection to the circumstances as it finds them. The *Buckley* Court recognized that "the grossest discrimination can lie in treating things that are different as though they were exactly alike." 424 U.S. at 97-98 (internal quotes omitted). So long as there is no reasonable basis to suspect that Congress has a suppressive purpose, Congress is free to treat technologies that are different

[55] Section 4 is calculated to protect access by the 40% of American households without cable to a vital and diverse source of programming. As for cable households, when Section 4 was enacted, approximately 9,000 of the Nation's 11,000 cable systems had unused channel capacity. *Compare* Television and Cable Action Update, Feb. 8, 1993, at 4 (over 11,000 cable systems), with Application For Injunction Pending Appeal in this case, No. A-798, at 17, n.22 ("about 2,000 cable systems . . . currently have no excess channel capacity"). Those 2,000 systems, of course, are free to expand their capacity without governmental or meaningful technological constraints, and many are planning to do so. *See* note 2, *supra.*

in a manner consistent with those differences in furtherance of the public interest.

II. THE DISTRICT COURT PROPERLY UPHELD SECTION 4 UNDER O'BRIEN.

Under *O'Brien's* "relatively lenient test," [56] a law is constitutional if 1) it "furthers an important or substantial governmental interest"; 2) "the governmental interest is unrelated to the suppression of free expression," 391 U.S. at 377; and 3) the "government interest . . . would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 799 (construing the *O'Brien* test); *United States v. Albertini*, 472 U.S. 675, 689 (1985) (same). Section 4 easily passes this test.

A. Section 4 Furthers Important And Substantial Governmental Interests.

This Court has repeatedly held that the very interests Section 4 is designed to further are important and substantial. In *Capital Cities Cable, Inc. v. Crisp*, the Court held that "protecting noncable households from loss of regular television broadcasting service due to competition from cable systems"—the primary interest furthered by Section 4—is "an important and substantial federal interest." 467 U.S. at 714. The Court has also held that preventing anticompetitive conduct and promoting diversity of expression are important and substantial governmental interests. *FTC v. Superior Ct. Trial Lawyers' Ass'n*, 493 U.S. 411, 430 (1990); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 567-68 (1990). Thus, the interests underlying Section 4 satisfy *O'Brien*.

Section 4 clearly furthers those interests. It prevents anticompetitive exclusion of local commercial television from the cable conduit and thereby protects noncable households from loss of free local commercial television through economic debilitation. Appellants are therefore forced to argue that Congress was wrong in concluding

[56] *Texas v. Johnson*, 491 U.S. 397, 407 (1989); *see also Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991).

that remedial legislation is needed to protect those interests. In their view, cable operators have not engaged in anticompetitive acts against local television stations with sufficient frequency to warrant concern, and Congress should simply trust that they will not do so in the future.

There was, however, ample basis to warrant congressional concern. Congress need not wait until local commercial television is a corpse before attempting to save it.[57] After reviewing the anticompetitive abuse by the cable monopoly that had occurred in the past, analyzing the increasing incentives for cable operators to exclude broadcast competitors from the cable conduit, and recognizing cable operators' increasing ability to do so, Congress made a *predictive judgment* that, absent remedial legislation, "there is a substantial likelihood that . . . additional local broadcast signals will be deleted, repositioned, or not carried," and that "the economic viability of free local broadcast television and its ability to originate quality local programming *will be* seriously jeopardized." [58]

Appellants do not seriously question the evidentiary building blocks on which that predictive judgment was based. Instead, they challenge the inferences Congress drew on the basis of largely undisputed facts. Congress and appellants have considered the same evidence; they simply have drawn different conclusions.[59]

[57] Appellant Turner is surely wrong that Congress must wait until local television is in "imminent" peril of "facing extinction." Turner Br. at 19, 40. Indeed, Congress was entitled to prevent anticompetitive behavior of cable systems that would diminish broadcasters' ability to compete in the market, even if it believed the weakened stations might survive without protection.

[58] Findings, paragraphs 15, 16; J.S. App. at 86a (emphasis added).

[59] For example, Congress cited the 1988 FCC survey of the cable industry to support its predictive judgment; appellants cite the same survey to support a contrary inference. *See, e.g.*, 1992 House Report at 52; Turner Br. at 42.

In making predictive judgments about the *future* economic health of local commercial television, Congress had to weigh many complex and dynamic factors. Congress considered cable operators' strong incentive to discriminate against local commercial broadcast stations, their *only* competitors for local television advertising revenues.[60] It considered evidence that local advertising revenues are a significant and increasingly important component of cable revenues, for which broadcast stations and cable operators "increasingly compete"—revenues NCTA claimed are "becoming a more and more significant source of revenue every day."[61] It considered evidence that cable operators had already engaged in significant discrimination against local broadcast stations,[62] and evidence that cable operators were deliberately mini-

[60] *See* Findings, paragraphs 15, 16; J.S. App. 85a-86a.

[61] Findings, 14; J.S. 85a. In Comments filed with the FCC in MM Docket No. 89-600 on March 1, 1990, at p. 44, appellant NCTA candidly acknowledged that "[a]dvertising is becoming a more and more significant source of revenues every day. Between 1984 and 1989, total advertising revenues more than tripled, from $594 million to an estimated $1.963 billion. The most dramatic increase was in *local* advertising revenues, *which quintupled*—from $98 million to $488 million. By 1995, total advertising revenues are expected to climb to $4.761 billion, with *local* advertising revenues tripling again to $1.464 billion." (emphasis added). The same Comments noted "that 30 percent of cable revenues could come from non-subscriber sources, primarily advertising." *Id.* at 43. The FCC's *Report* to Congress stressed the marked increase in cable advertising revenues. 1990 FCC Cable Report, 5 FCC Rcd. at 4967. Absent competition from local broadcasters, of course, cable operators would reap monopoly profits on video advertising. That is why the advertising industry testified in support of commercial must carry legislation. *1991 Cable Act Hearing* at 353 (Statement of the Ass'n of National Advertisers); *Must Carry Hearing* at 144 (Testimony of Daniel Jaffee). Federal limits on cable rates also increase cable's incentive to augment revenue from other sources like advertising. Finally, degradation of local commercial television would cause additional viewers to subscribe to cable, despite its high cost, thus raising cable revenues in that way, as well.

[62] *See* pages 9-10 *supra*. *See generally* Goodman Aff., J.A. 99-106, and the evidence cited therein.

mizing such discrimination while must carry legislation was pending.[63] Congress considered evidence that the recent and vastly increased number of *cable* programmers, particularly those affiliated with cable operators, significantly increased both the incentive and the ability of cable operators to discriminate against local commercial television stations by substituting cable programming for broadcast programming.[64]

Congress also relied on the FCC's expert judgment that cable posed an increasing risk to local broadcasting, and to service to noncable households. For three decades—through Democratic and Republican administrations alike—the FCC had expressed concerns about that risk. As the Court explained in *Crisp*, when the FCC "began its regulation of cable communications in the 1960s," it was "chiefly concerned" that cable programming "might, through competition, destroy or seriously degrade the service offered by a television broadcaster, and thereby cause a significant reduction in service to

[63] In *Century*, the court had stressed that there had not been, in general, wide-spread discrimination against broadcast stations in the sixteen months following the invalidation of the must carry rules in *Quincy*. 835 F.2d at 303. That was no accident. As the then chairman of appellant NCTA had acknowledged six weeks after the *Quincy* decision, "a wise man doesn't insult the alligators until he's across the river." Address of Edward Allen, Chairman NCTA, Washington Cable Club, Sept. 8, 1985. That remark was cited to the FCC in support of NAB's statement that "the consideration of cable deregulation by the Commission and the Congress has no doubt restrained many cable operators." Comments of the National Association of Broadcasters, MM Docket No. 90-4, Sept. 25, 1991. Those comments were, in turn, cited in the 1992 House Report at 53.

[64] Appellant Turner acknowledges, for example, that in 1976 there were only four cable programming services; now there are more than 120. Turner Br. at 9. In 1984, just before *Quincy*, basic cable program networks spent only $340 million for programming; in 1991, they spent $1.5 billion. *Id.* Congress was aware of these facts, and understood their significance. The Senate Report, for example, noted that programming choices had increased about 50% since 1984. 1991 Senate Report at 3. Congress was particularly concerned by the extent to which the cable industry "has become vertically integrated." Findings, para. 5; J.S. App. 83a.

households *not* served by cable systems." 467 U.S. at 701 (quotations omitted) (emphasis added). The FCC's 1990 Report on Cable—which Congress considered—described an increasing risk, noting that the absence of must carry requirements had created "an imbalance between broadcasting and cable television" which posed a threat that "needs to be addressed expeditiously." [65]

Congress considered all of this evidence, and much more.[66] The evidence showed a highly dynamic industry, in which cable operators had *increasing* incentive and ability to exclude and debilitate local commercial television stations. Thus, appellants are plainly wrong that the "same alleged 'incentives' have existed during the past eight years." [67] In view of the massive record, it was plainly reasonable for Congress to conclude that absent remedial legislation, the future economic health of local commercial television would be "seriously jeopardized." [68] Indeed, even NCTA told Congress that must carry provisions were needed "to assure continued carriage on cable systems of qualified local broadcast stations." [69]

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[65] 1990 FCC Cable Report, 5 FCC Rec. at 5041 (quoted in 1992 House Report at 57).

[66] *See* pages 7-13, *supra*.

[67] Turner Br. at 44.

[68] Finding 16; J.S. App. 86a. Although the number of broadcast stations has increased in recent years, it is incorrect to conclude that broadcast stations are in strong financial health. "For example, over one-quarter of all stations affiliated with the three major television networks lost more than $197,000 in 1990," and "lost more than $477,959 in 1991." Affirmation of Dr. Mark R. Fratrik, J.A. 87-88. "In like fashion, one half of all independents lost more than $410,585 in 1990, with one quarter losing more than $1.6 million," and "lost more than $314,795 in 1991," again, "with one quarter losing more than $1.6 million." *Id.*

[69] Letter from Mr. James P. Mooney of NCTA to the Hon. Daniel K. Inouye, Jan. 17, 1990, *reprinted in Oversight of Cable TV: Hearings on the Oversight of the 1984 Cable Telecommuns. Act Before the Subcomm. on Communs. of the Senate Comm. on Commerce*, 101st Cong., 1st Sess. 548 (1990).

The record before Congress provided ample support for its predictive judgment regarding local commercial television's troubled financial future absent remedial legislation. Deference is particularly appropriate for findings "of a judgmental or predictive nature." *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 813 (1978) (deferring even to *agency* judgment). "When Congress makes findings on essentially factual issues . . . those findings are of course entitled to a great deal of deference." *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 330 n.12 (1985). That is because Congress is "an institution better equipped to amass and evaluate the vast amounts of data bearing on [the] issue[s]." *Id.* at 330 n.12.[70] Where, as here, regulation involves an industry "dynamic in terms of technological change," this Court has acknowledged that "in evaluating the First Amendment claims [at issue], we must afford great weight to the decisions of Congress and the experience of the Commission." *Columbia Broadcasting System v. Democratic National Comm.*, 412 U.S. 94, 102 (1973).[71] Finally, as appellants acknowledge, deference is particularly warranted in cases that are reviewed under *O'Brien*.[72] For all these reasons, Congress' carefully considered judgment that remedial legislation is necessary should not be disturbed.[73]

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[70] This Court's recent decision in *FCC v. Beach Communications, Inc.*, 113 S. Ct. 2096, 2101-02 (1993), confirms the deference due Congress' conclusions, and makes clear that statutory classifications are not subject to the level of review appropriate for decisions of agencies or trial courts.

[71] *See also Columbia Broadcasting*, 412 U.S. at 102-03 ("The judgment of the Legislative Branch cannot be ignored or undervalued" simply because one side of the debate "casts its claims under the umbrella of the First Amendment."); *Rostker v. Goldberg*, 453 U.S. 57, 64, 67-68, 72-73 (1981).

[72] NCTA acknowledges, for example, that "the proper level of deference given to Congress varies inversely with the level of judicial scrutiny given to its actions." NCTA Br. at 39.

[73] For the reasons expressed in text and in note 68, *supra*, appellants' disputed factual assertions (see J.A. 334-339; 364-381) cannot call Congress' rejection of these claims into question in this Court.

Sable Communications, Inc. v. FCC, 492 U.S. 115, 129 (1989), and *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978), do not require a different result. Those cases arose in the inapposite context of strict scrutiny, in which the nature of the provisions at issue—a flat ban on speech and criminalization of speech about government—raise the greatest concerns about legislative motive. Moreover, neither legislative record contained *any* findings of fact. In addition, the conclusion Congress reached in *Sable* was contradicted by an extensive agency fact-finding process on the same question in which agency had identified a clear alternative to serve the identified purpose.[74]

Sable and *Landmark* stand for the unremarkable proposition that when a law raises the kinds of concerns that require strict scrutiny, judicial inquiry into the fit between the legislature's purpose and choice of remedy is not foreclosed by the legislature's naked conclusions of *law*. But courts are not free to ignore Congressional findings of *fact* that are based on substantial record evidence. And under *O'Brien*, courts are certainly not free to engage in a *de novo* fact-finding process.

Appellants had ample opportunity to submit evidence to Congress, and they did. The dissent below erroneously believed that critical assertions of fact made by appellants in their belated effort to dispute Congress' findings were "uncontradicted." J.S. App. 55a n.3, 62a, 64a, 65a, 6a6. To the contrary, NAB and the federal defendants specifically contested those assertions of fact, on procedural grounds and on the merits. Intervenor-Defendant Applicant National Association of Broadcasters' Response to Plaintiffs' Statement of Material Facts (filed February 19, 1993). J.A. 334-339. *See* J.A. 364-381. Like the dissent, appellants' appeal also relies heavily, and inappropriately, on NCTA's contested Statement of Material Facts. *See, e.g.*, J.S. at 26-27.

[74] *Sable* held only that in the context of strict scrutiny the Court need not defer to governmental "assertions" of fact made for the first time in legal proceedings, when there were "*no* legislative findings" of fact and "*no* evidence in the record" to support those assertions. 492 U.S. at 128-29 (emphasis added).

Accordingly, Section 4 satisfies *O'Brien*'s first prong.[75]

B. Section 4 Is Narrowly Tailored.

Section 4 easily satisfies *O'Brien Ward*'s third prong because the "fit" between the statute's ends and means is far closer than is required by that test.[76] The "fit" is sufficient so long as Congress "could reasonably have determined that its interests overall would be served less effectively absent the regulation." *Ward*, 491 U.S. at 798-U.S. at 801; *Renton*, 475 U.S. at 50-52 (same); *Albertini*, 472 U.S. at 689 (same).

Congress carefully crafted Section 4 to achieve its structural objectives, striking an appropriate balance between competing interests. Cable operators are not required to carry *all* local television stations, and are free to select any programming whatsover for the majority of their channels.[77] Section 4 plainly "promotes . . . substantial government interest[s] that would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 798-99. *See also Barnes v. Glen Theatre, Inc.*, 111 S. Ct. to the substantive problems which legitimately concern" Congress. *See Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. at 810.

This Court has repeatedly held that scrutiny under *O'Brien* should be particularly circumspect when courts

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[75] As shown *supra*, Point I, Section 4 is unrelated to the suppression of free expression, and it therefore satisfies *O'Brien*'s second prong.

[76] Indeed, Section 4 would satisfy even strict scrutiny, but the court need not reach that question in order to affirm.

[77] Every "burden" imposed by Section 4 will "serve to advance [Congress'] goals" within the meaning of *Ward*. *See* 491 U.S. at 799. Section 4 is even more precisely tailored given the interaction of the retransmission consent provision. *See* page 14 *supra*. Commercial broadcasters who are likely to be carried in the absence of must carry will demand retransmission consent—thereby foregoing their must carry rights—in order to receive compensation. Section 4 will thus function to protect only those commercial broadcasters who are most at risk of being excluded from cable systems, and for whom non-carriage would have the most devastating consequences. Section 4 thus protects *precisely* those local commercial television stations that need protection.

evaluate the means government chooses to achieve its objectives. *See, e.g., Ward*, 491 U.S. at 800. "The validity of such regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant governmental interests." *Albertini*, 472 U.S. at 689. *Accord Clark v. CCNV*, 468 U.S. 288, 289 (1984); *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 813 (1978). If the "record discloses a factual basis for the [legislature's] conclusion that this kind of restriction will have the desired effect," *O'Brien* is satisfied. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976) (plurality opinion).[78]

Under *O'Brien*, the means chosen by the legislature to further its interests "need not be the least restrictive or least intrusive means of doing so," *Ward*, 491 U.S. at 798, "[n]or are such regulations invalid simply because there is some imaginable alternative that might be less burdensome on speech." *Albertini*, 472 U.S. at 689. In any event, as demonstrated above, the "A/B" switch is not an effective alternative to must carry, as Congress found.[79] Appellants' alternative suggestion, that Congress should be required to use tax dollars to subsidize local commercial broadcasting,[80] is equally without merit. In every case of anticompetitive conduct Congress could simply use tax dollars to subsidize the victims of that conduct, and allow the antitrust violator to retain the benefits of its anticompetitive behavior. Such a subsidy would protect the violator, at public expense. But such a subsidy would ill-serve Congress' procompetitive goals because it would not deter the anticompetitive behavior Congress wishes to deter. Congress was certainly not required to prefer this less effective remedy to the one it chose. Furthermore, massive governmental subsidy of local commercial broadcasters would be a serious drain

[78] *See also Buckley v. Valeo*, 424 U.S. 1, 83 (1976).

[79] *See* pages 8-9, *supra*.

[80] *See* NCTA Br. at 41; TW Br. at 48.

on public resources, and would inject an unwanted governmental presence into what has long been a privately owned medium.[81]

For these reasons, Section 4 fully satisfies the *O'Brien* test.

III. SECTION 4 REQUIRES ONLY RATIONAL BASIS SCRUTINY.

The district court correctly concluded that Section 4 fully satisfies the *O'Brien/Ward* test, but appellants' claims should have been dismissed pursuant to the rational basis test. Appellants' "compelled speech" and "editorial discretion" claims are indistinguishable from claims rejected under the rational basis test in *PruneYard*, and appellants' "discrimination" claims are indistinguishable from claims rejected under the rational basis test in *Leathers*.[82] Because Section 4 satisfies the more demanding *O'Brien/Ward* test, it plainly satisfies the rational basis test. *See generally FCC v. Beach Communications, Inc.*, 113 S. Ct. 2096 (1993).[83]

[81] *See generally FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 475 (1940).

[82] An antitrust injunction forbidding exclusionary practices by a cable monopolist would not be subjected to First Amendment scrutiny.

[83] Alternatively, the District Court could have upheld Section 4 under a cable-specific standard of review. *See* NAB Motion to Affirm in No. 93-44, at 24-30. We emphasize, however, that such a standard would only be appropriate for reviewing regulations guaranteeing viewpoint-neutral *access* to the cable *conduit*.

CONCLUSION

The decision of the three-judge district court should be affirmed.

Respectfully submitted.

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Supreme Court of the United States
OCTOBER TERM, 1993

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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QUESTION PRESENTED

Whether the Cable Act's "must carry" provisions, which apply general prohibitions against the anticompetitive conduct of cable system monopolies in control of essential, bottleneck facilities and thus preserve the system of allocating local television broadcast signals, are consistent with the demands of the First Amendment.

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SEC v. *Chenery Corp.*, 332 U.S. 194 (1947) 27
Sable Communications v. *FCC*, 492 U.S. 115 (1989) 13
United Air Lines, Inc. v. *C.A.B.*, 766 F.2d 1107 (7th Cir. 1985) 25
United States v. *Albertini*, 472 U.S. 675 (1985) 35, 37
United States v. *Edge Broadcasting Co.*, 113 S. Ct. 2696 (1993) 35, 38
United States v. *Griffith*, 334 U.S. 100 (1948) 23
United States v. *Midwest Video Corp.*, 406 U.S. 649 (1972) 22
United States v. *O'Brien*, 391 U.S. 367 (1968) 8, 11, 31, 34, 35
United States v. *Paramount Pictures, Inc.*, 334 U.S. 131 (1948) 30, 40
United States v. *Robel*, 389 U.S. 258 (1967) 27
United States v. *Southwestern Cable Co.*, 392 U.S. 157 (1968) 5, 21
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United States v. *Western Elec. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd*, *Maryland* v. *United States*, 460 U.S. 1001 (1983) 40, 43
United States v. *Western Elec. Co.*, 900 F.2d 283 (D.C. Cir.), *cert. denied*, 498 U.S. 911 (1990) 40, 42
Walters v. *National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) 13
Ward v. *Rock Against Racism*, 491 U.S. 781 (1989) 8, 11, 31, 32, 33
Woods Exploration & Producing Co. v. *ALCOA*, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972) 25

AGENCY DECISIONS

Competition, Rate Deregulation, & the Comm'n's Policies Relating to the Provision of Cable Television Serv., Report, 5 FCC Rcd. 4962 (1990) 37
Computer III Remand Proceedings, Notice of Proposed Rulemaking, 5 FCC Rcd. 5242, *further proceedings*, 6 FCC Rcd. 174 (1990), *further proceedings*, 6 FCC Rcd. 7571 (1991), *pet. for review pending, California* v. *FCC*, No. 92-70083 (9th Cir. filed Feb. 14, 1993) 42
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Report & Order, 8 FCC Rcd. 5631 (1993) 20
In re CATV, Second Report & Order, 2 F.C.C.2d 725 (1966) 7
MTS & WTS Market Structure, Third Report & Order, 93 F.C.C.2d 241, *recon.*, 97 F.C.C.2d 682 (1983), *further recon.*, 97 F.C.C.2d 834, *aff'd in part, remanded in part, NARUC* v. *FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985) 43
Second Computer Inquiry, Final Decision, 77 F.C.C.2d 384, *modified*, 80 F.C.C.2d 50 (1980), *further modified*, 88 F.C.C.2d 512 (1981), *aff'd, Computer & Communications Indus. Ass'n* v. *FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983) 42

TABLE OF AUTHORITIES—Continued

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Telephone Company-Cable Television Cross-Ownership Rules, Second Report & Order, 7 FCC Rcd. 5781 (1992)	42
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STATUTES	
Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified at 47 U.S.C. §§ 534, 535)	*passim*
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H.R. 3636, 103d Cong., 1st Sess. (1993)	42, 43
H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. (1992)	17, 28
H.R. Rep. No. 628, 102d Cong., 2d Sess. (1992)	17, 18
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S. Rep. No. 92, 102d Cong., 1st Sess. (1991)	17, 18, 19
Cable Television Regulation: Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce, 102d Cong., 1st Sess. (1991)	17

TABLE OF AUTHORITIES—Continued

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Media Ownership: Diversity and Concentration: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transp., 101st Cong., 1st Sess. (1989)	17
Must Carry: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transp., 101st Cong., 1st Sess. (1989)	17
Oversight of Cable TV: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transp., 101st Cong., 1st Sess. (1989)	17
S. 12—Cable Television Consumer Protection Act of 1989: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transp., 102d Cong., 1st Sess. (1991)	17, 19, 21
S. 1880—Cable Television Consumer Protection Act of 1989: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transp., 101st Cong., 2d Sess. (1990)	17
The Sloan Commission on Cable Communications, *On the Cable: The Television of Abundance* (1971)	6
OTHER AUTHORITIES	
Gerald R. Faulhaber, *Telecommunications In Turmoil: Technology and Public Policy* (1987)	41
Glenn B. Manishin, *Antitrust and Regulation in Cable Television: Federal Policy at War with Itself*, 6 Cardozo Arts & Entertainment L.J. 75 (1987)	6
Ithiel de Sola Pool, *Technologies of Freedom* (1983)	41
Walter G. Bolter, *Telecommunications Policy for the 1990s and Beyond* (1990)	41

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-44

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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BRIEF OF APPELLEE ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.

STATEMENT OF THE CASE

Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, § 2(a)(2) (codified at 47 U.S.C. §§ 534, 535) (the "Cable Act"), in essence require that cable television system operators make available a certain limited percentage of their channels for carriage of competing commercial (Section 4) and noncommercial (Section 5) broadcast stations. These so-called "must carry" provisions are the product of years of congressional deliberations and are supported by extensive findings. The congressional findings, set forth in the Cable Act itself, pertain to: (1) abuses of the bottleneck monopoly that cable operators enjoy over delivery of programming, including broadcast television programming, to more than 60 percent of television households in the

United States; (2) the incentives and ability that cable system operators have to use their monopoly power to injure local broadcast stations that compete with them for advertising revenues; and (3) the importance of preventing anticompetitive conduct that threatens to destroy the current community-based, broadcast allocation scheme that serves viewers—both subscribers to cable television and particularly those who cannot or do not subscribe—throughout the Nation.

The Cable Act's must carry provisions directly and narrowly advance Congress' substantial interest in preventing anticompetitive conduct. The Act expressly declares its procompetitive purpose, and sets forth a clear mandate that responds directly to cable operators' incentive and demonstrated ability to abuse their monopoly power. The Act's protections are addressed to the class of competitors most directly subject to these monopoly abuses. The Act protects competitors by mandating access—the traditional remedy applied to monopolists that use their control of essential facilities to harm their competitors. Such measures, which are designed purely to prevent anticompetitive conduct, are not subject to any heightened First Amendment scrutiny when directed at an information provider using its monopoly information transport facility to stifle competition. Finally, the must carry provisions readily meet any "tailoring" requirement that may be imposed in this case, and thus, the District Court correctly upheld the must carry provisions against First Amendment challenge.

1. Appellants are cable system operators and cable programming providers that seek to have the must carry provisions of the Cable Act enjoined as a violation of their rights protected under the First Amendment. Pursuant to Section 23 of the Cable Act, 47 U.S.C. § 555 (c)(1), this constitutional challenge was heard by a three-judge court in the United States District Court for the District of Columbia. Appellee, the Association of

Independent Television Stations, Inc. ("INTV")—as the representative of the independent commercial television stations that suffer disproportionately from the cable system operators' monopoly abuses—intervened as a defendant in that action to urge the court to sustain the Cable Act. The constitutional challenge to the "must carry" provisions of the Cable Act was rejected by the three-judge district court, with one judge dissenting. See Brief of the United States at 6-9.

2. INTV is a nonprofit, incorporated association of commercial television stations that are not affiliated with the three principal television networks (ABC, NBC, and CBS). INTV's membership does not include any of the existing broadcast network organizations, although a number of stations affiliated with the Fox television network are members. In contrast to established VHF network affiliate stations, INTV member stations tend to be newer, UHF stations. The Cable Act prevents cable systems' anticompetitive actions that are particularly directed at and threaten the viability of smaller local commercial stations, which compete with cable systems for local advertising revenue. See *infra* pp. 15-17. For this reason, INTV was an active participant in the congressional proceedings that led to the enactment of the 1992 Cable Act and represents stations that are principal beneficiaries of the competitive safeguards that Congress implemented through the must carry provisions.

3. The history and nature of the relationship between cable television systems and local broadcast stations demonstrate the necessity of governmental regulation of cable systems generally and, in particular, the validity of the must carry provisions' response to the anticompetitive risks to broadcasters posed by cable systems' local bottleneck monopolies. Although broadcast television and cable television both provide video programming to the public, they are distinct technologies with differing operational characteristics.

Broadcast television stations transmit video signals over-the-air.[1] The Communications Act of 1934, as amended, delegated broad authority to the FCC to regulate broadcasting and specifically empowered the FCC to "make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of . . . service to each of the same." 47 U.S.C. § 307(a) & (b) (delegating authority to FCC to license stations "if public convenience, interest, or necessity will be served thereby"). The FCC in 1952 apportioned television channels among various communities across the country.[2] Both UHF and VHF channels were allotted.[3]

[1] Television signals are received via antennas that typically range from so-called "rabbit ears" that are placed on top of the television receiver to large outdoor antennas perched on masts 30 feet or more above ground. As a result of the line-of-sight characteristics of television signals, large outdoor antennas are capable of receiving television signals from farther away than indoor antennas. Large, outdoor antennas also are more costly and unsightly. Congress found that cable subscribers do not maintain their outdoor antennas and that the so-called A-B switch, which selects between a cable input and an antenna input was not a feasible means of maintaining subscriber access to local off-air signals. *See infra* p. 18 & note 14.

[2] *Television Assignments*, 41 F.C.C. 148 (1952) (FCC was guided by the goal that "as many communities as possible should have the opportunity of enjoying the advantages that derive from having local outlets that will be responsive to local needs"). The initial Table of Allotments established in 1952 has been amended from time to time. As of December 31, 1992, 1063 individual communities had been allotted television channels. These communities form approximately 225 television markets.

[3] Ten years later, Congress reaffirmed the importance of local, competitive services in enacting the All-channel Receiver Act, 47 U.S.C. § 303(s), which required television receivers to be constructed so that they could receive both UHF and VHF channels. Congress' goal was as follows:

> a television system which will serve all the people, encourage local outlets, foster competition—particularly in large markets—and meet educational needs.

[Continued]

Only a channel allotted to a specific community may be used by a broadcast television station, each of which is licensed to use a single, specific frequency or channel. The result is a ubiquitous, free television service which provides a diverse and competitive array of signals in local communities across the country.

Cable television is a means of distributing television or video program signals via wire or cable, instead of over-the-air.[4] In its infancy, cable television provided only an antenna service[5] and was known as a community antenna television or "CATV." CATV developed in response to demand for access to more broadcast signals than were available locally by antenna or for better reception of broadcast television signals. This demand was greatest in areas where off-air reception of broadcast television station signals was limited by distance, terrain, or urban "ghosting." Consequently, cable television systems developed initially in such diverse areas as the isolated valleys of Pennsylvania and West Virginia and the "canyons" of Manhattan.

H. R. Rep. No. 1559, 87th Cong., 2d Sess. 3, 9 (1962). *See also United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 174-75 (1968).

[4] Cable systems drew the moniker "cable" because cable systems use coaxial cable to distribute signals. Cable systems now are using optical fiber to replace traditional coaxial cable in many portions of their distribution systems. Optical fiber can carry many more signals than coaxial cable and also is immune from electrical interference.

[5] In their so-called "antenna" capacity, cable systems simply receive and retransmit television station signals. Local signals typically are received off-the-air at the cable system's head-end and retransmitted directly to cable subscribers. In some instances, a cable system may receive a local signal from a microwave relay system used by the cable operator to forward signals from a more convenient reception point. Cable systems also "process" all signals received so as to integrate them into their distribution system. Processing usually involves amplification of the signal and election

Cable television systems can and do provide television programming. However, cable distribution of television programming differs significantly from over-the-air transmission. First, cable operators charge viewers directly for service. In contrast, broadcasting is a totally advertising-supported medium which provides its signals to viewers for free. Second, cable is a natural monopoly. The inherent economies of scale in the construction of a cable system, as well as the theoretically unlimited capacity of cable or optical fiber, ensure that a single provider is the most efficient method of distributing signals.[6] Third, when a television set is connected to a cable system, the physical connection to the set as a practical matter supplants the off-the-air antenna connection, which means that cable subscribers can no longer receive broadcast television signals directly off-the-air.[7] Broadcast stations enjoy no comparable ability to foreclose competition from other broadcast stations or other competing media.

Cable systems always have carried broadcast station signals, and they still use broadcast television signals as one of their program offerings. Indeed, use of broadcast television signals was essential to cable's growth because,

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of the channel (frequency) on which it will be transmitted. They typically make no determinations as to whether to include particular programs from the station or to exclude others. Their function is precisely that of a passive antenna.

[6] The Department of Justice has stated its reluctance to challenge mergers between competing cable systems in light of cable's "natural monopoly characteristics." Department of Justice Press Release (Apr. 1, 1985), *cited in*, Glenn B. Manishin, *Antitrust and Regulation in Cable Television: Federal Policy at War with Itself*, 6 Cardozo Arts & Entertainment L.J. 75, 87-88 (1987); The Sloan Commission on Cable Communications, *On the Cable: The Television of Abundance* 147 (1971) ("[t]he arguments in favor of divorcing ownership from transmission derive additional strength from the inherent monopoly of cable system in any locality as opposed to the competition of several over-the-air broadcasters in most places").

[7] *See infra*, at p. 18 & note 14.

apart from cable's transmission capacity, broadcast signals historically were one of cable television's principal products. Without those signals, cable systems would have had nothing to offer except a new set of wires into the home—a conduit with no content. This unique aspect of the competitive relationship between the two industries has been a core consideration in much of the debate over regulation of cable television. The FCC and Congress consistently have embraced regulatory approaches dedicated to maintaining this essentially symbiotic relationship.

Thus, to permit cable systems to prosper, Congress granted those systems extraordinary protection from copyright claims by broadcasters. Copyright Revision Act of 1976, Pub. L. No. 94-553, 90 Stat. 2451 (codified at 17 U.S.C. § 100 *et seq.*) On the other hand, failure to carry local stations was considered anticompetitive even at the outset of cable operations. In 1965, when it originally asserted jurisdiction over microwave-served CATV systems, the FCC stated that "the failure or refusal by a CATV system to carry the signal of a local station" would constitute "an unreasonable restriction upon the local station's ability to compete."[8]

Because failure to carry local signals would be "patently destructive of the goals we seek in allocating television channels to different areas and communities," the FCC adopted local carriage requirements for microwave-served systems in 1965 and applied similar restrictions on all cable systems in 1966. The FCC observed that "failure to carry local stations and duplication of their programs are unfair competitive practices" and that "the CATV system which fails to carry the local station on its system has in practical effect cut off the station from access to CATV subscribers." *In re CATV, Second Report & Order*, 2 F.C.C.2d 725, 736 (1966). In 1972, the FCC again adopted new local carriage requirements or

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[8] *In re CATV, Second Report & Order*, 2 F.C.C.2d 725, 736 (1966) (internal quotation omitted).

"must carry" rules applicable to all cable systems. It reiterated its objective "to assure that 'local' stations are carried on cable television systems and are not denied access to the audience they are licensed to serve." Thus, the must carry requirements have for years been at the core of the interdependent relationship between broadcast and cable television.

4. The district court, in upholding the must carry provisions of the Cable Act against appellants' constitutional challenge, found:

> because the record indicates that Congress' primary purpose in enacting must-carry was to restore competitive balance and assure a functional market in the distribution of video signals, whatever might be said with those signals, the must-carry provisions appear to be unrelated to the content of the expression they will affect.

Jurisdictional Statement App. ("J.S.") 19a. Accordingly, the court determined that it need not decide whether, in general, cable should be treated "like" newspapers or broadcasters for First Amendment purposes; instead, the court concluded that the constitutionality of the must-carry provisions should be tested under the standard for incidental, non-content-based speech restrictions set forth in *United States* v. *O'Brien*, 391 U.S. 367 (1968), and *Ward* v. *Rock Against Racism*, 491 U.S. 781 (1989). J.S. 22a.

Applying that standard, the court concluded that the United States had articulated a significant government interest: "to promote fair competition among video 'speakers' in order to assure the survival of local broadcasting for the benefit of both those who subscribe to a cable service and those who do not." J.S. 23a. The court pointed to the "substantial record assembled by Congress" to support its conclusion that local broadcast television was in "serious jeopardy" as a "result of the cable operators' attempts to obtain a competitive advantage, not [as a result of] consumer demand." J.S. 24a-25a.

Although Judge Williams did not embrace appellants' view that heightened scrutiny is triggered merely by cable operators' status as speakers for purposes of the First Amendment, he nevertheless dissented from the holding of the court. He reasoned that because the must carry provisions benefited a particular "class of speakers," *i.e.*, local broadcast stations, those provisions must be subject to strict scrutiny. The dissent found that "at least at some level of abstraction," Congress' expressed interests, such as preserving free "over-the-air" local broadcasting, were "compelling." J.S. 58a, 61a. Under Judge Williams's view, however, any congressional interest in promoting those ends could be served by the "obviously" less intrusive alternative of "expansion of the [leased] access provisions of 612 of the 1984 Act." J.S. 59a.

SUMMARY OF ARGUMENT

This case can and should be resolved without determining what level of First Amendment protection generally should apply to the "speech" of cable television systems. Instead, the real issue is whether the must carry provisions directly advance the government's interest in preventing anticompetitive conduct. They do. Such procompetitive measures do not trigger strict scrutiny.

1. Congress precisely set forth in the Cable Act itself the basis for the conclusion that the must carry provisions directly serve to prevent anticompetitive practices. Congress specifically identified the cable systems' monopoly control over essential facilities required to distribute video programming, including programming of local broadcast stations. Congress also found that the cable operators have the ability to injure local broadcast stations by refusing to carry their signals and repositioning their signals to disadvantageous channels. In addition, Congress delineated how cable operators have an incentive

to abuse their monopoly power to harm local broadcasters because local broadcasters and cable operators compete directly for advertising revenue.

In addition to Congress' express statements, the procompetitive nature of the must carry provisions is reflected in the fact that Congress' rationale and remedy precisely mirror those established under Section 2 of the Sherman Act. Under traditional antitrust doctrine, a monopolist's ability to employ essential facilities to harm its competitors justifies imposition of an access requirement. That is exactly what Congress did in the must carry provisions. This type of application of general antitrust principles to cable systems, which not only function as information providers but also maintain monopoly control over transport facilities, does not trigger heightened First Amendment scrutiny. Instead, such regulation furthers First Amendment principles because it promotes competition of ideas. This Court has elaborated that conclusion in a range of cases applying antitrust principles to newspapers and other information providers, and indeed has done so in the very cases that set forth the "essential facilities" doctrine that Congress employed. Remedial and prophylactic measures targeting information providers' monopolistic practices necessarily distinguish between anticompetitive "speakers" and those "speakers" who are victims of monopolistic abuse. The First Amendment readily accommodates such distinctions, which is all that this case involves.

II. In many First Amendment contexts, this Court has required a showing that the challenged restriction "fits" or is tailored to the asserted neutral government interest. If the Court imposes such a requirement in this case, the must carry provisions readily meet it. Congress has crafted the must carry provisions to protect precisely those local broadcast stations most subject to monopolisitc abuse; Congress has done so in the manner traditionally employed in antitrust cases, by requiring that the monopolist provide access; and Congress has ensured that cable operators have ample remaining means of disseminating information.

III. The quickly emerging and developing information technologies make it imperative that this Court pursue the traditional First Amendment analysis that allows the government to pursue procompetitive regulation, such as that embodied in the must carry provisions. The information producing and transmitting industries pose an increasing range of traditional anticompetitive risks, which Congress and the FCC must remain free to address. If, conversely, this Court adopts appellants' analysis which depends solely upon the First Amendment "status" of the speaker—without regard to the monopolistic practices the "speaker" has a powerful incentive to pursue—then a range of increasingly important governmental regulation affecting competition in the information industries will be imperiled.

ARGUMENT

THE CABLE ACT'S MUST CARRY PROVISIONS ARE CONSISTENT WITH THE FIRST AMENDMENT BECAUSE THEY REFLECT CONGRESS' DIRECT EFFORT TO HALT AND PREVENT CLASSIC ABUSES OF MONOPOLY POWER BY CABLE OPERATORS.

This case turns upon a fundamental distinction that runs throughout this Court's First Amendment jurisprudence: whether a challenged governmental measure either (1) serves a "governmental interest . . . unrelated to the suppression of free expression," *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968), because it is "justified without reference to the content of the regulated speech," *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989) (internal quotation omitted); or (2) implicates strict judicial scrutiny because the measure lacks a neutral purpose, which is established by indications that "the government has adopted a regulation of speech because of disagreement with the message it conveys." *Id.*

Appellants' underlying arguments disregard what certain of their *amici* concede, that "the nature of the governmental restriction on speech is the critical factor in determining the appropriate level of scrutiny." Brief of United States Tel. Ass'n at 18. Measures designed to prevent anticompetitive conduct are foremost among the governmental interests that are, by their very nature, unrelated to regulation of expression and not justified in terms of the content of speech. This is so even when such procompetitive measures draw a distinction among classes of speakers and have an incidental effect upon speech, because they are applied to entities that produce information. See, *e.g.*, *FCC* v. *National Citizens Comm. for Broadcasting*, 436 U.S. 775, 800 n.18 (1978); *Lorain Journal Co.* v. *United States*, 342 U.S. 143, 155-56 (1951); *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945); *infra* pp. 28-34.

The Cable Act's must carry provisions in fact directly advance a governmental interest in preventing anticompetitive conduct. Therefore, they trigger no strict scrutiny, and are subject at most to a "tailoring" requirement to ensure that Congress has in fact pursued an interest in protecting competition. See *infra* pp. 28-34. There is no doubt that the must carry provisions are precisely this type of measure. See *infra* pp. 14-28, 34-39.

This case thus can and should be resolved without addressing the principal claim that underlies all of appellants' arguments: that cable television systems are entitled to the greatest degree of First Amendment protection in all situations. Even conceding that to be so in certain circumstances, appellants' arguments beg the essential question whether Congress designed the must carry provisions to redress carefully identified anticompetitive threats or to burden particular messages or speakers. The history of the broadcast and cable industries, as well as the structure and history of the must carry provisions demonstrate that the provisions clearly are a permissible form of procompetitive regulation.

I. IN ENACTING THE MUST CARRY PROVISIONS, CONGRESS PRECISELY AND SPECIFICALLY TARGETED CLASSIC ANTICOMPETITIVE PRACTICES THAT ARE CONTRARY TO GENERAL ANTITRUST PRINCIPLES.

Given the care and detail with which Congress outlined the competitive justifications for the must carry provisions, only the strongest evidence could justify the conclusion that those provisions were not in fact designed to advance competitive purposes. Deference to Congress' determination of the character and suitability of the must carry provisions is particularly appropriate because this case presents review of essentially factual judgments regarding competitive conditions that in turn underlie policy considerations. "When Congress makes findings on essentially factual issues . . . , those findings are of course entitled to a great deal of deference, inasmuch as Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on such an issue." *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985); see *Rostker* v. *Goldberg*, 453 U.S. 57, 72-73 (1981); *Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547 (1990).[9]

This Court has indicated that for measures designed to govern complex and highly regulated industries, such as broadcasting and cable television, courts "must afford great weight to the decisions of Congress." *Columbia Broadcasting Sys., Inc.* v. *Democratic Nat'l Comm.*, 412

[9] Deference is particularly warranted in this case because Congress acted on the basis of an exhaustive study of the precise competitive concerns that directly bear upon the legal issues posed by this constitutional challenge. *See infra* pp. 14-21. These circumstances sharply distinguish this case from the bare legal issue addressed in *Sable Communications* v. *FCC*, 492 U.S. 115 (1989), where this Court invalidated an Act of Congress after noting that "the congressional record contains *no* legislative findings" of fact relevant to the legal issue of tailoring. *Id.* at 129 (emphasis added).

U.S. 94, 102 (1973). In such circumstances, this "weight" is reflected by acceptance of Congress' characterization of the competitive problems it identifies and the likely efficacy of its chosen remedies, rather than deference on the ultimate legal issue:

> That is not to say we "defer" to the judgment of the Congress and the Commission on a constitutional question . . . . The point is, rather, that when we face a complex problem with many hard questions and few easy answers we do well to pay careful attention to how the other branches of Government have addressed the same problem.

Id. at 103. Finally, appellants bear a particularly heavy burden in this case in which they seek to topple a regulatory scheme constructed by Congress before that scheme actually operates. See *Rust* v. *Sullivan*, 111 S. Ct. 1759, 1767 (1991) ("'A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid'") (citation omitted).

A. Congress Specifically Identified The Cable System Operators' Financial Incentive And Ability To Use Their Bottleneck Monopolies To Injure Their Local Broadcast Station Competitors.

With nearly syllogistic precision, Congress set forth *in the Cable Act itself* the anticompetitive potential and practices of cable television systems that the must carry provisions were designed to prevent. See generally Cable Act § 2(a). Congress specifically found that cable systems have used—and would continue to use—their essential, bottleneck monopolies in an anticompetitive fashion to injure their local broadcast competitors. In reaching this conclusion, Congress determined, first, that cable television systems are bottleneck monopolies that control subscribers' access to video programming. Cable systems

"face[] no local competition" because they have the hallmark characteristic of essential facilities: "the extraordinary expense of constructing more than one cable television system to serve a particular geographical area." *Id.* at § 2(a)(2).

Second, over-the-air broadcast is dependent upon carriage by cable systems, rather than a substitute for cable programming. "[O]ver 60 percent of the households with television[] subscribe to cable television," *id.* at § 2(a)(3), and "[m]ost subscribers to cable television systems do not or cannot maintain antennas to receive broadcast television services, do not have input selector switches to convert from a cable to antenna reception system, or cannot otherwise receive broadcast television services." *Id.* at § 2(a)(17). Congress found that alternative means of mandating direct access to broadcast services—for example, requiring cable systems to install so-called "A B switches" that would permit a television viewer to switch between cable and broadcast reception—are "not an enduring or feasible method of distribution." *Id.* at § 2(a)(18).

Third, "[t]he cable industry has become vertically integrated" between programming production and transmission of programming. *Id.* at § 2(a)(5). "As a result, cable operators have the incentive and ability to favor their affiliated programmers." *Id.*[10]

Fourth, "[c]able television systems and broadcast television stations increasingly compete for television advertising revenues." *Id.* at § 2(a)(14); see also *id.* at § 2(a)(19). The cable operator has a financial interest not only in the advertising presented with its own programming, but also in advertising that runs with cable programming services that it carries but does not own. Thus,

[10] The anti-competitive effects of these combinations are exacerbated by the fact that the cable industry has a local monopoly at the end of the vertical chain.

for example, local operators are given advertising space on national cable networks, such as ESPN. This is sold to local advertisers.[11] Cable operators also sell advertising on locally originated cable channels. Both types of advertising compete directly with advertising that local broadcast stations sell. In sum, competition for advertising revenue is primarily at the local level, where cable operators exert monopoly control to undermine competition from local broadcast stations.

Fifth, cable television systems have every economic incentive to use their bottleneck monopoly facilities to impede or bar access of competing broadcast television stations to subscribers, thus benefiting the cable system financially at the expense of its direct competitors:

> A cable television system which carries the signal of a local television broadcaster is assisting the broadcaster to increase its viewership, and thereby attract additional advertising revenues that otherwise might be earned by the cable system operator. As a result, there is an economic incentive for cable systems to terminate the retransmission of the broadcast signal, refuse to carry new signals, or reposition a broadcast signal to disadvantageous channel position. There is a substantial likelihood that absent the reimposition of such a [must carry] requirement, additional local broadcast signals will be deleted, repositioned or not carried.

Id. at § 2(a)(15).

Finally, without a must carry requirement, the cable systems' anticompetitive practices of "delet[ing], reposition[ing], or not carry[ing] local broadcast signals" would

[11] National cable networks also sell advertising at the national level in direct competition with independent television stations, which sell advertising to both local and national advertisers. Thus, a vertically-integrated local cable operator has a dual incentive to damage competitive broadcast stations which compete for advertising at both the national and local levels.

"seriously jeopardize[]" the "economic viability of free local broadcast television." *Id.* at § 2(a)(16). This result, in turn, reduces the locally based broadcast services available *both* to cable subscribers and to television viewers who do not subscribe to cable television—by virtue of choice, availability, or financial resources. See *id.* at § 2(a)(10)-(11); see also *id.* at § 2(a)(12) ("[t]here is a substantial governmental interest in promoting the continued availability of such free television programming, especially for viewers who are unable to afford other means of receiving programming").

Even if these congressional findings embodied in the Act were not sufficient to prove the procompetitive purpose of the must carry provisions, an extensive legislative record amply supports each step of this syllogism. The 1991 Cable Act was the product of three years of lengthy hearings from 1989-91.[12] Those hearings and the resulting congressional reports reflect documented information from an enormous number of industry and consumer representatives.[13]

[12] *See Cable Television Regulation: Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. (1991); *S. 12—Cable Television Consumer Protection Act of 1989: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transp.*, 102d Cong., 1st Sess. (1991); *S. 1880—Cable Television Consumer Protection Act of 1989: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transp.*, 101st Cong., 2d Sess. (1990); *Oversight of Cable TV: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transp.*, 101st Cong., 1st Sess. (1989); *Must Carry: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transp.*, 101st Cong., 1st Sess. (1989); *Media Ownership: Diversity and Concentration: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transp.*, 101st Cong., 1st Sess. (1989).

[13] *See* H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. (1992); H.R. Rep. No. 628, 102d Cong., 2d Sess. (1992); S. Rep. No. 92, 102d Cong., 1st Sess. (1991).

Thus, Congress had before it extensive evidence of the cable systems' essential monopoly position. See generally S. Rep. No. 92, 102d Cong., 1st Sess. 8-13, 24-29 (1991) (collecting sources). In particular, Congress was aware of the enormous expense of constructing cable systems and the fact that more than 99 percent of the Nation's more than 11,000 cable television systems confront *no* competition. See *id.* at 13 & n.35 (citing sources). The dependence of broadcast television upon cable television also was well documented. The Senate Report specifically noted that "98 percent of cable homes do not have roof top antennas connected to their television sets," and credited the FCC's conclusion that "the cable industry encouraged its subscribers to take down their antennas and eliminate their capacity to receive signal[s] off-air." *Id.* at 45. The bases for rejecting proffered alternatives to the must carry requirement were extensively set forth. *Id.* at 44-46.[14]

Congress also relied upon extensive evidence of the cable systems' actual practices of refusing to carry or of repositioning local broadcast television stations.[15] The House and Senate Reports credited a far-reaching FCC study of cable system practices, which showed that cable systems routinely refused to carry local broadcast stations and often provided them with inferior channel placement. *Id.* at 42-44 (setting forth conclusions of "Cable System Broadcast Signal Carriage Survey," Staff Report by the Policy and Rules Division, Mass Media Bureau, Federal Communications Commission (Sept. 1, 1988)); H.R. Rep. No. 628, *supra*, at 52-53. "By far the most frequent replacement for a dropped local television station is a basic cable network—the program services in which cable operators often own equity interests and or profit from local advertising sales." S. Rep. No. 92, *supra*, at 43. These denials of carriage and shifting of channels reflected the cable systems' ownership interest rather than viewer preferences, because the favored programming was often less popular than the displaced broadcast programming.[16]

The burden of the cable systems' anticompetitive practices falls disproportionately upon smaller, independent television stations. Generally, a cable system has a financial incentive to carry the network-affiliated stations because that carriage maintains or increases the cable system's subscriber base. Indeed, these larger, network stations were the principal beneficiaries of the Cable Act's "retransmission consent" provisions, Cable Act § 6, which permitted stations to forgo their "must carry" rights and enter contractual negotiations for the carriage of their

[14] *See id.* at 45 ("[b]oth the cable and the broadcast industries have stated that the A/B switch is not a workable solution to the carriage problem"); *id.* at 45 n.115 (citing sources).

[15] *See, e.g., id.* at 42-43 & n.110 (citing testimony); H.R. Rep. No. 628, *supra*, at 53-56.

[16] *See* INTV, "Free Television Under Siege," May, 1988, *cited in*, S. Rep. No. 92, *supra*, at 43 n.110; S. Rep. No. 92, *supra*, at 40-44; *S. 12 Hearings*, *supra* (testimony of James B. Hedlund, Pres., INTV); INTV, "Stations Repositioned from VHF to UHF Channels by Cable Systems," *cited in*, *S. 12 Hearings*, *supra* (testimony of James B. Hedlund, App. H); Paul Kagen Assocs., Inc., *Marketing New Media* 2 (Jan. 1990), *cited in*, *S. 12 Hearings*, *supra*, at 228 n.48 (testimony of James B. Hedlund); Comments of the National Association of Broadcasters, *Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates*, MM Docket No. 90-4 (FCC filed Sept. 25, 1991); Federal Communications Commission, *Public Notice, Television Channel Utilization* (Sept. 4, 1992), *cited in*, Request of Def.-Intervenor Applicant INTV for the Ct. to Take Judicial Notice of Station Licenses & Channel Vacancies, *Turner Broadcasting Sys., Inc.* v. *United States*, Civil Action No. 92-2247 (D.D.C. filed Mar. 12, 1993); Federal Communications Commission, *Public Notice, Television Channel Utilization* (Sept. 7, 1989), *cited in*, Request of Def.-Intervenor Applicant INTV, *supra*; *see also* S. Rep. No. 92, *supra*, at 44 ("[i]n almost every instance, the stations shifted [to disadvantageous and unfamiliar channels] have been replaced by a cable program service in which the system operator is selling advertising or in which the operator has an equity interest or both").

signals. Smaller stations, most of which are INTV members, do not have that luxury.

Congress recognized that smaller, independent stations were peculiarly vulnerable to the cable systems' anticompetitive practices. See Cable Act § 2(a)(8)-(12). For those stations, denial of carriage or placement on an unfamiliar or disadvantageous channel could well put them out of business. See *supra* note 16. To viewers, particularly non-subscribers, that outcome would mean a loss of services (*i.e.*, fewer and/or weaker broadcast television stations). But to cable operators, it would mean the elimination of a competitor for finite advertising dollars. The cable operators' incentives to so eliminate competitors will only increase because the tapering growth in new cable subscribers and recently enacted cable rate regulation make advertising dollars the only source for increased cable revenues.[17]

Appellants argue that this evidence should be ignored because local broadcast stations have not gone out of business in large numbers prior to 1992 and because the overall number of instances in which Congress documented cable operators dropping and shifting local stations does not impress appellants as significant. But this analysis ignores the real import of the record before Congress. Even in a period of absolute market power where cable operators could charge virtually any amount to subscribers, cable systems engaged in widespread efforts to exclude and disadvantage local broadcast competitors. With the elimination of monopoly rents through rate regulation, Congress reasonably predicted that the cable systems would turn their full attention to advertising revenues, which meant that local broadcasters, unless

[17] *See* 47 U.S.C. § 543 (rate regulation); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Report & Order*, 8 FCC Rcd. 5631 (1993).

protected, would be targeted for abuse in ever increasing numbers.[18] Given the important public interest served by these broadcasters, especially with respect to viewers who do not subscribe to cable, Congress was not required to wait for them to disappear before remedying the inherently anticompetitive structural defect in the market. If Congress' factfinding and policy judgments are entitled to any deference in this case, then this record is more than sufficient to sustain the must carry provisions.[19]

Congress has made clear that the must carry restrictions are essential to prevent monopoly abuse and thus to preserve the "fair, efficient, and equitable distribution of broadcast services" that had been developed pursuant to the Communications Act. Cable Act § 2(a)(9), including the preservation of local broadcast services engendered by the table of allotments. *Id.* § 2(a)(10)-(12). This Court has recognized that the government has both the authority to protect and a substantial interest in protecting local broadcasters from cable operators' monopoly abuse.

In *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968), this Court upheld the FCC's power to fashion regulations that included must carry provisions that were in certain respects more restrictive than those now at issue.[20] The Court held that regulation was proper be-

[18] *See S. 12 Hearings, supra*, at 232-33 (testimony of James B. Hedlund, Pres., INTV); *see also* Cable Act §§ 2(a)(14)-(16).

[19] *Cf. United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 176-77 (1968) (endorsing FCC regulation of cable systems based upon need to "plan in advance of foreseeable events, instead of waiting to react to them") (internal quotation omitted).

[20] Under the rules reviewed in *Southwestern Cable Co.*, "local [cable] systems were required to carry, upon request and in a specific order of priority, the signals of broadcast stations into whose viewing area they bring competing signals." *FCC* v. *Midwest Video Corp.*, 440 U.S. 689, 712 (1979) (Stevens, J., dissent-

cause, for example, importation of distant signals would likely "destroy or seriously degrade the service offered by a television broadcaster . . . and thus ultimately deprive the public of the various benefits of a system of local broadcasting stations." *Id.* at 175 (internal quotation omitted); compare Cable Act § 2(a)(10). Congress' various statements recognizing the importance of local broadcasting services, see, *e.g.*, Cable Act § 2(a)(10)-(11), simply reflect Congress' judgment that fair competition in this industry is particularly valuable to both cable subscribers and non-subscribers; it is not, as appellants assert, an indication of congressional intent to bolster the "content" of local broadcast programming. See, *e.g.*, Brief for Appellants Discovery Communications, Inc. at 26.

This Court also has recognized that local broadcasters are particularly vulnerable to cable systems' anticompetitive conduct. In *United States* v. *Midwest Video Corp.*, 406 U.S. 649, 664 (1972), the Court held that "controlling the competitive impact [cable television] may have on broadcast services" readily justified regulation of cable television. In addition, regulation of "signal carriage by cable television systems reflect[s] an important and substantial federal interest" that includes "protecting noncable households from loss of regular television broadcasting service due to competition from cable systems." *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 714 (1984); compare Cable Act § 2(a)(12). In this case, the must carry provisions directly respond to the well-documented monopoly abuses that Congress expressly found are uniquely visited upon local broadcast stations.

ing). *Southwestern Cable Co.* passed upon the FCC's power, rather than upon the validity of the rules, but a plurality of the Court later indicated that the rules' "validity was . . . subsequently and correctly upheld by courts of appeals as within the guidelines of that decision. See, *e.g.*, *Black Hills Video Corp.* v. *FCC*, 399 F.2d 65 (CA8 1968)." *United States* v. *Midwest Video Corp.*, 406 U.S. 649, 659 n.17 (1972).

B. General Antitrust Principles Both Proscribe The Abuses Of Market Power That Congress Enacted The Must Carry Provisions To Prevent And Justify Mandatory Access To Essential Facilities.

Any doubt that Congress enacted the must carry provisions to prevent anticompetitive abuses should be dispelled by the way in which those provisions parallel generally applicable antitrust principles. The must carry provisions address the same antitrust concerns that this Court and other courts have repeatedly acknowledged whenever monopolists use their essential facilities to harm their direct competitors. And the remedy that Congress imposed—mandated access to the monopolist's essential facility—is precisely that which antitrust laws traditionally require.

Section 2 of the Sherman Act is violated when a single entity "use[s] its monopoly power . . . in its service area to foreclose competition or gain a competitive advantage, or to destroy a competitor." *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 377 (1973); see also *United States* v. *Griffith*, 334 U.S. 100, 107 (1948).[21] A long-standing line of cases applied this principle to prohibit monopolists from employing "essential facilities" to disadvantage their actual or potential competitors. A facility is "essential" if access to it is necessary to allow competition in a related market and if competitors cannot practicably or feasibly duplicate it. See, *e.g.*, *MCI Communications Corp.* v. *AT&T*, 708 F.2d 1081, 1132 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983); see also *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973). A monopolist that controls such an essential facility violates the antitrust laws if it denies comparable use of the facility when access is in fact feasible. See *MCI Communications Corp.*, 708 F.2d at 1132-33.

[21] Section 2 of the Sherman Act prohibits efforts that "monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States." 15 U.S.C. § 2.

United States v. *Terminal Railroad Association*, 224 U.S. 383 (1912), was one of the earliest cases applying these principles. There, a coalition of railroad companies controlled a bridge, tracks, and other facilities that allowed access to the St. Louis terminal, a junction vital to competing rail companies. This Court held that the coalition could not deny access to the terminal; instead, the antitrust laws required the combination of railroads to admit competing rail carriers. *Id.* at 409-411. Similar principles have been applied when the facility or resource controlled has been deemed vital to competition, even though alternative resources remain available. See, *e.g.*, *Associated Press* v. *United States*, 326 U.S. 1 (1945) (newspapers controlling important but not exclusive source of news required to allow access to news delivery by competitors).

More recent cases have applied similar principles to require access to a single entity's bottleneck facilities. In *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973), this Court considered an electric utility's refusal to "wheel" power through its essential facilities to competing retail providers. The utility provided retail service and also possessed "a strategic dominance in the transmission of power in most of its service area," and its refusal to "wheel" impeded its competitors' ability to provide retail service. *Id.* at 377 (internal quotations omitted). Refusal of access thus constituted a violation of Section 2. *Id.* See also *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951) (denial of access by monopolist newspaper to advertisers violated antitrust laws when undertaken to harm competing broadcast station); *Aspen Highlands Skiing Corp.* v. *Aspen Skiing Co.*, 738 F.2d 1509 (10th Cir. 1984) (monopolist required to provide access to multi-area ticket arrangement on basis of control of essential facility), *aff'd*, 472 U.S. 585 (1985) (same arrangement violated antitrust laws because non-dealing

was based on competitive harm to rivals rather than efficiencies).[22]

Congress' justifications for the must carry provisions precisely mirror the reasoning employed in these essential facilities cases. Congress, like the courts applying the Sherman Act, focused upon the anticompetitive effect inherent in control of facilities essential to competition, which cannot be readily or feasibly replicated. Compare Cable Act § 2(a)(2)-(3) (cost of developing cable television systems and resulting lack of competition); *supra* pp. 14-16, with *United States* v. *Terminal R.R. Ass'n*, 224 U.S. 383 (1912); *MCI Telecommunications Corp.*, 708 F.2d at 1132-34. As with the essential facilities line of cases, Congress scrutinized that monopoly control and recognized that impeding access to such facilities likely would provide—and indeed already had provided—the monopolist with an anticompetitive advantage over competing service providers. Compare Cable Act § 2(a)(5), (12)-(18) (dependence of broadcasters upon monopoly cable systems for programming delivery; vertical integration of cable systems creates incentive to harm local broadcast station competitors); *supra* pp. 15-17, with *Otter Tail Power Co.*, 410 U.S. at 377-78; *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S.

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[22] Similarly, the antitrust laws were held to have been violated by the Bell System's refusal to allow competing long distance providers access to the local telephone facilities essential to provide competitive telephone service. *See MCI Communications Corp.* v. *AT&T*, 708 F.2d 1081, 1132-33 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983). *See also Delaware & Hudson Ry.* v. *Consolidated Rail Corp.*, 902 F.2d 174 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 2011 (1991); *Advanced Health-Care Servs., Inc.* v. *Radford Community Hosp.*, 910 F.2d 139 (4th Cir. 1990) (hospital and related services); *Fishman* v. *Wirtz*, 807 F.2d 520 (7th Cir. 1986) (sports arena); *Hecht* v. *Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977) (football stadium), *cert. denied*, 436 U.S. 956 (1978); *Woods Exploration & Producing Co.* v. *ALCOA*, 438 F.2d 1286 (5th Cir. 1971) (natural gas pipelines), *cert. denied*, 404 U.S. 1047 (1972); *cf. United Air Lines, Inc.* v. *C.A.B.*, 766 F.2d 1107 (7th Cir. 1985) (computerized reservation system).

585 (1985); *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951). Consistent with standard antitrust principles, the must carry provisions respond to this anticompetitive threat structurally by requiring that the monopolist provide competitors with reasonable access to the essential facility. Compare Cable Act § 4 with *Otter Tail Power Co.*, 410 U.S. at 377-78; *United States* v. *Terminal R.R. Ass'n*, 224 U.S. 383 (1912); *MCI Telecommunications Corp.*, 708 F.2d at 1132-34.

Appellants' only response to this congressional application of standard antitrust doctrine is to attempt a distinction between antitrust liability that arises in particular cases and Congress' authority to apply antitrust principles through a general rule directed at an industry. See, *e.g.*, Brief for Appellant Daniels Cablevision, Inc. at 18-19. No such distinction exists. First, the argument is conceptionally flawed. Cases produce rules, and rules must be applied in particular cases. See, *e.g.*, *FTC* v. *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 432-33 (1990) (*per se* antitrust rules are product of judicial interpretation, "but the rules nevertheless have the same force and effect as any other statutory commands"). Cable systems are already subject to the "rules" regarding essential facilities set forth in the cases outlined above, *supra* pp. 23-25, and they face uncertain but potentially great antitrust exposure for anticompetitive actions, such as those identified in legislative hearings leading to the Cable Act. See *supra* notes 12, 16. In addition, the must carry provisions provide for case-by-case determinations that appellants demand: the "rule" of the must carry provisions is subject to waiver and exemption provisions, see 47 U.S.C. § 534(h)(1)(C); 47 C.F.R. § 76.59, and sanctions are imposed only following elaborate FCC proceedings, 47 U.S.C. § 534(d), which are subject to judicial review. See 47 U.S.C. § 402(a); 28 U.S.C. §§ 2342-44.

Second, Congress is fully empowered to craft rules that apply antitrust principles to particular industries. Congress has already performed this task for the railroad, motor carrier, telecommunications, natural gas, and other industries. Even administrative agencies are empowered to assess competitive conditions and apply general antitrust principles through rulemaking or adjudication, see, *e.g.*, *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974); *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947), and Congress' power to craft legislative rules applying those principles is certainly no less. *Cf. FCC* v. *National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978); *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943).

Finally, regulation through a legislative rule such as the Cable Act is *preferable* to vesting executive officers with broad prosecutorial discretion to proceed on an ad hoc basis against particular speakers. In the context of ensuring fair competition, broad *per se* rules are favored, even when governing ostensibly expressive activities. See *Superior Court Trial Lawyers Ass'n*, 493 U.S. at 430-36. Although legislatures "ordinarily may delegate power under broad standards," the "area of permissible indefiniteness narrows" when a regulation promulgated pursuant to such power "potentially affects fundamental rights." *United States* v. *Robel*, 389 U.S. 258, 274-75 (1967) (Brennan, J., concurring).[23]

At bottom, Congress should not be hamstrung in its response to monopoly abuses in a way that allows threatened entities to be driven out of business before effective remedies can be applied. See *infra* note 24. Con-

[23] For this reason, this Court has struck down measures that allow executive officials to make ad hoc determinations as to whether speakers' activities were lawful. *See, e.g., Board of Airport Comm'rs* v. *Jews for Jesus, Inc.*, 482 U.S. 569, 576 (1987); *City of Houston* v. *Hill*, 482 U.S. 451, 466-67 (1987). This Court similarly has limited the discretion that may be exercised to target particular speakers through licensing and permit schemes or through administrative investigations. *See, e.g., FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 225-28 (1990) (and cases cited); *Freedman* v. *Maryland*, 380 U.S. 51 (1965).

gress properly addressed the problem of the cable operators' abuse of their essential facilities by adopting the must carry provisions as structural rules to promote competition."[4]

C. The Cable Act's Application Of General Antitrust Principles To "Speakers" Triggers No Heightened First Amendment Review.

Measures designed to advance competition reflect a substantial governmental interest unrelated to the suppression of speech, and no heightened First Amendment standard of review applies merely because the affected monopolists engage in activities arguably protected as "speech." This basic precept defeats appellants' two principal claims: that as cable operators, they are entitled to a "level" of First Amendment protection, *i.e.*, "strict scrutiny", that they assert renders the must carry provisions invalid, and that the must carry provisions impermissibly discriminate among classes of speakers. In fact, all "speakers"—even newspapers—are subject to regulation designed to protect competition without triggering heightened review, and it is perfectly permissible to protect any class of entities, even a particular class of "speakers," from anticompetitive conduct. This is precisely what Congress did in the Cable Act.

This Court has repeatedly affirmed that no heightened scrutiny applies to the application of pro-competitive measures simply because they affect speakers or "speech." In *Associated Press* v. *United States*, 326 U.S. 1 (1945),

[4] Congress specifically rejected a "complaint based, case-by-case process—so-called 'negative must carry.'" H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 75 (1992). Congress concluded:

> Such post hoc approaches permit significant economic harm to occur before relief is granted. By then it is simply too late. Given the current economic condition of free, local over-the-air broadcasting, an affirmative must-carry requirement is the only effective mechanism to promote the overall public interest.

Id.

this Court not only upheld an antitrust decree that prohibited newspaper publishers from withholding or directing distribution of their "speech," but also indicated that applying antitrust principles to protect certain classes of speakers from anticompetitive conduct advances First Amendment values:

> [The First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. . . . The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity.

Id. at 20; see also *Citizen Publishing Co.* v. *United States*, 394 U.S. 131, 139-40 (1969); *Lorain Journal Co.* v. *United States*, 342 U.S. 143, 155-56 (1951); *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 226-27 (1943); *cf. FTC* v. *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990) (no heightened First Amendment scrutiny of "expressive" concerted refusal to deal).

In *FCC* v. *National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978), this Court applied that principle in a context analogous to this case: general rules, embodying antitrust principles, that affected particular information industries. Invoking rational basis review, this Court upheld the FCC's cross-ownership regulation that limited newspaper owners' ability to "speak" through ownership of broadcasting stations. The Court set forth the principle that should resolve this case:

> [T]he regulations are in form quite similar to the prohibitions imposed by the antitrust laws. This

> court has held that application of the antitrust laws to newspapers is not only consistent with, but is actually supportive of the values underlying, the First Amendment.

Id. at 800 n.18. The only reason that this principle was "not a complete answer to the issues in this case" was that the FCC's rationale for the rule had "relied primarily on First Amendment rather than antitrust considerations." *Id.* Here, by contrast, there is no question of review of an agency's rationale, and Congress expressly and directly implemented "antitrust considerations." See *supra* pp. 14-28.[25]

Indeed, this Court routinely has upheld application of antitrust principles to types of restrictions on "speech" activities that are indistinguishable from those appellants assert. In *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951), this Court upheld an antitrust decree that required a newspaper to print advertisements that it previously had declined to publish from businesses that also advertised through a competing local broadcast station. This "must carry" obligation, limiting the newspaper's "editorial discretion," arose from the same circumstances found by Congress to necessitate the Cable Act provisions: the newspaper was a bottleneck monopoly that controlled essential distribution facilities, and it had denied access to advertisers for the purpose of harming its competitor (the local broadcast station). *Id.* at 148-49, 154-55.[26]

[25] One of two principal aspects of *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), also conforms to this analysis. This Court rested that decision upon the broadcaster's monopoly control over facilities essential to disseminating information. *Id.* at 386-91; *compare Lorain Journal Co.*, 342 U.S. at 147-48, 153-54. The decision is thus one of an extensive body of cases requiring bottleneck monopolists to provide access.

[26] *See also Associated Press* v. *United States*, 326 U.S. 1 (1945) (dissemination of news governed by consent decree); *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131 (1948) (restrictions upon distribution of motion pictures); *compare supra* pp. 23-28.

The competitive harm to the local broadcast station arose from the same competition for limited advertising dollars that Congress identified as the basis for the Cable Act's must carry requirement. See *Lorain Journal Co.*, 342 U.S. at 148-49; compare Cable Act § 2(a)(14)(15).

The must carry provisions also may be understood as requiring monopolists to divest themseleves of control over certain information dissemination facilities to foster competition. This Court has repeatedly upheld application of such restrictions to First Amendment "speakers." See, *e.g.*, *FCC* v. *National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978) (restriction on newspapers' acquisition of broadcast facilities); *Citizen Publishing Co.* v. *United States*, 394 U.S. 131, 139 (1969) (divestiture decree applied to monopoly newspapers); *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 226-27 (1943) (chain broadcasting restrictions).

These cases do not apply "heightened scrutiny" to regulations embodying general antitrust principles; instead, they invoke a more basic First Amendment principle regarding content neutrality. Measures designed to prevent anticompetitive conduct are "content neutral" because they are "*justified* without reference to the content of the regulated speech." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989) (emphasis in original) (internal quotation omitted); see also *Boos* v. *Barry*, 485 U.S. 312, 317 (1988) (opinion of O'Connor, J.); *Clark* v. *Community for Creative Non-Violence ("CCNV")*, 468 U.S. 288, 293 (1984); *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986); *cf. United States* v. *O'Brien*, 391 U.S. 367, 377 (1968) (measure not content based if government interest is "unrelated to the suppression of free expression").

The principle that heightened scrutiny does not apply when media entities are subject to procompetitive regulation also provides a complete response to appellants' claim that the must carry provisions unjustifiably discriminate among classes of speakers. See, *e.g.*, Brief for

Appellants Discovery Communications, Inc. at 23-25. "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward*, 491 U.S. at 791.[27] Competitive regulation affecting monopoly abuse by information providers *necessarily* has a differential effect. This is so because it targets the source of monopoly abuse and seeks to benefit the entities subject to that abuse. Thus, in *Associated Press* v. *United States*, 326 U.S. 1 (1945), particular speakers—combining newspapers—were subject to restrictions that favored a separate class: the disadvantaged newspaper competitors. In *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951), the monopoly newspaper was restricted to benefit the broadcast station subject to monopoly abuse. Broader restrictions also apply only to particular classes of speakers. See, *e.g.*, *FCC* v. *National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978) (newspapers restricted); *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943) (chain broadcasting rules).[28]

[27] In contrast, restrictions that do not reflect a neutral justification are subject to heightened scrutiny. *See, e.g., Riley* v. *National Fed'n of the Blind*, 487 U.S. 781, 789 n.5 (1988) (striking statute that compelled conveyance of state-specified message, after finding that "the desired and intended effect of the statute is to encourage some forms of solicitation and discourage others").

[28] In contrast, this Court has rejected distinctions among speakers that are not derived from the asserted neutral state interest. In *City of Cincinnati* v. *Discovery Network, Inc.*, 113 S. Ct. 1505 (1993), the Court deemed the city's distinction between commercial and non-commercial newsracks to be content-based because "the distinction bears no relationship *whatsoever* to the particular interests that the city has asserted [in safety and aesthetics]." *Id.* at 1514. Instead, the ordinance was deemed content-based because it rested on the assumption "that commercial speech has 'low value.'" *Id.* at 1517. Here, the differential regulation of cable operators and local broadcasters is derived directly and solely from cable operators' ability and incentive to abuse their monopolies, and local broadcasters' vulnerability to that abuse.

In the Cable Act, Congress followed the same pattern. The must carry provisions do benefit local broadcast stations, but they do so precisely because that class of "speakers" competes with cable monopolies for local advertising revenues and thus is subject to monopoly abuse. See Cable Act § 2(a)(15)-(16). This "incidental effect on some speakers," *Ward*, 491 U.S. at 791, reflects Congress' careful tailoring of measures designed to advance competition, rather than impermissible discrimination that triggers heightened First Amendment scrutiny.[29]

Similar principles of "neutrality" are derived from the cases involving the application of general tax laws to some information providers but not to others.[30] The issue becomes, again, whether the incidental effect on certain burdened speakers is justified without reference to content (*i.e.*, is truly a revenue generating measure) or seeks to burden particular views or disfavored speakers. In considering a tax that applied fully to cable television oper-

[29] Judge Williams, in dissent below, also asserted that the must carry provisions discriminated among classes of speakers, by unduly favoring local broadcast stations. This conclusion ignores that the competitive market is *local*, and it ignores both the unique competitive vulnerability of those stations and incentives that cable operators have to harm those direct competitors in the provision of programming to the home (and thus competitors for advertising revenue). *See also infra* pp. 37-38. Judge Williams's dissent in this regard particularly rested upon his conclusion that Congress had not made adequate findings concerning the existence of anticompetitive potential. *See* J.S. 63a-66a. That conclusion reflects inadequate respect for a coordinate Branch and ignores the substantial record support for Congress' conclusion that the district court majority found persuasive. *See supra* pp. 8-9.

[30] The analogy is not exact because taxation schemes may readily be made more general and thus operate without discriminating among speakers. In contrast, procompetitive measures directed at monopolies controlled by information producers necessarily must discriminate among speakers. Thus, a more stringent standard of review might apply to review of discriminatory tax schemes, but, as discussed in text, the Cable Act's must carry provisions readily pass even that test.

ators but not to certain newspaper and magazine sales, this Court held that "differential taxation of speakers, even members of the press, does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing, particular ideas." *Leathers* v. *Medlock*, 111 S. Ct. 1438, 1447 (1991). Appellants do not and cannot point to any danger that the must carry provisions could suppress particular ideas, or even suggest what those ideas may be. It is clear that the "status" of the cable operators as First Amendment "speakers" does not require the application of any heightened scrutiny.

II. THE MUST CARRY PROVISIONS DIRECTLY AND NARROWLY ADVANCE THE GOVERNMENT INTEREST IN PREVENTING THE CABLE MONOPOLISTS' ANTICOMPETITIVE CONDUCT.

Application to media entities or information providers of measures designed to protect competition, such as the must carry provisions, triggers no heightened scrutiny or tailoring requirement. See *supra* pp. 28-34; see also *FCC* v. *National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978); *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951); *Associated Press* v. *United States*, 326 U.S. 1 (1945). To the extent any heightened scrutiny were found applicable, it should be applied, as it usually is, only to ensure that the government in fact is pursuing the articulated, content-neutral state interest rather than an impermissible interest directed to suppressing particular messages. See, *e.g.*, *Ward* v. *Rock Against Racism*, 491 U.S. 781 (1989); *United States* v. *O'Brien*, 391 U.S. 367 (1968). If any doubt remains that the Cable Act's must carry provisions are designed to and in fact do protect against anticompetitive abuses, it is resolved by the close fit between Congress' expressly stated purpose of protecting against monopoly abuse and Congress' chosen means reflected in Section 4 of the Cable Act.

A governmental measure satisfies this heightened scrutiny if it is not "substantially broader than necessary" and if "the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 799 (quoting *United States* v. *Albertini*, 472 U.S. 675, 689 (1985)); see *Albertini*, 472 U.S. at 689 (same standard defines tailoring requirement of *United States* v. *O'Brien*, 391 U.S. at 377); *United States* v. *Edge Broadcasting Co.*, 113 S. Ct. 2696, 2705 (1993) (reaffirming *Ward* standard).[31] Similar "fit" requirements apply to review of time, place, and manner restrictions, see *Clark* v. *CCNV*, 468 U.S. 288, 298 (1984) (*O'Brien* standard equivalent to time, place, and manner standard), and to review of commercial regulations. See *United States* v. *Edge Broadcasting Co.*, 113 S. Ct. at 2705.

Section 4 of the Cable Act promotes Congress' interest in preventing anticompetitive abuses in a direct manner that is not "substantially broader than necessary." *Ward*, 491 U.S. at 800. Congress identified cable systems' incentive and ability to abuse monopoly power regarding a discrete class of competitors: local broadcast stations that compete for local advertising revenues. Cable Act § 2(a)(14). Section 4 benefits *only* that class of programmers. See 47 U.S.C. § 534(h)(1)(A) ("local commercial television station" is one "within the same television market

[31] *O'Brien* and related cases also require that the challenged regulation (1) be "within the constitutional power of the Government;" (2) "further[] an important or substantial governmental interest;" and (3) further an "interest [that] is unrelated to the suppression of free expression." *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968). The Commerce Clause empowers Congress to enact the must carry provisions. Congress has a substantial interest in preventing anticompetitive conduct, and particularly possesses an "important federal interest" in preventing cable systems from using their market power to harm providers of local broadcast services. *See Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 714 (1981); *supra* pp. 20-22. Preventing monopoly abuses is unrelated to the suppression of free expression. *See supra* Part I.

as the cable system"); *id.* at § 534(h)(2)(local low power station). Indeed, stations receive protection only in their local market. *Id.* at § 534(a), (h)(1)(B)(i)-(ii). Most importantly, the Act expressly provides that the "broadcasting station's market" shall be subject to a waiver process by which a cable operator can escape the must carry obligation upon a showing that doing so would "better effectuate the purposes of this section." *Id.* at § 534(h)(1)(C).

Congress' chosen remedy also responds directly to the identified anticompetitive activity. Congress determined that cable systems' monopoly power provided cable operators with the ability to harm competing local broadcast stations by denying access or repositioning stations to unfamiliar and disadvantageous channels. See Cable Act § 2(a)(15). Section 4 of the Act, in turn, imposes the requirements that cable operators not deny carriage to certain local broadcast station competitors, see 47 U.S.C. § 534(a), and not degrade their carried signals or reposition their channels. See *id.* at § 534(b)(4), (6). Requiring that a monopolist in control of essential facilities provide reasonable access, or divest itself of control over a portion of those facilities, are traditional antitrust remedies, even as applied against information providers.[32] Congress specifically considered and rejected proffered alternatives that were "not an enduring or feasible method of distribution and . . . not in the public interest." Cable Act § 2(a)(18), see also *supra* notes 14, 24.

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[32] *See, e.g., MCI Communications Corp.* v. *AT&T*, 708 F.2d 1081, 1132 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983); *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973); *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951); *Associated Press* v. *United States*, 326 U.S. 1 (1945); *see also FCC* v. *National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978) (limitation of control); *Citizen Publishing Co.* v. *United States*, 394 U.S. 131 (1969) (divestiture of control).

There is no doubt that the must carry provisions "leave open ample alternative channels for communication of the information." *Clark* v. *CCNV*, 468 U.S. at 293. Cable systems with small capacity or small numbers of subscribers are exempt; for larger cable systems, the Act guarantees that must carry stations will consume no more than a third of the activated channels on the system, and that program duplication will not occur. See 47 U.S.C. § 534(b).

Judge Williams, in dissent below, argued that requiring cable opertators to lease access, as provided by 47 U.S.C. § 532, was a less restrictive means of accomplishing Congress' objectives. J.S. 59a. This point, which had not been briefed in the district court, entirely mistakes (1) the nature of competition between broadcasters and cable systems; (2) cable systems' power to act anticompetitively; and (3) the operation of leased access. Leased access would be *less* efficacious because cable operators would remain free to discriminate among programmers, and thus able to employ their monopoly power to the disadvantage of particular local broadcast competitors.[33] Leased access would not be less burdensome; indeed, *appellants* assert that it would require precisely the forced carriage and divestiture of control that they find objectionable in the must carry provisions. See *e.g.*, Brief for Appellants Discovery Communications, Inc. at 47 n.21.[34] In addition, leased access, unlike the must carry provisions, does not precisely respond to the need to protect the particular local broadcasting competitors that

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[33] The FCC has concluded that the leased access provisions have proved largely ineffective. *See Competition, Rate Deregulation & the Comm'n's Policies Relating to the Provision of Cable Television Serv., Report*, 5 FCC Rcd. 4962, 4973-76 (1990).

[34] Even if leased access were less burdensome, under an *O'Brien* "intermediate scrutiny" analysis, a challenged measure is not "invalid simply because there is some imaginable alternative that might be less burdensome on speech." *United States* v. *Albertini*, 472 U.S. 675, 689 (1985).

the cable operator has the greater incentive and ability to harm.[35]

Appellants, in contrast, advance two principal objections to the "fit" between the must carry provisions and Congress' procompetitive aims. First, they claim that the must carry provisions "indiscriminately protect each and every broadcaster regardless of the quantity of local service available in the community and irrespective of the number of local outlets already carried by the cable operator." Brief for Appellants Discovery Communications, Inc. at 45 (internal quotation omitted). This reasoning is doubly flawed. Congress crafted the must carry provisions not to ensure a particular "quantity" of local broadcasting but to respond to the cable systems' incentive and ability to use their monopoly power against all local broadcast competitors. In addition, appellants' invitation to examine particular markets and the need to protect particular broadcast stations ignores this Court's holding that "the validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case." *Ward*, 491 U.S. at 801; see *United States* v. *Edge Broadcasting Co.*, 113 S. Ct. at 2705-06.

Second, appellants claim that, in some cases, a local broadcaster "is entitled to carriage even if it carries no local programming at all." Brief for Appellants Discovery Communications, Inc. at 45-46 (internal quotation omitted). This point *supports* the validity of the must carry provisions because it confirms both the Act's content neutrality and its careful "fit." Congress sought to protect local stations against economic harm based upon

[35] Leased access approaches would also undermine Congress' desire to prevent monopoly abuse. It would permit cable operators to use their market power to extract unreasonable payment for carriage. Such a result stands in stark contrast to congressional policies to promote competition.

their *competitive* position. That vulnerability to the cable systems' monopolistic abuse exists by virtue of competition for advertising dollars—*without respect to the content* of broadcast programming. Congress precisely crafted the must carry provisions to meet the anticompetitive danger that it had identified.

III. APPELLANTS' POSITION WOULD UNJUSTIFIABLY UNDERMINE AN ARRAY OF GENERAL REGULATORY MEASURES DESIGNED TO PREVENT ANTICOMPETITIVE CONDUCT WITHIN INFORMATION PRODUCTION AND TRANSMISSION INDUSTRIES.

As the preceding sections show, this case presents this Court with two quite different paradigms for addressing regulation of information providers. The first is the traditional First Amendment approach of upholding regulatory measures that are designed directly to prevent anticompetitive conduct, even when information providers possess the monopoly power subjected to regulation. See *supra* pp. 23-34. The second, suggested by appellants, would require this Court to determine whether a particular regulated entity is a "speaker" for First Amendment purposes and, if so, to subject to strict scrutiny even those governmental measures that advance traditional procompetitive objectives.[36]

The choice in this case between these two approaches is particularly important because technological developments are blurring the distinction between information transmission and information production: in the new "information age," many transmission monopolists will also be able to claim to be "speakers" through ownership of interests in text and programming services and through

[36] *See, e.g.*, Brief for Appellant Daniels Cablevision, Inc. at 5-23; Brief for Appellant Turner Broadcasting Sys., Inc. at 27-31; Brief for Appellant Time Warner Entertainment Co., L.P. at 21-31; Brief Amicus Curiae of the California Cable Television Ass'n in Supp. of Appellants at 3-19.

control over the mix of information customers may receive. Under the traditional First Amendment approach set forth in the preceding sections, the government could regulate their monopoly power and prevent competitive abuses, even with incidental effects on the mix of carried messages, but could not enact measures designed to and having the purpose of balancing or altering the content of those messages. Under appellants' theory of the case, the convergence of technologies would enable a vast range of monopolists to escape regulations designed to constrain their anticompetitive actions.

Until relatively recently, few First Amendment questions of this nature arose because a fairly sharp division existed between, on the one hand, control of transmission of information through essential, bottleneck monopolies and, on the other, the production of information, which might be distributed in any number of ways. Thus, the telephone industry largely confined itself to carriage of other persons' messages and provided few services or products that were entitled to First Amendment protection. Local telephone service was and is provided through a classic bottleneck monopoly.[37] Information providers, however, distributed their products in a variety of ways: for example, over telephone facilities, through public mails or private newspaper delivery, or through theaters and bookstores.

Generally, information distribution did not involve essential facilities, and the exceptions could be addressed by particular antitrust suits. See, *e.g.*, *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951); *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131 (1948); *Asso-*

[37] *See United States* v. *Western Elec. Co.*, 900 F.2d 283 (D.C. Cir.), *cert. denied*, 498 U.S. 911 (1990); *MCI Telecommunications Corp.* v. *AT&T*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983); *United States* v. *Western Elec. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd*, *Maryland* v. *United States*, 460 U.S. 1001 (1983).

ciated Press v. *United States*, 326 U.S. 1 (1945). The exception to this neat division was television and radio broadcasting, which combined transmission with information production—and for which this Court developed a sui generis First Amendment jurisprudence to match Congress' sui generis regulatory scheme. See, *e.g.*, *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969); 47 U.S.C. §§ 301-333.

Increasingly, however, this traditional division is rapidly disintegrating.[38] The same entities that control wire-based facilities that are bottleneck monopolies also use those facilities to deliver their own programming and selection of programming and information services. As this case shows, cable system operators combine both functions, through both their ownership of programming they transmit and through their ability to shape the mix of programming available to viewers. Satellite and other wireless broadcast services present similar issues. Local telephone companies increasingly provide various video and text services entitled to First Amendment protection. Entities that manufacture and control equipment that allows customers to receive information services also increasingly seek to develop programming and other protected "speech" products. In addition, information providers traditionally entitled to First Amendment protections—for example, publishers, newspapers, and libraries—increasingly rely upon potentially monopolistic electronic transmission to distribute their products, through electronic publishing, interactive text services, or otherwise. As the recent spate of mergers and joint ventures between information providers and transmitters shows, this trend will only accelerate.

[38] *See generally* Walter G. Bolter, *Telecommunications Policy for the 1990s and Beyond* (1990); Gerald R. Faulhaber, *Telecommunications In Turmoil: Technology and Public Policy* (1987); Ithiel de Sola Pool, *Technologies of Freedom* (1983).

The defining characteristic of regulation of information transmission facilities has been the government's application of general rules to particular industry segments in order to prevent anticompetitive conduct. The must carry provisions are merely one of a vast array of such regulations, affecting nearly every segment of the telecomunications industry. Because many of these transmission facilities are enormously expensive and allow declining marginal transmission costs, they continue to present broad opportunities for market power abuses.[39]

Of particular importance is the array of regulations that affect carriage of information products that are, or may be, entitled to First Amendment protection. For example, the FCC has for more than a decade struggled to craft rules to guide the provision by telephone companies of "enhanced services," which include many value-added, "multimedia," and other information products.[40] Similarly, complex rules govern when telephone companies may provide video services,[41] and Congress is considering legislation addressing related issues.[42] Telephone com-

[39] *See, e.g., United States* v. *Western Elec. Co.*, 900 F.2d 283 (D.C. Cir.) (anticompetitive potential of local telephone companies' bottleneck monopoly), *cert. denied*, 498 U.S. 911 (1990).

[40] *See, e.g., Second Computer Inquiry, Final Decision*, 77 F.C.C.2d 384, *modified*, 80 F.C.C.2d 50 (1980), *further modified* 88 F.C.C.2d 512 (1981), *aff'd, Computer & Communications Industry Ass'n* v. *FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983); *Computer III Remand Proceeding, Notice of Proposed Rulemaking*, 5 FCC Rcd. 5242, *further proceedings*, 6 FCC Rcd. 174 (1990) (Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards), *further proceedings*, 6 FCC Rcd. 7571 (1991), *pet. for review pending, California* v. *FCC*, No. 92-70083 (9th Cir. filed Feb. 14, 1993).

[41] *See, e.g., Telephone Company-Cable Television Cross-Ownership Rules, Second Report & Order*, 7 FCC Rcd. 5781, 5820-21 (1992).

[42] *See National Communications Competition and Information Infrastructure Act of 1993*, H.R. 3636, 103d Cong., 1st Sess. (1993); *see also, Antitrust Reform Act of 1993*, H.R. 3626, 103d Cong., 1st Sess. (1993).

panies' provision of "information services" is still affected indirectly by an antitrust consent decree as well as by FCC regulations, and legislation is pending in Congress to address these issues as well.[43]

A particularly effective and pervasive governmental response to control over bottleneck facilities has been to require that monopolists provide various forms of reasonable access to entities that might be subject to anticompetitive harm. For example, certain local telephone companies must provide non-discriminatory, equal access pursuant to an antitrust consent decree,[44] but FCC regulations impose like requirements on local telephone companies generally.[45] Congress, too, is considering imposing similar access duties.[46] Along with telephone companies, satellite carriers are subject to a statutory "common carrier" duty, which prohibits unreasonable discrimination among customers and requires provision of service when feasible. See, *e.g.*, 47 U.S.C. §§ 201(a)-(b), 202(a). Cable operators are subject to certain "leased access" requirements, and the 1992 Cable Act imposes various nondiscrimination requirements that are not at issue in this case. See 47 U.S.C. §§ 532, 536, 548.

Appellants' interpretation of the First Amendment poses substantial risk to the viability of this entire range

[43] *See, e.g., Modification of Final Judgment*, Decree § II(D) (interexchange restriction), *cited in, United States* v. *Western Elec. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd Maryland* v. *United States*, 460 U.S. 1001 (1983); *Telecommunications Infrastructure Act of 1993*, S. 1086, 103d Cong., 1st Sess. (1993); H.R. 3626, *supra*.

[44] *See Modification of Final Judgment, supra*, at Decree §§ II(B), IV(F), App. B.

[45] *MTS & WATS Market Structure, Third Report & Order*, 93 F.C.C.2d 241, *recon.*, 97 F.C.C.2d 682 (1983), *further recon.*, 97 F.C.C.2d 834, *aff'd in part, remanded in part, NARUC* v. *FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985).

[46] *See* H.R. 3636, *supra*.

of government efforts to prevent anticompetitive abuses in these monopoly-ridden industries. First, appellants concede that protecting competition is a legitimate if not compelling interest, even in these industries, but assert that the government is limited to pursuing this interest through individualized, ad hoc enforcement efforts, such as antitrust suits. See *supra* pp. 26-27. They would bar the FCC or Congress from enacting regulations or statutes that effectively target particular competitive problems within these industries.[47] And, as noted above, generally applicable regulations are the preferable means for protecting fundamental rights. See *supra* pp. 27-28. But, in many ways, the distinction appellants attempt to draw also is illusory. For example, much of the telephone industry is regulated through administration of a consent decree, but Congress is now considering legislation that would supersede aspects of the decree.[48] The actual impact on information providers of the "regulation" of their activities is not affected by whether the "rules" govern-

[47] The local telephone companies acknowledge that "common carrier" requirements that force them to carry the messages of their competitors are consistent with the First Amendment. *See* Brief of United States Tel. Ass'n at 23. This is so even though "common carrier" obligations are precisely the industry-specific measures designed to prevent anticompetitive conduct that the local telephone companies elsewhere attack, *id.* at 22, and even though the common carrier obligations are "far more extensive than a must-carry rule." *Id.* at 23. In fact, appellants' arguments, by denying the government the ability to regulate through general rule to preclude an information industry's monopolistic abuses, would also call into question these "common carrier" obligations that are essential to regulation of the telecommunications industry. And, contrary to the telephone companies' suggestion, there is no basis to believe that video providers—either the telephone companies themselves or cable operators—will relinquish their bottleneck control over information by providing general access to competitors.

[48] *See Antitrust Reform Act of 1993*, H.R. 3626, 103d Cong., 1st Sess. (1993).

ing competition are set forth in a judicial decree, regulation, or statute.[49]

Second, appellants' novel theory threatens the government's ability to regulate these emerging and established information industries because, in appellants' view, the monopolist's *status* as an information provider makes it a First Amendment "speaker" entitled to the highest degree of protection—and to heightened "scrutiny" of any regulation—without regard to whether the regulation targets anticompetitive conduct rather than information content. Under appellants' theory, even a regulation focused upon anticompetitive harm will still be subject to strict scrutiny whenever that regulation—like the must carry provisions or any other effective "access" based requirement—"discriminates" between the monopolist "speaker" and the speakers shielded from anticompetitive abuse. Thus, Congress and the FCC would effectively be barred from establishing legislation or regulation to govern these industries.

In contrast, adhering to traditional First Amendment doctrine would not unsettle this vast range of procompetitive regulation and would continue to protect core First Amendment values. Thus, Congress or the FCC could enact measures that directly address the structural anticompetitive ability and incentives that are pervasive and increasing in many of these information transmission industries. At the same time, ordinary judicial review under the First Amendment would ensure that such regu-

[49] Given the size of the affected industries, appellants' requirement of "individualized" regulation through enforcement actions would result in no regulation at all. The FCC recently announced that it would seek to hire scores of new employees to review and analyze cable operators' filings in response to the rate regulation imposed by the Cable Act. That personnel requirement would increase exponentially if the FCC, or the Justice Department, were required to investigate, monitor and seek judicial redress for complaints of anticompetitive action against individual local broadcasters.

lation is confined to content neutral purposes, and never serves to burden particular messages or to target particular speakers based upon their views.

The must carry provisions at issue in this case present precisely this choice. Congress, relying upon an extraordinary record and findings, has regulated through a general rule directly to achieve classic antitrust objectives of preventing anticompetitive abuses of monopoly power. That conclusion traditionally ends the First Amendment inquiry. Nonetheless, the subjects of that regulation object that strict scrutiny is required because they engage in protected editorial and programming activities. To accept that claim would challenge the full range of Congressional and FCC regulatory actions that are directed to the emerging information carriage and production industries. Such regulatory upheaval is not required by the First Amendment, and therefore, appellants' challenges should be rejected.

CONCLUSION

For the foregoing reasons, the judgment of the three-judge district court should be affirmed.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

Appeal from the United States District Court
for the District Of Columbia

BRIEF OF INTERVENORS-APPELLEES ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS, PUBLIC BROADCASTING SERVICE, AND CORPORATION FOR PUBLIC BROADCASTING

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QUESTION PRESENTED

Intervenors-appellees, the Association of America's Public Television Stations, Public Broadcasting Service and Corporation for Public Broadcasting, address the following question:

Whether Congress, consistent with the First Amendment, may require cable operators to carry a limited number of noncommercial educational television stations in order to redress the severe competitive imbalances that exist in the video marketplace and preserve the institution of local public broadcasting.

RULE 29.1 LIST OF PARENT COMPANIES AND SUBSIDIARIES

Pursuant to Rule 29.1, the Association of America's Public Television Stations, Public Broadcasting Service and Corporation for Public Broadcasting, through undersigned counsel, hereby certify that they have no parent companies, subsidiaries, or affiliates that have any outstanding securities in the hands of the public.

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Associated Press v. *United States*, 326 U.S. 1 (1945) 15, 20, 22, 25, 26, 27, 28, 29, 35, 43

Berkshire Cablevision v. *Burke*, 571 F. Supp. 976 (D.R.I. 1983), *vacated as moot*, 773 F.2d 382 (1st Cir. 1985) 32

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Carlson v. *Village of Union City*, 601 F. Supp. 801 (W.D. Mich. 1985) 32

Central Telecommunications, Inc. v. *TCI Cablevision, Inc.*, 800 F.2d 711 (8th Cir. 1986), *cert. denied*, 480 U.S. 910 (1987) . . . 31, 32

Century Communications Corp. v. *FCC*, 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988) 9, 10, 11, 12, 34, 35, 45

Century Federal, Inc. v. *City of Palo Alto*, 710 F. Supp. 1552 (N.D. Cal. 1987) 32

TABLE OF AUTHORITIES (cont.)

Cases: Page

Chicago Cable Communications v. *Chicago Cable Commission*, 879 F.2d 1540 (7th Cir. 1989), *cert. denied*, 493 U.S. 1044 (1990) 31, 43

Citizen Publishing Co. v. United States, 394 U.S. 131 (1969) 27

City of Cincinnati v. *Discovery Network, Inc.*, 113 S. Ct. 1505 (1993) 23

City of Renton v. *Playtime Theaters, Inc.*, 475 U.S. 41 (1986) 22

Columbia Broadcasting System, Inc. v. *Democratic National Committee*, 412 U.S. 94 (1973) 41

Committee For An Independent P-I v. *Hearst Corp.*, 704 F.2d 467 (9th Cir.), *cert. denied*, 464 U.S. 892 (1983) 28

Community Communications Co. v. *City of Boulder*, 660 F.2d 1370 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982) 32

Daniels Cablevision v. *FCC*, Civ. No. 92-2292, 1993 W.L. 393000 (D.D.C. Sept. 16, 1993), *appeal docketed*, No. 93-5350 (D.C. Cir. Nov. 22, 1993) 18

Erie Telecommunications, Inc. v. *City of Erie*, 659 F. Supp. 580 (W.D. Pa. 1987), *aff'd on other grounds*, 853 F.2d 1084 (3d Cir. 1988) 25, 32

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FCC v. *Midwest Video Corp.*, 440 U.S. 689 (1979) 37

FCC v. *National Citizens Commission for Broadcasting*, 436 U.S. 775 (1978) 27, 28, 39

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Kovacs v. *Cooper*, 336 U.S. 77 (1949) 40

Lamprecht v. *FCC*, 958 F.2d 382 (D.C. Cir. 1992) 41, 42

Leathers v. *Medlock*, 111 S. Ct. 1438 (1991) . . 30, 39

Lorain Journal Co. v. *United States*, 342 U.S. 143 (1951) 27, 28, 38

Loretto v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) 30, 31

Metro Broadcasting, Inc. v. *FCC*, 497 U.S. 547 (1990) 41, 43

Miami Herald Publishing Co. v. *Tornillo*, 418 U.S. 241 (1974) 35, 38

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Omega Satellite Products Co. v. City of Indianapolis, 694 F.2d 119 (7th Cir. 1982) . . 30, 32

Pacific Gas & Electric Co. v. *Public Utilities Commission*, 475 U.S. 1 (1986) 38

Preferred Communications, Inc. v. *City of Los Angeles*, 68 Rad Reg.2d (P&F) 121 (C.D. Cal. 1990) 32

PruneYard Shopping Center v. *Robins*, 447 U.S. 74 (1980) 38

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Riley v. *National Federation of the Blind, Inc.*, 487 U.S. 781 (1988) 38

Rostker v. *Goldberg*, 453 U.S. 57 (1981) 41

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Simon & Schuster, Inc. v. *New York State Crime Victims Board*, 112 S. Ct. 501 (1991) 23

Southeastern Promotions Ltd. v. *Conrad*, 420 U.S. 546 (1975) 21

Cases: Page

Storer Cable Communications v. *City of Montgomery*, 806 F. Supp. 1518 (M.D. Ala. 1992) 25

Swift and Co. v. United States, 196 U.S. 375 (1905) 44

Teleprompter Corp. v. *Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974) 7, 36

Telesat Cablevision, Inc. v. *City of Riviera Beach*, 773 F. Supp. 383 (S.D. Fla. 1991) 32

Texas v. *Johnson*, 491 U.S. 397 (1989) 22

United States v. *American Telephone and Telegraph Co.*, 552 F. Supp. 131 (D.D.C. 1982) 28

United States v. *Midwest Video Corp.*, 406 U.S. 649 (1972) 33

United States v. *New York Times Co.*, 328 F. Supp. 324 (S.D.N.Y.), *remanded*, 444 F.2d 544 (2d Cir.), *aff'd*, 403 U.S. 713 (1971) 39

United States v. *O'Brien*, 391 U.S. 367 (1968) 16, 19, 20, 21, 29, 40, 45

United States v. *Southwestern Cable Co.*, 392 U.S. 157 (1968) 6, 32, 33, 43

Cases: Page

United States v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956) 27

United States v. *Western Electric Co.*, 673 F. Supp. 525 (D.D.C. 1987) 37

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Warner Cable Communications, Inc. v. *City of Niceville*, 911 F.2d 634 (11th Cir. 1990) *cert. denied*, 111 S. Ct. 2839 (1991) 31

Younger v. *Harris*, 401 U.S. 37 (1971) 21

Statutes:

Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 . . . . . 9, 17
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47 U.S.C. § 542(b) (1988) 30
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Copyright Revision Act of 1976, 17 U.S.C.
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Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 4, 106 Stat. 949 (1992) 6, 43

Legislative Material:

H.R. Rep. No. 628, 102d Cong., 2d Sess. (1992) . . . . . *passim*

H.R. Rep. No. 682, 101st Cong., 2d Sess. (1990) 12

H.R. Rep. No. 934, 98th Cong., 2d Sess. (1984) *reprinted in* 1984 U.S.C.C.A.N. 4655, 4707 9

H.R. Rep. No. 1476, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5703-04 8

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H.R. Rep. No. 572, 90th Cong., 1st Sess. (1967), *reprinted in* 1967 U.S.C.C.A.N. 1799, 1801 3

S. Rep. No. 221, 102d Cong., 2d Sess. (1992), *reprinted in* 1992 U.S.C.C.A.N. 834, 839 . . . . . 4, 5

S. Rep. No. 92, 102d Cong., 1st Sess. (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1135 . . . . . 6, 15, 16, 34

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S. Rep. No. 222, 90th Cong., 1st Sess. (1967), *reprinted in* 1967 U.S.C.C.A.N. 1772, 1778-79 3

Cable TV Consumer Protection Act of 1991: Hearing on S. 12 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation, 102d Cong., 1st Sess. (1991) 11

Cable TV Consumer Protection Act of 1989: Hearings on S. 1880 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation, 101st Cong., 2d Sess. (1990) 11

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Cable Television Regulation: Hearings on H.R. 1303 and H.R. 2546 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce, 102d Cong., 1st Sess. 837 (1991) 4, 11, 24, 33, 35, 40, 41, 47, 48

Cable Television Regulation (Part 1): Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce, 101st Cong., 2d Sess. (1990) . . 11

Cable Television Regulation (Part 2): Hearing Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce, 101st Cong., 2d Sess. (1990) . . . 11

Must Carry: Hearing on Cable Carriage of Local Broadcast Signals Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation, 101st Cong., 1st Sess. (1989) 11

Oversight of Cable TV: Hearings on the Oversight of the 1984 Cable Telecommunications Act Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation, 101st Cong., 1st Sess. (1989) 11

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Cable Television: Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce, 100th Cong., 2d Sess. (1988) 11

Administrative Material:

FCC Final Report and Order, 58 Fed. Reg. 17,350, 17,351 (1993) (to be codified at 47 C.F.R. Part 76) 17

47 C.F.R. § 73.606 (1992) 3

CATV, Second Report and Order, 2 F.C.C.2d 725 (1966) 8, 13, 39

Notice of Proposed Rulemaking: Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates, 5 FCC Rcd. 259 (1990) 12

Report on Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, 5 FCC Rcd. 4962 (1990) 8, 9, 12

Notice of Inquiry: Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, MM Docket No. 89-600 (FCC 89-345) (released Dec. 29, 1989) 12

Administrative Material: Page

Notice of Inquiry Into the Availability of Broadcast Television Signals on Cable Television Systems, MM Docket No. 88-138 (FCC 88-129) (released May 10, 1988) 12

Cable System Broadcast Signal Carriage Survey, A Staff Report by the Policy and Rules Division, FCC Mass Media Bureau (Sept. 1, 1988) . .12, 13, 35, 44, 49

CATV Syndicated Program Exclusivity Rules, 79 F.C.C.2d 663 (1980), *aff'd sub nom. Malrite T.V.* v. *FCC*, 652 F.2d 1140 (2d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982) 8

Cable Television Report and Order, 36 F.C.C.2d 143 *on reconsid.*, 36 F.C.C.2d 325 (1972), *aff'd sub nom. American Civil Liberties Union* v. *FCC*, 523 F.2d 1344 (9th Cir. 1975) . . . 8

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

No. 93-44

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,
v.
FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

Appeal From The United States District Court
For The District of Columbia

BRIEF OF INTERVENORS-APPELLEES ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS, PUBLIC BROADCASTING SERVICE, AND CORPORATION FOR PUBLIC BROADCASTING

Intervenors-appellees, the Association of America's Public Television Stations, Public Broadcasting Service, and Corporation for Public Broadcasting (collectively "the public broadcasters"), submit this brief in support of the constitutionality of Section 5 of the Cable Television Consumer Protection and Competition Act of 1992, 47

U.S.C.A. § 535 (Supp. 1993) ("1992 Cable Act").[1/] Section 5, which enacts must carry requirements with respect to noncommercial educational television stations, is in important respects distinct from Section 4, its commercial counterpart. Section 5 should be assessed in light of the unique history of public television, which has long occupied a critical and protected niche in the nation's telecommunications infrastructure. That niche, and the considerable governmental and public commitment that helped create it, are especially threatened by cable's emergence as a bottleneck in the free flow of video information. Section 5 is therefore supported not only by the same substantial governmental interests that support Section 4, but also by additional governmental interests that apply only to public television. Further, Section 5 will have a substantially more limited impact on cable operators than Section 4. Thus, while the public broadcasters fully endorse the constitutionality of Section 4, they also submit that there are independent reasons to uphold Section 5.

STATEMENT

Section 5 of the 1992 Cable Act was enacted against the backdrop of public television's special position in the telecommunications infrastructure, the unique characteristics of cable television, and the threat that cable presents to the continued viability of local public television.

[1/] The Association of America's Public Television Stations ("APTS") and Public Broadcasting Service ("PBS") are non-profit membership organizations, whose members are the licensees of virtually all of the nation's public television stations. APTS serves as the national representative of these stations, presenting their views and participating in proceedings before Congress, executive and administrative agencies, and in other activities. PBS provides national program distribution and other program-related services to the nation's public television stations. The Corporation For Public Broadcasting ("CPB") is the private, non-profit corporation authorized by the Public Broadcasting Act of 1967 and financed primarily by federal appropriations to facilitate and promote a nationwide system of public broadcasting. Collectively, APTS, PBS, and CPB represent the broadcast stations that are the beneficiaries of Section 5 of the Cable Act.

A. The Special Role of Public Television.

Congress repeatedly has found that public television serves an important purpose because "the economic realities of commercial broadcasting do not permit widespread commercial production and distribution of educational and cultural programs which do not have a mass audience appeal." H.R. Rep. No. 572, 90th Cong., 1st Sess. (1967), *reprinted in* 1967 U.S.C.C.A.N. 1799, 1801 (citing testimony of the presidents of each of the three networks). To overcome this market failure, Congress and the FCC have worked together to fashion a system of locally oriented public television stations that would be "uniquely fitted" to offer "programs of high quality, obtained from diverse sources." S. Rep. No. 222, 90th Cong., 1st Sess. (1967), *reprinted in* 1967 U.S.C.C.A.N. 1772, 1778-79; *see generally* 47 U.S.C.A. § 396(a) (1991 & Supp. 1993).[2/]

The first step toward a special, universally available, noncommercial television service was taken in 1952 when the FCC, pursuant to its statutory mandate to distribute the available broadcast television channels "in a fair, efficient, and equitable manner" among communities across the country, 47 U.S.C. § 307(b) (1988), reserved nearly one-third of the nation's broadcast television channels for noncommercial educational licensees. *See* Television Table of Allotments, 47 C.F.R. § 73.606 (1992). Since that time, a primary objective of our national telecommunications policy has been to assure that all Americans, wherever they live and whatever their economic circumstances, have access to locally-controlled public television services. Today, the FCC's initial reservation of channels has grown into a noncommercial broadcast infrastructure of more than 349

[2/] The volume of Supplement IV 1992 to the United States Code containing Title 47 has not yet been published, and therefore citations to recently amended sections of that title are to West's United States Code Annotated.

stations spread across the country's approximately 211 television markets. These noncommercial licensees include a diverse array of local school boards and other state and local agencies, public and private colleges and universities, and a variety of other local and community-based non-profit organizations dedicated to providing educational, informational, cultural, and alternative noncommercial programming. Over 98 percent of American homes have access to at least one noncommercial educational broadcast service either through cable or over-the-air broadcasts.[3/]

The substantial funding necessary to construct and operate this infrastructure has come from a wide variety of public and private sources. As recited in the 1992 Cable Act, the federal government has expended nearly $3 billion on public broadcasting since 1969. § 2(a)(8)(C). State and local governments have contributed nearly $5 billion since 1972. H.R. Rep. No. 628, 102d Cong., 2d Sess. 69 (1992) ("1992 House Report"). Despite these substantial governmental expenditures, the development and operation of the system would not have been possible without private contributions (primarily from viewers), totalling over $6 billion during the same period. *Id.* *See* 1992 Cable Act § 2(a)(8).

Local stations serving their communities are the bedrock of the public television system. As Congress recognized, local stations are "[a]t the heart of public broadcasting." S. Rep. No. 221, 102d Cong., 2d Sess. 6 (1992), *reprinted in* 1992 U.S.C.C.A.N. 834, 839. These stations provide locally oriented news and public affairs programs, locally oriented instructional programming, programming providing outlets to local cultural and artistic groups, and coverage of local and state governments.

3/ *Cable Television Regulation: Hearings on H.R. 1303 and H.R. 2546 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 837 (1991) ("1991 House Hearings").

Nowhere is the local orientation of public television more evident than in its commitment to educational programming. Nearly 70,000 schools with over 29 million elementary and secondary students use public television instructional programming every day. Public television stations have prepared thousands of adults, many of them disabled or of modest means and with no other effective option, to earn a General Educational Development certificate — the equivalent of a high-school diploma — through telecourses. In college education, public television stations and the PBS Adult Learning Service provide degree track courses through accredited colleges throughout the country. Since 1981, local stations, in conjunction with more than 1,800 colleges and universities, have brought telecourses to 1.4 million college students.

Public television stations also serve as vital local community institutions. All across the country, public television stations are actively engaged in their communities, serving as catalysts for local attention to and action on vital issues of local importance such as literacy, racial harmony, child care, health care, AIDS, and the environment. *See* S. Rep. No. 221, *supra*, at 6-7, *reprinted in* 1992 U.S.C.C.A.N. 839-40. In addition, public television has become a leader in providing innovative video services to groups of viewers that are too few or too impoverished to attract other broadcast service. For example, public broadcasting has been a principal source of programming for the disabled by developing closed captioning for the hearing impaired and descriptive video services for the visually impaired. *See* 1992 House Report at 101. Public broadcasting also remains a crucial source of programming for non-English speaking audiences by simulcasting selected programs in a second language. *Id.* Indeed, just prior to passage of the 1992 Cable Act, Congress found in related legislation that public television stations are "valuable local community resources . . . to address national concerns and solve local problems" and that "it is in the public interest for the Federal Government to ensure that all citizens of the United States have access to public

telecommunications services." Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 4, 106 Stat. 949 (1992) (amending 47 U.S.C. § 396(a)).

B. Cable's Role As A Conduit.

Cable television originated as a "community antenna" service — a conduit for the retransmission of broadcast television signals. *See United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 163-64 (1968).[4/] This core cable function was, and remains, of particular importance to the public broadcasting system. In its early years, the public broadcasting system covered only a fraction of the area covered by commercial broadcast stations, and cable extended public television's reach into some of those unserved areas. Although many more public television stations are now on the air, nearly two-thirds of them are located in the hard-to-receive UHF frequency band (broadcast channels 14-69). *See* 1992 House Report at 70. UHF signals are more easily obstructed by terrain, man-made obstacles and atmospheric conditions than are VHF signals (broadcast channels 2-13). Many households can receive UHF signals only by means of outdoor antennas, which viewers often find too difficult or too expensive to install or maintain and which are, in any event, banned or severely restricted in many communities and developments across the country. *See id.* at 54. Thus, cable remains an important conduit for the vast majority of public television stations that broadcast on UHF frequencies.[5/]

[4/] *Accord Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 707 (1984) ("cable operators simultaneously receive and channel to their subscribers a variety of signals from many sources without any advance notice about the . . . content of" the programming provided).

[5/] Today, cable operators also serve a conduit function for programming produced for sale by cable programmers. The average cable system presently has the capacity to carry about 36 channels, *see* S. Rep. No. 92, 102d Cong., 1st Sess. 3 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1135 ("1991 Senate Report"), but there are more than 80 cable (continued...)

C. Cable's Role As A Gatekeeper And Prior Regulatory Responses.

Cable's primary role as a conduit gives it a unique status as the "gatekeeper" into cable homes. As Congress has found, "[a]ll evidence indicates that, once a television set is connected to a cable system, consumers will not watch signals available only over-the-air." 1992 House Report at 54. With over 60% of all television households now receiving cable, *see* 1992 Cable Act § 2(a)(3), cable operators have enormous control over what programming viewers can see. This gatekeeper function, unless otherwise restrained, gives cable systems the ability to "cherry pick" broadcast stations, dropping or giving unfavorable channel placement to any station perceived to be in competition with the cable operator's preferred programming, or otherwise considered to be less desirable, less popular, or less profitable.

Cable's power as gatekeeper has been greatly enhanced by its freedom to use the programming of broadcast stations without their consent. When cable was a pure "conduit," doing nothing but retransmitting broadcast signals, the Supreme Court found this passive activity to be so devoid of expressive content that it did not constitute a "performance" for purposes of the copyright laws.[6/] And when Congress

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[5/](...continued)
programmers. J.A. at 303. Consequently, not all cable programmers can obtain carriage on most cable systems, even without any requirement that cable operators carry broadcast signals. Recently, a few cable operators have begun to produce and transmit their own original programming. However, there has been no showing that the must carry requirements of the 1992 Cable Act threaten to displace any of the original programming produced by cable operators.

[6/] *See Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390 (1968); *Teleprompter Corp.* v. *Columbia Broadcasting Sys., Inc.*, 415 U.S. 394, 402-05 (1974) (extending *Fortnightly* to cable systems that import distant broadcast signals).

did finally subject cable to copyright liability for carrying broadcast signals, it granted cable a "compulsory" license that perpetuated cable's ability to carry all local signals without permission, without cost, and without any restrictions as to channel placement. *See* Copyright Revision Act of 1976, 17 U.S.C. § 111 (1988 & Supp. IV 1992). The FCC has concluded that the compulsory license scheme "forced the cable television industry and the broadcast television industry into a significantly imbalanced contract" and contributed significantly to the cable industry's "explosive" growth. *Report on Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 FCC Rcd. 4962, 5038 (¶ 147) (1990) ("1990 FCC Cable Report").

In adopting the 1976 Copyright Act, Congress was aware that cable systems might abuse their power and deny local broadcast stations access to the viewers they were licensed to serve. But Congress relied on the fact that, in the mid-1960s, the FCC had adopted a careful array of regulations governing cable's use of broadcast signals — foremost of which were the must carry rules — that were designed to protect the universal reach of the local broadcast system.[7/]

With minor fine-tuning by the FCC, often at the request of the cable industry, the must carry rules remained in place for twenty years.[8/] It was during this period of assured universal availability that the nation invested massively in the

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[7/] *See* H.R. Rep. No. 1476, 94th Cong., 2d Sess. 89 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5703-04; 1992 House Report at 48; *see also CATV, Second Report and Order*, 2 F.C.C. 2d 725 (1966).

[8/] *See, e.g., Cable Television Report and Order*, 36 F.C.C.2d 143, *on reconsid.*, 36 F.C.C.2d 325 (1972), *aff'd sub nom. American Civil Liberties Union* v. *FCC*, 523 F.2d 1344 (9th Cir. 1975); *see also CATV Syndicated Program Exclusivity Rules*, 79 F.C.C.2d 663 (1980), *aff'd sub nom. Malrite T.V.* v. *FCC*, 652 F.2d 1140 (2d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982) (reaffirming importance of must carry rules).

public television system and that system truly began to fulfill its considerable promise. Cable, too, prospered under the must carry regime, extending its reach from fewer than two million households in 1965 to over 36 million households, or 43 percent of the nation, by 1985.

In 1984, Congress substantially deregulated the cable industry and preempted most state and local controls that were viewed as restraints on its growth. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (codified in scattered sections of 47 U.S.C.). However, while deregulating the cable industry, Congress left the compulsory license in place. In so doing, Congress relied on the fact that the FCC's must carry rules would remain as a crucial counterweight to cable's freedom from copyright liability. "Given the current compulsory licensing system for cable systems under the copyright laws, if the 'must carry' rules were eliminated, local cable operators might not carry some local broadcast stations." S. Rep. No. 67, 98th Cong., 1st Sess. 11 (1983). Because of "the importance of local programming," Congress saw "a need to continue the existing 'must carry' rules to protect the public interest." *Id.* at 11-12; *see* H.R. Rep. No. 934, 98th Cong., 2d Sess. 70 (1984) *reprinted in* 1984 U.S.C.C.A.N. 4655, 4707; *see also* 1992 Cable Act § 2(a)(17).

This careful balance between the compulsory license and the FCC's must carry rules was upset in 1985 in *Quincy*,[9/] and again in 1987 in *Century*,[10/] when the D.C. Circuit found two different versions of the Commission's must carry rules invalid under the First Amendment. Although both decisions stressed that must carry requirements were not *per*

[9/] *Quincy Cable TV, Inc.* v. *FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

[10/] *Century Communications Corp.* v. *FCC*, 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988).

se invalid under the First Amendment,[11] both concluded that the Commission had failed to justify its rules on the factual record.[12] The net effect of these decisions was to eliminate the must carry rules and throw the video industry into significant imbalance. As the FCC found in 1990, the elimination of must carry rules "drastically" and unfairly changed the relationship between the cable and broadcast industries and threatened the universal availability of public broadcast signals. *See* 1990 FCC Cable Report, 5 FCC Rcd. at 5037-38 (¶ 146); *see also* P. Goldstein, *Copyright* § 5.8.2 at 644 (1989) ("The judicial determination that the Commission's 'must carry' rules violate the first amendment undercut an important foundation stone of [the compulsory license]."). The FCC therefore unequivocally recommended that Congress enact must carry requirements for public television. *See* 1990 FCC Cable Report, 5 FCC Rcd. at 5044 (¶ 163).[13]

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[11] *See Century*, 835 F.2d at 304 ("We do not suggest that must-carry rules are per se unconstitutional, and we certainly do not mean to intimate that the FCC may not regulate the cable industry so as to advance substantial government interests."); *Quincy*, 768 F.2d at 1463 ("[W]e have not found it necessary to decide whether any version of the mandatory carriage rules would contravene the First Amendment.").

[12] The FCC at that time had little enthusiasm for the must carry rules, as reflected in its decisions not to seek certiorari in either case.

[13] Predictably, appellants make much of the D.C. Circuit's decisions in *Quincy* and *Century*. There are, however, major differences between Section 5 of the 1992 Cable Act and the rules that were found suspect in those cases. First, Section 5's impact is far narrower than those rules. For example, the rules struck down in *Quincy* required some cable systems to devote all of their channel capacity to must carry signals and made no allowances for limiting carriage of duplicative programming. *See Quincy*, 768 F.2d at 1440, 1445-46 n.24, 1460. Second, unlike those rules, which were based on FCC predictions and intuitions that were found by the D.C. Circuit to lack any empirical basis, both Sections 4 and 5 are the product of extensive study by the Congress, which in turn drew on wide-ranging studies by the FCC, all undertaken after the *Quincy* and *Century* decisions. *See infra* notes 14, 15. In particular, the record compiled by Congress and the FCC shows that public television stations

(continued...)

D. The Congressional Response To *Quincy* And *Century*.

In response to the *Quincy* and *Century* decisions, and as part of a larger inquiry looking toward "reregulation" of the cable industry, Congress undertook a comprehensive five-year investigation into the ownership structure and business practices of the cable industry generally and into the cable-broadcast relationship in particular. Both houses of Congress held numerous, lengthy hearings and compiled evidence from dozens of witnesses representing all sectors of the communications industry.[14] The Congressional deliberations also drew heavily on three different inquiries conducted by the FCC after *Quincy* and *Century*, including the Commission's

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[13](...continued)
have been subjected to serious harm at the hands of cable operators in the absence of must carry rules. *See infra* p. 13.

[14] The legislation was preceded by eight sets of hearings in the House and Senate conducted between 1988 and 1991: (1) 1991 House Hearings, *supra* n.3; (2) *Cable TV Consumer Protection Act of 1991: Hearing on S. 12 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation*, 102d Cong., 1st Sess. (1991); (3) *Cable Television Regulation (Part 2): Hearing Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 101st Cong., 2d Sess. (1990) ("1990 House Hearing"); (4) *Cable TV Consumer Protection Act of 1989: Hearings on S. 1880 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation*, 101st Cong., 2d Sess. (1990); (5) *Cable Television Regulation (Part 1): Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 101st Cong., 2d Sess. (1990); (6) *Oversight of Cable TV: Hearings on the Oversight of the 1984 Cable Telecommunications Act Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation*, 101st Cong., 1st Sess. (1989); (7) *Must Carry: Hearing on Cable Carriage of Local Broadcast Signals Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation*, 101st Cong., 1st Sess. (1989); (8) *Cable Television: Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 100th Cong., 2d Sess. (1988).

exhaustive 1990 Cable Report.[15/] Ultimately, both the House and Senate produced comprehensive reports on the 1992 Cable Act. *See* 1992 House Report; 1991 Senate Report.[16/]

The results of this inquiry were clear and unequivocal. *First*, Congress found that the cable industry has monopoly status in the market:

- "For a variety of reasons, including local franchising requirements and the extraordinary expense of constructing more than one cable television system to serve a particular geographic area, most cable television subscribers have no opportunity to select between competing cable systems." 1992 Cable Act § 2(a)(2).

- The cable industry has become "a dominant nationwide video medium" that penetrates over 60 percent of the households with televisions. *Id.* § 2(a)(3).

[15/] *See* (1) *Notice of Proposed Rulemaking: Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates*, 5 FCC Rcd. 259 (1990); (2) *Notice of Inquiry: Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, MM Docket No. 89-600 (FCC 89-345) (released Dec. 29, 1989); (3) *Notice of Inquiry Into the Availability of Broadcast Television Signals on Cable Television Systems*, MM Docket No. 88-138 (FCC 88-129) (released May 10, 1988); *see also* 1990 FCC Cable Report, 5 FCC Rcd. 4962. At Congress' request, the FCC staff also produced a report on cable operators' conduct toward broadcasters in the wake of *Quincy* and *Century*. *Cable System Broadcast Signal Carriage Survey, A Staff Report by the Policy and Rules Division, FCC Mass Media Bureau* (Sept. 1, 1988) ("FCC Signal Carriage Survey").

[16/] In addition, there is a report accompanying a cable bill that passed the House in the 101st Congress. H.R. Rep. No. 682, 101st Cong., 2d Sess. (1990).

- "The cable industry has become highly concentrated" and "vertically integrated," thereby potentially reducing "the number of media voices available to consumers" and making "it more difficult for noncable-affiliated programmers [such as public broadcasters] to secure carriage on cable systems." *Id.* § 2(a)(4) & (5).

- "As a result of the economic incentive that cable systems have to delete, reposition, or not carry local broadcast signals, . . . the economic viability of free local broadcast television . . . will be seriously jeopardized." *Id.* § 2(a)(16).

Second, Congress found in this monopolistic environment extensive evidence of discriminatory behavior against public television stations, especially those that offer educational and instructional programming. *See* 1992 House Report at 70. An FCC study submitted to Congress revealed that between 1985 and 1988, 153 public television stations, nearly half of all such stations, were dropped or denied carriage 463 times by 347 cable systems. FCC Signal Carriage Survey at 10.[17/] The FCC study also showed that 182 stations had been involuntarily repositioned on 541 occasions between 1985 and 1988. *Id.* at 19.

Third, Congress found that a must carry requirement for public television stations would impose only a minimal burden on the cable industry. *See* 1992 House Report at 71. Data supplied to the Congress showed that a blanket requirement

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[17/] When a noncommercial station is dropped from a cable system, cable subscribers are cut off from public television and public television is cut off from viewers who provide it with financial support. As a result, the financial viability of public television station is threatened, to the detriment of both its cable and over-the-air viewers.

for carriage of *all* substantially unduplicated public television programming would have the following effects:

- 84 percent of the nation's cable systems would be required to carry one public television station;

- 13 percent would be required to carry two public television stations; and

- 3 percent would be required to carry more than two public television stations, and all of those cable systems are located in seven large television markets: New York City, Los Angeles, Chicago, San Francisco, Boston, Washington, D.C. and New Orleans.

Id. The 1992 Cable Act has even less impact than this hypothetical "blanket" requirement because it limits the number of public television stations that must be carried (depending on cable channel capacity) and eliminates substantial duplication. Indeed, the impact is so minimal that the National Cable Television Association, an appellant here, agreed in 1990 to support must carry legislation limited to public television. *See* 1990 House Hearing at 128 (statement of James P. Mooney, President and CEO of NCTA).[18/]

Fourth, Congress found that a must carry requirement for public television stations will serve important public interests that are jeopardized in the absence of such a requirement.

- "There is a substantial governmental and First Amendment interest in ensuring that cable

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[18/] The minimal impact of Section 5 refutes appellant Discovery's erroneous contention that this provision is more onerous than the FCC's 1986 must carry rules. *See* Discovery Br. at 17.

subscribers have access to local noncommercial educational stations . . . ." 1992 Cable Act § 2(a)(7).

- "[P]ublic television provides educational and informational programming to the Nation's citizens, thereby advancing the Government's compelling interest in educating its citizens." *Id.* § 2(a)(8)(A).

- "[P]ublic television is a local community institution . . . that provides public service programming that is responsive to the needs and interests of the local community." *Id.* § 2(a)(8)(B).

- "[I]n recognition of public television's integral role in serving the educational and informational needs of local communities," the Federal Government, as well as local governments and citizens, have made enormous investments in public broadcasting. *Id.* § 2(a)(8)(B) & (C).

- "[A]bsent carriage requirements there is a substantial likelihood that citizens, who have supported local public television stations, will be deprived of those services." *Id.* § 2(a)(8)(D).

Fifth, Congress also gave careful and extended consideration to the constitutionality of the must carry provisions. *See, e.g.*, 1992 House Report at 58-74; 1991 Senate Report at 53-62. In Congress' view, the must carry requirements are nothing more than "economic regulations designed to promote competition and a diversity of voices in communications services," and, as such, should be upheld under the minimal standard of First Amendment review set forth in *Associated Press* v. *United States*, 326 U.S. 1 (1945). 1991 Senate Report at 55; *see* 1992 House Report at 72. In addition, Congress cited Section 5's content-neutrality, its

service of substantial government interests, and its minimal burden on the cable industry as grounds for upholding that provision under *United States* v. *O'Brien*, 391 U.S. 367 (1968). *See* 1992 House Report at 62-67, 72-74; 1991 Senate Report at 57-62.

E. Section 5 of the 1992 Cable Act.

Section 5 of the 1992 Cable Act amends the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*, by adding a new Section 615.[19/] This section requires cable operators to carry the signals of all "qualified local noncommercial educational" ("NCE") television stations whose signals the cable system carried as of March 29, 1990, although this requirement can be waived by agreement of both parties. 1992 Cable Act § 5(c).[20/] Section 5 also requires cable operators to carry the signals of NCE stations that request carriage. *Id.* § 5(b)(1). The number of stations that must be carried depends on the channel capacity of the cable system.

Cable systems with twelve or fewer useable activated channels are required to carry the signal of only one NCE station. *Id.* § 5(b)(2)(A). In the event that a cable system of 12 or fewer usable activated channels is beyond the reach of any local NCE station, the cable operator must import and carry the signal of one distant NCE station to be chosen by the operator. *Id.* § 5(b)(2)(B)(i) & (ii). To satisfy this

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[19/] For convenience, we will refer to the provision as Section 5 rather than Section 615.

[20/] A qualified noncommercial educational television station is (1) a station licensed by the FCC as such, owned by a public agency or nonprofit entity, and eligible to receive a grant from the Corporation for Public Broadcasting; or (2) a station that is owned and operated by a municipality and transmits predominantly noncommercial programs for educational purposes. *Id.* § 5(l)(1). The term "local" is further defined in the Act. *Id.* § 5(l)(2).

requirement, a cable operator is not required to remove any programming service that it carried on March 29, 1990, although the operator is required to carry such a non-local station with the first channel that becomes available. *Id.* § 5(b)(2)(B)(iii).

Cable systems with thirteen to thirty-six channels are required to carry at least one NCE station, but not more than three. *Id.* § 5(b)(3)(A)(i). However, a cable operator is not required to carry more than one local NCE affiliated with the same state public television network if there is substantial duplication of the programming carried on the two stations. *Id.* § 5(b)(3)(C).[21/] Cable systems that are beyond the reach of a local NCE are also required to import the signal of one distant NCE. *Id.* § 5(b)(3)(B).

Cable systems with capacities of more than thirty-six channels are required to carry all local NCE stations that request carriage. *Id.* § 5(b)(1). However, when such operators are required to carry three stations, they are not required to carry additional stations with substantially duplicative programming. *Id.* § 5(e).

The limited burden of Section 5's must carry obligations on cable operators is further reduced by the statute's inter-relationship with the scheme for public, educational and government ("PEG") channels established in the Cable Communications Policy Act of 1984. Under that statute, a franchising authority may require a cable operator, as one of the terms of its franchise, to designate channels for public, educational, or governmental use. 47 U.S.C. § 531 (1988). When a cable operator is required under Section 5 of the Cable Act to add the signal of an NCE station, the cable operator may do so, subject to approval by the franchising

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[21/] Substantial duplication has been defined by the FCC. *See* FCC Final Report and Order, 58 Fed. Reg. 17,350, 17,351 (1993) (to be codified at 47 C.F.R. Part 76).

authority, by placing that additional signal on a PEG channel that is not in use for its designated purpose. 1992 Cable Act § 5(d). In these circumstances, the must carry obligation is fulfilled without any additional loss of current channel availability by the cable operator.[22/]

Section 5 also creates certain channel positioning rights. Each NCE station having a mandatory carriage right under Section 5 must be carried, at its election, on its current over-the-air channel, its channel position as of July 19, 1985, or on such other channel number that is mutually agreed upon by the station and the cable operator. *Id.* § 5(g)(5).

F. The Decision Below.

On April 8, 1993, the three-judge district court held that Sections 4 and 5 of the Cable Act do not violate the First Amendment freedoms of speech and press. The court prefaced its opinion with a careful review of the "exhaustive" Congressional fact-finding process (discussed above) that resulted in the enactment of the Cable Act. Jurisdiction Statement Appendix ("J.S. App.") 10a. In particular, the court took note of the evidence before Congress that cable has become the "dominant nationwide video medium," and that the industry is characterized by little intra-industry competition, horizontal and vertical integration, and

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[22/] Neither the section of the 1984 Cable Act authorizing the reservation of PEG channels nor the action of any franchising authority pursuant to that section is being challenged on this appeal. However, appellant Time Warner's omnibus complaint in this action did include such a challenge, and that claim was rejected by the single-judge district court. *See Daniels Cablevision* v. *FCC*, Civ. No. 92-2292, 1993 WL 393000 (D.D.C. Sept. 16, 1993), *appeal docketed*, No. 93-5350 (D.C. Cir. Nov. 22, 1993). As stated by the district court, "[t]he PEG and leased access provisions were enacted to serve a significant regulatory interest, *viz.*, affording speakers with lesser market appeal access to the nation's most pervasive video distribution technology. Enabling a broad range of speakers to reach a television audience that otherwise would never hear them is an appropriate goal and a legitimate exercise of federal legislative power." *Id.* at *4 (citations omitted).

substantial barriers to entry. *Id.* at 11a-12a. These attributes have created a cable "bottleneck" in the flow of video information that has "artificially diminish[ed] the audiences of local broadcasters, . . . decrease[d] their revenues," and placed free local broadcast television "in serious jeopardy." *Id.* at 25a. As aptly summarized by the district court, "unconstrained, cable holds the future of local broadcasting at its mercy." *Id.* at 26a.

In light of this record, the district court held that the Act "is simply industry-specific antitrust and fair trade practice regulatory legislation" that is "justified by the existing structure of the cable business itself" and designed to "create competitive balance in the video industry as a whole, and to redress the effects of cable operators' anticompetitive practices." *Id.* at 13a. As such, "the must carry provisions are, in intent as well as form, unrelated (in all but the most recondite sense) to the content of any messages" that the cable industry might convey. *Id.*

The district court applied the First Amendment balancing test for content-neutral regulation established in *United States* v. *O'Brien*, 391 U.S. 367 (1968), as modified by *Ward* v. *Rock Against Racism*, 491 U.S. 781 (1989). The must carry requirements meet this test, the court held, because they are supported by substantial government interests, including the promotion of fair competition among video "speakers" and the preservation of local broadcasting, J.S. App. 23a, and because they serve those substantial government interests effectively without unnecessarily burdening a significant amount of the cable industry's speech, *id.* at 27a. On the latter point, the district court specifically noted the minimal burden imposed by Section 5. *Id.*

Judge Williams dissented. Although he agreed with Congress and the majority that cable industry "bottlenecks" in the free flow of video information pose "a very real problem," he asserted that the remedy chosen by Congress —

must carry — is not the least restrictive alternative available for solving the problem. J.S. App. 50a, 66a. Judge Williams also disagreed with Congress' (and the majority's) factual finding that cable poses substantial dangers to the continued vitality of local broadcasting. *Id.* at 60a-67a. Thus, he concluded that the must carry provisions should be reviewed, and struck down, under strict First Amendment scrutiny. In so doing, however, Judge Williams plainly rejected plaintiffs' contention that Congress is constitutionally barred from imposing access requirements on cable operators. *Id.* at 51a.

SUMMARY OF ARGUMENT

1. Section 5 should be judged under a First Amendment standard much less rigorous than that applied to the traditional print media. As an initial matter, heightened scrutiny is not warranted in this case because Section 5 is a content-neutral economic regulation, addressed to the structure of the cable industry. Section 5 is not intended to suppress particular speech transmitted by cable operators or programmers, or to promote particular speech transmitted by public television stations, but rather to overcome competitive barriers erected by the cable industry to the widespread dissemination of public television programming. This Court has held, in a series of cases, that reasonable economic regulation designed to eradicate anticompetitive conduct and promote First Amendment values should be upheld under minimal First Amendment scrutiny. *See, e.g., Associated Press* v. *United States*, 326 U.S. 1 (1945). Section 5 easily meets this standard.

2. At most, this Court should apply a First Amendment standard no more exacting than that established in *United States* v. *O'Brien*, 391 U.S. 367 (1968). Such a standard is appropriate here because of Section 5's content-neutrality, and because of the many factors distinguishing the cable industry from the traditional print media. These factors include

cable's receipt of substantial government benefits, the longstanding regulatory relationship between government and cable, the bottleneck characteristics of cable operators, and cable's longstanding and predominant role as a passive conduit of video information.

3. As clearly established in the Congressional findings underlying Section 5, as well as in the Act's legislative history, Section 5 meets the *O'Brien* standard. First, Section 5 serves several substantial government interests, including the promotion of localism, diversity, and fair competition in the video marketplace and the protection of the nation's substantial investment in and commitment to public television services. Second, Section 5 is not substantially broader than necessary to achieve these legitimate government ends.

ARGUMENT

To a large extent this case turns on the determination of the appropriate standard of First Amendment scrutiny warranted by the nature of the regulation at issue and the special characteristics of the cable industry. As the Court has recognized, "[e]ach medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems." *Southeastern Promotions Ltd.* v. *Conrad*, 420 U.S. 546, 557 (1975). However, before turning to the question of the appropriate standard of review, we note that under any standard, appellants face a heavy burden because they challenge Section 5 of the 1992 Cable Act on its face. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *Rust* v. *Sullivan*, 111 S. Ct. 1759, 1767 (1991) (internal quotation and citation omitted). Indeed, as the Court made clear in *Younger* v. *Harris*, 401 U.S. 37, 52 (1971), courts passing on the facial constitutionality of

statutes are acting "fundamentally at odds with the function of the federal courts in our constitutional plan." In short, appellants face a heavy burden in challenging Section 5, a burden that — as we demonstrate below — they cannot overcome.

I. SECTION 5 SHOULD BE UPHELD UNDER A STANDARD OF REASONABLENESS BECAUSE IT CONTENT-NEUTRAL ECONOMIC REGULATION DESIGNED TO PREVENT ANTI-COMPETITIVE CONDUCT AND PROMOTE DIVERSITY IN THE MARKET FOR VIDEO INFORMATION.

Appellants' First Amendment analysis presumes that strict or intermediate scrutiny are the only possible standards that can be applied to their claims. That presumption is wrong. As this Court has recognized on numerous occasions, content-neutral economic regulations addressed to the structure of a particular industry — even an industry whose product is speech — are properly tested under a standard of reasonableness. *See Associated Press* v. *United States*, 326 U.S. 1 (1945). Under that standard, which is applicable here, Section 5 easily passes muster.

A. Section 5 Is Content-Neutral Economic Regulation.

It is well-settled that the core of First Amendment protection is a bar against regulation directed to suppressing the content of free expression. *See, e.g., Texas* v. *Johnson*, 491 U.S. 397, 414 (1989). This Court has counseled that, in determining content neutrality, "[t]he government's purpose is the controlling consideration." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989). Thus, "[g]overnment regulation of expressive activity is content neutral so long as it is justified without reference to the content of the regulated speech." *Id.* (internal quotation and citation omitted); *accord City of Renton* v. *Playtime Theaters, Inc.*, 475 U.S. 41, 48 (1986); *International Soc'y for Krishna Consciousness, Inc.*

v. *Lee*, 112 S. Ct. 2711, 2722 (1992) (Kennedy, J., concurring).

Appellants seek to avoid the teaching of *Ward*. First, they assert that the *Ward* inquiry into the government's purpose and justifications is appropriate only for statutes that regulate the time, place or manner of speech, or that primarily regulate conduct and affect speech only incidentally. *See, e.g.*, NCTA Br. at 27-28; Time Warner Br. at 17, Discovery Br. at 30. This argument, however, overlooks the Court's statement that the inquiry for determining content neutrality set forth in *Ward* applies "in speech cases generally." 491 U.S. at 791.

Appellants also assert that under *Simon & Schuster, Inc.* v. *New York State Crime Victims Bd.*, 112 S. Ct. 501 (1991), and *City of Cincinnati* v. *Discovery Network, Inc.*, 113 S. Ct. 1505 (1993), the government's justification for Section 5 cannot be the controlling consideration for determining its content-neutrality. That argument is wrong. In *Simon & Schuster*, the Court did not even address the question of the law's content-neutrality, *see* 112 S. Ct. at 511 n.**, and thus did not modify the *Ward* analysis. In *Discovery Network*, the Court affirmed the thrust of *Ward* by stating that "[i]t is the absence of a neutral justification for its selective ban on newsracks that prevents the city from defending its newsrack policy as content-neutral." 113 S. Ct. at 1517. The constitutional defect in the regulation at issue in *Discovery Network* was that it was aimed at newsracks carrying a particular type of publication. *Id.*

Under appellants' analysis, a law should be deemed content-based (and therefore subject to strict scrutiny) if it has any impact on the business of a media entity — *i.e.*, speech. But that analysis is hopelessly overbroad. As *Ward* correctly recognizes, only an inquiry into the government's *justification* can properly distinguish content-based from content-neutral regulations.

Under *Ward*, Section 5 is clearly content-neutral. Indeed, as found by the district court, "[a]ll parties agree (at least, the plaintiffs concede) that the must-carry provisions are not *viewpoint*-based: must-carry rights are conferred upon all full-power local broadcasters, and the obligations upon most cable operators, regardless of any views expressed in the programming of either." J.S. App. 15a-16a (emphasis in original). Despite appellants' protestations, Section 5's requirements are not based on content. Under the Act, cable operators are obliged to carry their minimal quota of noncommercial educational television stations regardless of the content of the stations' speech. If other programming must be denied carriage in order to comply with Section 5, the statute prescribes no test whatsoever as to how that decision is to be made. *See* J.S. App. 16a.[23/]

As set forth in substantial detail in the Act itself, Section 5 is based on Congress' concern over the monopolistic position of cable systems, the corresponding likelihood that citizens will be deprived of the diversity provided by local public television programming, and the consequent threat to the viability of local public television stations, which Congress found to be vital community institutions in which the nation has made an enormous investment. 1992 Cable Act § 2(a)(2), (3), (4), (5), (6), & (8). *See supra* pp. ___.[24/] In short, Congress' purpose in enacting Section 5 was to preserve and promote continued access to the

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[23/] Appellants go to extremes in support of their claim that Section 5 is content-based. For example, appellant Turner contends that Section 5 is content-based because its requirements "turn[] upon a determination" of substantial duplication of programming. Turner Br. at 25. That contention is specious. The "substantial duplication" provision of Section 5 is a burden-reducing measure (designed to relieve cable operators of the obligation to carry noncommercial educational stations with duplicative programming) and not a *basis* for the imposition of must carry requirements in the first instance.

[24/] The legislative history of the Act contains a similar analysis. *See, e.g.*, 1992 House Report at 68-72.

institution of public television — not to any particular programming — in the face of economic conditions that are denying viewers that access now and may increasingly do so in the future. *See, e.g.*, 1992 Cable Act § 2(a)(8); 1992 House Report at 68.

Section 5 cannot be considered content-based because it fosters — through public television — substantial government interests in education, localism, diversity, and community service. These interests are institutional ones, similar to those served by schools or libraries, and are not, therefore, associated with any particular speech or point of view. No one could argue that government support for a library or school constitutes government preferment for the books the library chooses for its shelves or the school chooses for its courses. Similarly, because Section 5 does not dictate the content of public television programming that must be carried by cable operators, or the content of programming not carried by cable operators, the governmental support for the institution of public television through Section 5 does not offend the First Amendment. Instead, Section 5 is nothing more than content-neutral economic regulation — akin to the antitrust laws or other commercial regulations — designed to eradicate market imbalances and ensure "the widest possible dissemination of information from diverse and antagonistic sources." *Associated Press*, 326 U.S. at 20.[25/]

[25/] *Cf. Storer Cable Communications* v. *City of Montgomery*, 806 F. Supp. 1518, 1546, 1559 (M.D. Ala. 1992) (trade regulation directed specifically at cable operators found content-neutral); *Erie Telecommunications, Inc.* v. *City of Erie*, 659 F. Supp. 580, 600 (W.D. Pa. 1987) (concluding that provisions of franchise agreement requiring dedication and maintenance of public access channels are content-neutral), *aff'd on other grounds*, 853 F.2d 1084 (3d Cir. 1988).

B. As Content-Neutral Economic Regulation, Section 5 Should Be Upheld Under Associated Press And Related Cases.

Because Section 5 is content-neutral economic regulation addressed to the structure of the cable industry, the proper framework for the analysis of appellants' claims is provided by *Associated Press* v. *United States* and related cases. Under these authorities, reasonable economic regulation of a particular industry, aimed at eradicating anticompetitive conduct and promoting First Amendment values, should be upheld under minimal First Amendment scrutiny.

In *Associated Press*, the issue was whether the government, through application of the antitrust laws, could take steps to regulate AP's monopolistic news and membership practices without running afoul of the First Amendment. These practices prevented non-members from obtaining news from AP or its members, and made it difficult for newspapers in competition with AP members to become members themselves. At bottom, as found by the Court, AP's rules furnished members with "the exclusive right to publish news in a given field" and a consequent "competitive advantage over their rivals." 326 U.S. at 17 (footnote omitted).

AP argued that the government's efforts to ameliorate this competitive imbalance violated its First Amendment rights. Reasoning that "[the First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public," *id.* at 20, the Court rejected AP's claim without any hint of heightened scrutiny. The Court stated:

> Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge

> if they impose restraints upon that constitutionally guaranteed freedom. . . . *Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.*

Id. (emphasis added, footnote omitted). *See Lorain Journal Co.* v. *United States*, 342 U.S. 143, 155 (1951) (no heightened scrutiny applied in upholding antitrust consent decree requiring newspaper to publish advertising of businesses that also advertised on a rival radio station; the decree imposed "no restriction upon any guaranteed freedom of the press").

The same sort of minimal scrutiny applied in *Associated Press* has been used to reject other First Amendment challenges to content-neutral economic regulation of the communications industry that has the effect of limiting the ability to speak. For example, in *FCC* v. *National Citizens Comm'n for Broadcasting*, 436 U.S. 775 (1978), the Court upheld the FCC's rules restricting cross-ownership of same-market media outlets as "a reasonable means of promoting the public interest in diversified mass communications." *Id.* at 802. These rules had the direct effect of preventing some speakers from speaking where they wished. In sustaining the cross-ownership rules, the Court noted that they were "in form quite similar to the prohibitions imposed by the antitrust laws" and that "the application of [such] laws to newspapers is not only consistent with, but is actually supportive of the values underlying, the First Amendment." *Id.* at 800 n.18 (citing *Associated Press* and *Lorain Journal*, and *Citizen Publishing Co.* v. *United States*, 394 U.S. 131, 139-140 (1969)). *Cf. United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 201-04 (1956) (upholding, without discussion of the First Amendment, rules placing limitations on the total

number of broadcast stations a person may own or control).[26/]

Appellants argue that the *Associated Press* doctrine stands only for the unexceptionable proposition that media entities are not exempt from laws of general applicability. That reading of *Associated Press* and related cases is cramped and inaccurate. Both *Associated Press* and *Lorain Journal* involved First Amendment challenges to particular applications of the antitrust laws that specifically altered the expressive activity of a media organization — in *AP*, the news organization was ordered to share collective information that it would not have otherwise shared; in *Lorain Journal*, the newspaper was required to carry advertising that it would not have otherwise carried. Similarly, *National Citizens Comm'n for Broadcasting* involved direct regulation of media entities that specifically altered the expressive activities of those entities.

As in those cases, the recognition that Section 5's must carry rules are content-neutral economic regulations intended to promote diversity in the information marketplace should end the Court's consideration of plaintiffs' First Amendment claim. Under the *Associated Press* doctrine, the First Amendment poses no obstacle to Congress' reasonable efforts

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[26/] Similarly, in *Committee For An Independent P-I* v. *Hearst Corp.*, 704 F.2d 467 (9th Cir.), *cert. denied*, 464 U.S. 892 (1983), the Ninth Circuit upheld the Newspaper Preservation Act, which created an antitrust exemption for joint operating agreements entered into by failing newspapers. Despite its incidental effect on the speech of smaller newspapers, the court found that "[t]he Act is an economic regulation which has the intent of promoting and aiding the press." *Id.* at 483. On the basis of this conclusion and the Act's content-neutrality, the court applied the *Associated Press* doctrine to reject plaintiffs' First Amendment challenge under a minimal level of scrutiny. *Id.*; *cf. United States* v. *American Tel. and Tel. Co.*, 552 F. Supp. 131, 183 (D.D.C. 1982) (the *absence* of a consent decree barring AT&T from entering the electronic publishing market would pose "a substantial danger" to the First Amendment principle of "diversity in sources of information").

to restore balance to the increasingly one-sided business relationships of cable systems and public broadcasters in order to further a compelling national goal. Far from impermissibly infringing on First Amendment interests, the must carry provisions quite clearly promote them. As the Supreme Court stated in *Red Lion Broadcasting Co.* v. *FCC*, "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." 395 U.S. 367, 390 (1969).

II. AT MOST, SECTION 5 SHOULD BE REVIEWED UNDER THE *O'BRIEN-WARD* STANDARD.

Even if the Court determines that Section 5 should not be reviewed under the First Amendment standard set forth in *Associated Press* and related cases, there is no basis for employing a standard of review more stringent than that established in *United States* v. *O'Brien*, 391 U.S. 367 (1968) and *Ward* v. *Rock Against Racism*, 491 U.S. 781 (1989). As discussed above, Section 5 is content neutral economic regulation that affects speech, at most, incidentally. This conclusion, standing alone, should result in the application of *O'Brien-Ward* to appellants' claims. As discussed below, however, several additional factors, taken together, justify this intermediate standard over any heightened standard of review applicable to the print medium.

A. Unlike The Print Medium, The Cable Industry Has Always Operated With Substantial Government Assistance.

Contrary to the longstanding tradition of separation between government and the print medium, cable has for almost thirty years been the recipient of substantial government assistance. Unlike *any* business entity other than traditional public utilities, cable relies for dissemination

of its message upon the permanent physical occupation of governmental resources. In order to provide cable service to subscribers, cable wires and associated equipment must be hung from utility poles, housed in underground utility ducts, or otherwise placed in or across public rights-of-way.[27] Further, cable operators necessarily depend upon franchising authorities to exercise their powers of eminent domain in order to ensure cable's access to private property. *See Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

Cable operators also receive a host of other statutory benefits. For example, cable systems receive guaranteed access to utility company poles at government-prescribed rates. *See* 47 U.S.C. § 224 (1988). Congress also imposes a limit on the amount of the fees local franchising authorities can extract from cable operators. *See* 47 U.S.C. § 542(b) (1988). Even the existence of the franchising authority has been a benefit to the cable industry because a franchise is a prerequisite to operating a cable system, *see* 47 U.S.C.A. § 541 (1991 & Supp. 1993), and, as a practical matter, the number of such franchises is necessarily limited, thus insulating franchise holders from competition. Indeed, until the 1992 Act prohibited the practice, *id.*, franchise authorities were authorized to grant exclusive franchises available to cable operators. Congress has also severely restricted the ability of franchise authorities not to renew franchises, *see* 47 U.S.C.A. § 546 (1991 & Supp. 1993), and has required that cable systems receive compensation when such a non-renewal occurs, *see* 47 U.S.C. § 547 (1988).

In addition, under the provisions of the Copyright Act, cable operators are granted a compulsory license to retransmit local broadcast signals without fee. *See* 17 U.S.C. § 111(c)

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[27] *See Leathers* v. *Medlock*, 111 S. Ct. 1438, 1441 (1991); *Omega Satellite Products Co.* v. *City of Indianapolis*, 694 F.2d 119, 127 (7th Cir. 1982).

& (d) (1988 & Supp. IV 1992). Thus, government (and the broadcasting industry) essentially subsidizes cable operators by granting them free and unrestricted access to local broadcasting. While Section 6 of the Cable Act alters this regime to some extent for commercial broadcasters, the retransmission consent scheme established by Section 6 does not apply to public broadcasters. Accordingly, NCTA's argument that the compulsory license is no longer a benefit to cable operators (NCTA Br. at 33-34) is completely irrelevant to noncommercial broadcasting and Section 5.[28]

The existence of these numerous government benefits is a characteristic unique to the cable industry and stands in stark contrast to the historic independence (and even antagonism) of the print medium vis à vis the government. While newspaper publishers make use of the streets and the mail to deliver their products, their dependence on government assistance does not nearly approach cable's dependence on government assistance. As numerous lower courts have found, these extensive government benefits to cable, especially when viewed in the aggregate, justify a less searching First Amendment standard than that traditionally applied to the print media.[29]

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[28] Appellants also disingenuously assert that they are not receiving a "benefit" under the compulsory license scheme because, prior to the enactment of the 1976 Copyright Act, the retransmission of broadcast signals was not considered a public performance under the copyright law. *See, e.g.*, NCTA Br. at 33 n.27 (citing *Fortnightly* and *Teleprompter*). But *Fortnightly* and *Teleprompter* were decided under the 1909 Copyright Act; the 1976 Act, by broadening the definition of a "performance," clearly subjects the retransmission of broadcast signals to copyright liability. *See* 17 U.S.C. § 101 (1988). The Act then goes on to exempt cable operators from that liability by granting them the clearly beneficial compulsory license with respect to local broadcast signals. *See id.* § 111.

[29] *See, e.g., Warner Cable Communications, Inc.* v. *City of Niceville*, 911 F.2d 634 (11th Cir. 1990) *cert. denied*, 111 S. Ct. 2839 (1991); *Chicago Cable Communications* v. *Chicago Cable Comm'n*, 879 F.2d 1540 (7th Cir. 1989), *cert. denied*, 493 U.S. 1044 (1990); *Central Tele-*

(continued...)

B. Unlike The Print Medium, The Cable Industry Has Always Operated Under Substantial Government Control To Protect Local Broadcasting.

Since its inception as a conduit of broadcast signals, cable has been subject to longstanding government regulation. On at least two occasions, this Court has recognized that such regulation is necessary to ensure that cable's growth is consistent with the government's allocation and licensing policies for local broadcasting and public television.

In *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968), the Court upheld the FCC's authority to regulate cable under the provisions of the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.* (1988). In so doing, the Court relied on the FCC's "reasonabl[e]" determination that the importation of cable signals threatened to

> destroy or seriously degrade the service offered by a television broadcaster, and thus ultimately deprive the public of the various benefits of a system of local broadcasting stations. In particular, the Commission feared that CATV

[29](...continued)
communications, Inc. v. *TCI Cablevision, Inc.*, 800 F.2d 711 (8th Cir. 1986), *cert. denied*, 480 U.S. 910 (1987); *Omega Satellite Products Co.* v. *City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982); *Community Communications Co.* v. *City of Boulder*, 660 F.2d 1370, 1377 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982); *Telesat Cablevision, Inc.* v. *City of Riviera Beach*, 773 F. Supp. 383 (S.D. Fla. 1991); *Erie Telecommunications, Inc.* v. *City of Erie*, 659 F. Supp. 580, 599-600 (W.D. Pa. 1987), *aff'd*, 853 F.2d 1084 (3d Cir. 1988); *Carlson* v. *Village of Union City*, 601 F. Supp. 801, 809-12 (W.D. Mich. 1985); *Berkshire Cablevision* v. *Burke*, 571 F. Supp. 976, 985-88 (D.R.I. 1983), *vacated as moot*, 773 F.2d 382 (1st Cir. 1985); *but see Preferred Communications, Inc.* v. *City of Los Angeles*, 68 Rad Reg.2d (P&F) 121 (C.D. Cal. 1990); *Century Federal, Inc.* v. *City of Palo Alto*, 710 F. Supp. 1552 (N.D. Cal. 1987); *Group W Cable, Inc.* v. *City of Santa Cruz*, 669 F. Supp. 954 (N.D. Cal. 1987).

> might, by dividing the available audiences and revenues, significantly magnify the characteristically serious financial difficulties of UHF and educational television broadcasters.

392 U.S. at 175-76 (internal quotation, citation and footnotes omitted). The Court also took note of the Commission's view that "the hazards to educational television [posed by cable] were sufficiently strong to warrant some special protection." 392 U.S. at 176 n.44 (internal citation omitted). The FCC's original must carry rules followed shortly thereafter, flowing directly from — and, indeed, being justified by — Congress' original reservation of broadcast channels for public television stations.

Similarly, in *United States* v. *Midwest Video Corp.*, 406 U.S. 649 (1972), the Court upheld the FCC's authority to regulate cable in order to "control[] [its] competitive impact . . . on broadcast services" and ensure that "viewers are provided suitably diversified programming." *Id.* at 664, 669. Such regulation is proper because it "preserves and enhances the integrity of broadcast signals and therefore is reasonably ancillary to the effective . . . regulation of television broadcasting." *Id.* at 670 (internal quotation and citation omitted). As the Court subsequently confirmed in *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 714 (1984), "[t]here can be little doubt that the comprehensive regulations developed over the past 20 years by the FCC to govern signal carriage by cable television systems reflect an important and substantial federal interest."

Section 5 is based on the same rationale as the cable regulations at issue in *Southwestern Cable* and *Midwest Video*. As Congress specifically found, "[a] primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming," 1992 Cable Act § 2(a)(10), and cable poses a significant threat to "the economic viability of free local broadcast television."

Id. § 2(a)(16). Indeed, "absent carriage requirements there is a substantial likelihood that citizens, who have supported local public television services, will be deprived of those services." *Id.* § 2(a)(8)(D). Congress' desire to preserve and protect its system of broadcast regulation and the institution of public television has no counterpart in any actual or hypothetical regulation of the print medium. Thus, there is no basis for applying a heightened print-based standard of First Amendment review to Section 5.

C. Unlike The Print Medium, The Cable Industry Poses A Significant Bottleneck To The Public's Receipt Of A Diverse Array Of Information.

A third factor distinguishing the cable industry from print is its increasingly dominant position as a distributor of information to household televisions. Cable's role as an information bottleneck results from the fact that, as a practical matter, most cable operators are completely insulated from competition. Indeed, Congress cited the "necessarily severely limited number of franchised cable systems able to operate in any one community," as grounds for ensuring, through must carry, that "the diversification principle . . . is not undermined in this increasingly important governmentally franchised medium." 1991 Senate Report at 51-52. Congress also relied on the fact that "[m]ost subscribers to cable television systems do not or cannot maintain antennas to receive broadcast television services, do not have input selector switches to convert from a cable to antenna reception system, or cannot otherwise receive broadcast television services." 1992 Cable Act § 2(a)(17).[30/]

[30/] The D.C. Circuit in both *Quincy* and *Century* was profoundly skeptical of the FCC's lack of empirical support for its intuition that selector switches and continued use of outdoor antennas were not adequate means to preserve cable subscribers' access to local broadcast stations. That question has now been resolved by congressional fact-finding which drew on empirical studies conducted by the FCC after *Quincy* and (continued...)

Further, as discussed extensively by Congress in the Cable Act and its legislative history, cable operators — as a result of increased penetration into households, substantial barriers to entry, and vertical integration — now have both the market power and the economic incentive to deny carriage to a growing number of noncommercial broadcast stations. 1992 Cable Act § 2; 1992 House Report at 50-54. The FCC has compiled overwhelming evidence that the cable industry has denied carriage to public television stations in the wake of *Quincy* and *Century*. *See* FCC Signal Carriage Survey at 10; *supra* p. 13.[31/] In short, without must carry obligations, cable operators are increasingly acting as impediments, rather than facilitators, to the "widest possible dissemination of information from diverse and antagonistic sources." *Associated Press*, 326 U.S. at 20. A similar economic structure does not exist for print speakers. This factor also counsels against a heightened print-based standard of review.

To be sure, the Court rejected a similar economic scarcity argument in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), but that decision is not applicable here because cable's position as a gatekeeper to viewers is so much more dominant than newspapers' position as a gatekeeper to readers. Even in one-newspaper communities, there are a myriad of ways for print speakers to reach their audiences — flyers, leaflets, newsletters, alternative newspapers, and the like. In contrast, the only

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[30/](...continued)
Century. *See, e.g.*, 1992 House Report at 54, 70-71. The D.C. Circuit's skepticism therefore is no longer justified.

[31/] While appellants dispute the evidence that commercial broadcasters suffered after the demise of the FCC's must carry rules, appellants, have not disputed that public television stations suffered grievously. *See* NCTA Br. at 39-40; Turner Br. at 42-43.

means by which a video speaker can reach its local audience is through the sole cable operator in the community.[32]

D. The First Amendment Interests Of The Cable Industry With Respect To Must Carry Are Not Weighty Enough To Justify Review Under Heightened Scrutiny.

Finally, a functional analysis of the cable industry reveals an additional factor justifying less than heightened First Amendment scrutiny: namely, that with respect to their obligations under Section 5, cable operators' First Amendment interests are minimal at best.[33] Must carry rules implicate cable's primary function — that of a passive distributor of broadcast signals. In this capacity, cable operators do not resemble either the print press or broadcasters.[34] Given the minimal expressive activity necessary to perform this distribution role, *see Teleprompter Corp.*, 415 U.S. at 402-05, cable operators are more analogous to common carriers than to publishers or broadcasters. Indeed, the Court has found that "[a] cable system may operate as a common carrier with

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[32] As the district court correctly found, *Tornillo* also is distinguishable because of the patently content-based nature of the right-of-reply law at issue in that case. J.S. App. 22a n.25. *See infra* pp. 37-38.

[33] Although the *Turner* and *Discovery* appellants are cable programmers rather than cable system operators, their claims are derivative of, and contingent upon, the asserted rights of cable system operators. There are approximately 80 national and 48 regional cable networks that currently offer programming. J.A. at 303. Yet the average cable system has a capacity of approximately 40 channels. *Id.* As a result, cable programmers clearly live in a harsh, competitive environment in which many will not be carried, irrespective of Section 5. Because cable programmers cannot trace their non-carriage directly to Section 5, they lack standing to bring this facial constitutional challenge. *See Allen* v. *Wright*, 468 U.S. 737, 751-52 (1984).

[34] There has been no showing that the limited requirements of Section 5 (or even the more extensive requirements of Section 4) threaten to displace any of the relatively limited self-originated programming carried by cable operators.

respect to a portion of its service only." *FCC* v. *Midwest Video Corp.*, 440 U.S. 689, 701 n.9 (1979).

Cable operators (and programmers derivatively) assert that must carry rules infringe on the operators' First Amendment right to select programming of their choice for each channel in the system. However, a similar choice has been denied to common carriers, such as telephone companies. *See* 47 U.S.C. § 202(a) (1988) (nondiscrimination requirement for common carriers). Under this rubric, local telephone companies are obliged to carry *any* message presented to them. Because cable operators are acting akin to common carriers when retransmitting broadcast signals, a similar result should apply to their First Amendment objections to must carry. *See United States* v. *Western Elec. Co.*, 673 F. Supp. 525, 586 n.273 (D.D.C. 1987) ("[C]ommon carriers are quite properly treated differently for First Amendment purposes than traditional news media."). [35] At the very least, in light of the minimal burden imposed by Section 5's must carry rules on the expressive activity of cable operators, the Court should not apply a heightened level of First Amendment scrutiny.

E. Appellants' Arguments For Heightened Scrutiny Are Without Merit.

Appellants offer two primary arguments in support of their claim to heightened First Amendment scrutiny, but each is without merit.

First, appellants contend that the must carry provisions impermissibly infringe on cable operators' "editorial

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[35] This analysis is not affected by the holding in *FCC* v. *Midwest Video Corp.*, 440 U.S. 689 (1979). In that case, the Court concluded that the FCC did not have jurisdiction to create a broad right of access to cable channels based on a common carrier rationale. The proper limits of FCC jurisdiction are not at issue here.

discretion" — their ability to chose or reject programming as they wish. *See*, *e.g.*, NCTA Br. at 18-21; Turner Br. at 30-31. For this, appellants primarily rely on *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), in which the Court struck down a state statute granting political candidates the right to reply to criticisms published in newspaper editorials. Unlike the statute in *Tornillo*, however, which authorized a right of access predicated on content — indeed, *political* content — Section 5 does not dictate that cable systems carry or not carry programming having any particular content. *Cf.* 1992 House Report at 69, 72 (discussing enormous variety of public television programming). Nor are cable operators "being compelled to affirm their belief in any governmentally prescribed position or view." *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74, 88 (1980).[36] Furthermore, *Lorain Journal*, 342 U.S. at 155-56, demonstrates that the First Amendment's protection for editorial discretion is not offended when a newspaper is required to carry material it would not otherwise carry in order to redress anticompetitive conduct.

In addition, the nature of the "editorial discretion" exercised by cable operators is substantially different from that exercised by newspapers. In contrast to newspaper editors, who actually read and often change copy before it is published, cable operators merely transmit the signals delivered to their headends. Further, as appellants' factual submissions make clear, the discretion exercised by cable operators in selecting programming in the first instance is

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[36] For these same reasons, appellants' reliance on other "compelled speech" cases is misplaced. The statute at issue in *Riley* v. *National Federation of the Blind, Inc.*, 487 U.S. 781 (1988), was content based because it required entities engaging in particular speech (charitable solicitation) also to engage in other particular speech (the disclosure of certain information). Similarly, the compelled speech at issue in *Pacific Gas & Elec. Co.* v. *Public Utilities Comm'n*, 475 U.S. 1 (1986) was triggered by PG&E's expression of its own views, and thus "penalize[d] the expression of particular points of view." *Id.* at 9-10.

guided entirely by "customer satisfaction." *See*, *e.g.*, J.A. at 245-247, 264, 273. While cable operators are entitled to some measure of First Amendment protection, *see Leathers* v. *Medlock*, 111 S. Ct. 1438, 1442 (1991), their focus on maximizing customer satisfaction sets them apart from the tradition of a "cantankerous" and "obstinate" press that fearlessly informs the public and watchdogs the government — the tradition that has been accorded the highest level of First Amendment protection. *United States* v. *New York Times Co.*, 328 F. Supp. 324, 331 (S.D.N.Y.), *remanded*, 444 F.2d 544 (2d Cir.), *aff'd* 403 U.S. 713 (1971). Because of these differences in the "editorial discretion" exercised by cable operators and newspaper publishers, the level of First Amendment protection traditionally afforded to newspapers need not be applied to cable.

Second, appellants argue that the must carry provisions discriminate against the cable industry in order to promote the speech of broadcasters. NCTA Br. at 21-23; Turner Br. at 27-30. This "favoritism" argument, however, has been rejected by the Court on several occasions. In *Leathers* v. *Medlock*, for example, the Court applied rational basis review to a sales tax that applied only to cable operators and not to the print media. 111 S. Ct. at 1446. The Court explicitly stated that "a differential burden on speakers is insufficient by itself to raise First Amendment concerns." *Id.* The Court also rejected the argument that "intermedia and intramedia discrimination, even in the absence of any evidence of intent to suppress speech or of any effect on the expression of particular ideas, violates the First Amendment." *Id.* at 1445. Similarly, in upholding the FCC's rules restricting cross-ownership of same-market media outlets in *National Citizens Comm'n for Broadcasting*, the Court made clear that "efforts to enhance the volume and quality of coverage of public issues through regulation of broadcasting may be permissible where similar efforts to regulate the print media would not be." 436 U.S. at 800 (internal quotation and citation omitted). Indeed, if it were true that strict scrutiny applied

to any regulation favoring one member of the media over another, then there would be no basis for the government's well-settled right to arbitrate between the claims of competing speakers under valid time, place, and manner restrictions. *See, e.g., Kovacs* v. *Cooper*, 336 U.S. 77 (1949) (favoring the "natural speech" of residents and denizens of public fora over the "amplified" speech of persons driving sound trucks).[37/]

III. SECTION 5 SHOULD BE UPHELD UNDER *O'BRIEN-WARD*.

Under *O'Brien-Ward*, the must carry rules clearly satisfy the First Amendment because they serve substantial government interests and are no broader than necessary in doing so.[38/]

A. This Court Should Accord Due Deference To Congress' Legislative Judgment And Factual Findings.

Although appellants focus much of their argument under *O'Brien* to attacks on the Congressional record supporting must carry, that record must be viewed in its appropriate context. Passed by two-thirds of the members of both Houses

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[37/] Appellants' favoritism argument relies on an overstated reading of *Buckley* v. *Valeo*, 424 U.S. 1, 48-49 (1976). But even the *Buckley* Court recognized that this "favoritism" principle applies only in "traditional free speech case[s]" and not in cases, such as those involving the broadcast media or, indeed, the cable industry, posing "unique and special problems." 424 U.S. at 50 n.55 (internal quotation and citation omitted). *See also* J.S. App. 17a-18a (finding that *Buckley* does not support appellants' favoritism argument).

[38/] As made clear above, Section 5 meets *O'Brien*'s requirement that "the governmental interest [underlying the regulation] is unrelated to the suppression of free expression." 391 U.S. at 377. It is also clear that Section 5 meets *O'Brien*'s requirement that the government regulation at issue be "within the constitutional power of the Government." *Id.*

of Congress, Section 5 is not some hastily-considered floor amendment. Instead, as demonstrated previously, Section 5 is the product of extensive study by both the Congress and the FCC in light of previous guidance from the courts. *See supra* pp. 11-12. Especially where, as here, Congress gave extensive and deliberate consideration to the question of the Cable Act's constitutionality, due consideration must be given to Congress' legislative judgment. *See Bowen* v. *Kendrick*, 487 U.S. 589, 617 (1988); *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981). That judgment "cannot be ignored or undervalued simply because one segment of the broadcast constituency casts its claims under the umbrella of the First Amendment." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 103 (1973).

Further, appellants must overcome the even greater deference owed to the extensive and detailed Congressional findings of fact underlying the Cable Act. Such deference is compelled by the fact that "Congress is an institution better equipped [than a court] to amass and evaluate the vast amounts of data bearing on [the] issue[s]." *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985); *accord Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547, 569 (1990); *Rostker*, 453 U.S. at 72-73. Although a court presented with a constitutional challenge to federal legislation is obliged to "review a legislature's judgment that the facts [it relied upon] exist," it must nevertheless "review Congress's judgment deferentially, without reweighing the evidence *de novo*." *Lamprecht* v. *FCC*, 958 F.2d 382, 392 n.2 (D.C. Cir. 1992). Accordingly, there is no basis for appellants' suggestion that the Court should re-weigh the massive factual record analyzed by Congress.

Even in the absence of this deferential standard, the record underlying Congress' factual findings with respect to Section 5 is more than sufficient to justify Congress' decision to enact noncommercial must carry rules. In addition to drawing on the FCC's investigations, including the

Commission's exhaustive 1990 Cable Report, both Houses of Congress held numerous, lengthy hearings and compiled evidence from dozens of witnesses representing all sectors of the communications industry. *See supra* pp. 11-12. Moreover, the judgments reached in the 1992 Cable Act were not merely the product of recent investigations, but also of 40 years of close and continuous oversight of the relationship between the cable and broadcast industries. The conclusions gleaned from these years of study are set forth in Section 2 of the Act. Far from findings that "black is white or freedom is slavery," *Lamprecht*, 958 F.2d at 392 n.2, these conclusions are well-grounded in the evidence presented and, as established below, wholly sufficient to support Section 5.

B. Congress Has Demonstrated A Substantial Government Interest.

As set forth in the Act and its legislative history, the Cable Act's must carry provisions are intended to further several longstanding government interests: (1) promoting fair competition in the video marketplace, (2) preserving for the public the benefits of local television service, and (3) promoting the widespread dissemination of information from diverse sources. *See generally* 1992 Cable Act § 2(a). With respect to Section 5 in particular, the must carry rules also serve the goals "of furthering the educational development of all citizens and [ ] protect[ing] the nation's substantial investment in and commitment to public television services." 1992 House Report at 68; *see also id.* at 68-71; 1992 Cable Act § 2(a)(8).

As the district court correctly held, the substantiality of each of these asserted interests is "beyond dispute." J.S. App. 23a. Localism, diversity, and fair competition have served as the touchstones of Congressional regulation of the television industry — and judicial review of that regulation under the First Amendment — since 1934. *See* 47 U.S.C. § 307(b) (1988) (nationwide allocation of channels); *Metro*

Broadcasting, Inc., 497 U.S. at 567 ("the interest in enhancing broadcast diversity is, at the very least, an important governmental objective"); *Southwestern Cable Co.*, 392 U.S. at 172-74 & nn.38-39 (localism); *Associated Press*, 326 U.S. at 20 (fair competition).[39] "There can be little doubt that the comprehensive regulations developed over the past 20 years by the FCC to govern signal carriage by cable television systems reflect an important and substantial federal interest." *Capital Cities Cable, Inc.*, 467 U.S. at 714.

Moreover, Congress' support and encouragement of public television has long been recognized as "further[ing] the general welfare." 47 U.S.C. § 396(a)(5) (1988). More recently, in amendments to the 1934 Communications Act, Congress made the point as clearly as it can be made:

> [P]ublic television and radio stations and public telecommunications services constitute valuable local community resources for utilizing electronic media to address national concerns and solve local problems through community programs and outreach programs.
>
> [I]t is in the public interest for the Federal Government to ensure that all citizens of the United States have access to public telecommunications services through all appropriate available telecommunications distribution technologies.

Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 4, 106 Stat. 949 (amending 47 U.S.C. § 396(a) (1988)).

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[39] *See also Chicago Cable Communications*, 879 F.2d at 1549 ("Encouragement of 'localism' certainly qualifies as an important or substantial interest.").

Appellants do not contest the legitimacy of Congress' interest in fostering and maintaining the nation's public television services, nor could they reasonably do so. Instead, appellants attack the sufficiency of the evidence garnered by Congress to support the Act's must carry provisions. Even if it were proper for this Court to re-weigh the factual evidence presented to Congress (which it plainly is not), appellants' claims are erroneous.

First, appellants contend that the evidence does not support the view that cable poses any threat to local broadcast programming. *See*, *e.g.*, NCTA Br. at 39-41. In making this argument, however, appellants largely ignore the record evidence that relates specifically to noncommercial television. Thus, appellants do not address the evidence before Congress demonstrating that between 1985 and 1988, 153 public television stations, nearly half of all such stations, were dropped or denied carriage 463 time by 347 cable systems. FCC Signal Carriage Survey, at 10; *see also id.* at 19 (182 public television stations involuntarily repositioned on 541 occasions between 1985 and 1988).[40] Appellants also fail to address the fact that this evidence conforms to Congress' common-sense reasoning concerning the unique economic incentives of cable operators with respect to public television stations. In short, even if appellants' arguments concerning the commercial broadcasting evidence were accurate, which they are not, it is plain that Congress made sufficient

[40] In a feeble attempt to address Section 5, appellants note that the total number of noncommercial television stations has increased since 1985. *See*, *e.g.*, NCTA Br. at 40. This isolated fact, however, says nothing about the evidence of cable's anticompetitive conduct toward public television stations or about cable's incentives to deny carriage to public television in the future. Congress may act to guard against the "dangerous probability [of attempts to monopolize] as well as against the completed result." *Swift and Co. v. United States*, 196 U.S. 375, 396 (1905).

evidentiary findings to support the noncommercial must carry rules of Section 5.[41]

Second, relying on *Century*, appellants contend that non-carriage is not a threat to broadcast television because of the alternative means available for receiving such signals over-the-air — *i.e.*, via A/B switch technology. *See* Turner Br. at 41; Time Warner Br. at 42-43. In making this claim, however, appellants fail to discuss the substantial evidence developed since *Century* — and relied on by Congress — showing that technology such as the A/B switch is not a workable solution to the threat of non-carriage. *See* 1992 House Report at 54, 70-71, 74; 1992 Cable Act § 2(a)(17)&(18). Nor, again, do appellants come to grips with the unique problems of public television — in this case, the fact that two-thirds of public television stations use the UHF band for their over-the-air transmissions, making public television signals particularly vulnerable to interference from terrain, atmospheric disturbances and man-made obstacles. *See* 1992 House Report at 70. Accordingly, public television stations are even more dependent than commercial stations on continued cable carriage of their signals.

C. Section 5 Is Not Substantially Broader Than Necessary To Achieve The Substantial Government Interest On Which It Rests.

Section 5 is also narrowly tailored to achieve the government's interest, thus satisfying the second major prong

[41] Some of appellants' contentions concerning the evidence are misleading. For example, both NCTA and Turner quote a section of the 1992 House Report for the proposition that Congress found no "widespread pattern" of carriage denials of local television stations. NCTA Br. at 40; Turner Br. at 43. However, both appellants omit the remainder of the sentence, which states that "there is ample evidence that some cable systems will refuse to carry the signals of local television stations, and that such refusal to carry poses a grave threat to the allocation system favoring local service established by Congress and the FCC." 1992 House Report at 52.

of the *O'Brien* test. In order to meet this requirement, a regulation need not be the "least restrictive" or "least intrusive" means available. *Ward*, 491 U.S. at 798. "So long as the means chosen are not substantially broader than necessary to achieve the government's interest," the regulation will be upheld even if "a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Id.* at 800.

Here, Congress has carefully crafted the requirements of Section 5 to achieve its objectives with minimal burden on cable operators. Among other provisions, the must carry rules for noncommercial stations are circumscribed in the following ways:

- The number of public television stations that a cable operator must carry is limited, depending on the number of channels available on the system. 1992 Cable Act § 5(b)(1), (2) & (3).[42/]

- The cable operator is not obligated to carry substantially duplicative qualified signals. *Id.* § 5(b)(3)(C) & (E).

- If the cable operator is obliged to add a public television station under the must carry rules, it can choose to carry that station on a channel already reserved for public access programming if that channel is not being used for its designated purpose, subject to the agreement of

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[42/] Thus, in general, systems with 12 or fewer channels are required to carry only one public television signal; systems with 13-36 channels must carry one but no more than three public television stations; and systems with more than 36 channels must carry all public television stations that request carriage.

the franchising authority. *Id.* § 5(d); *see* 1992 House Report at 100.[43/]

These limitations clearly meet the primary "tailoring" concerns of the D.C. Circuit in *Quincy*, which invalidated must carry rules that "required carriage of every local or significantly viewed signal irrespective of the number of must carry channels already being transmitted, the degree of programming duplication, or the channel capacity of a cable system." 768 F.2d at 1440.[44/] In short, there is no danger that Section 5 will cause the problem of "channel saturation" that strongly influenced the *Quincy* court to strike down the FCC's much broader must carry rules.[45/]

Section 5 is also congruent with Congress' interest in preserving and promoting localism. As Congress found, noncommercial stations have long been the beacon of localism in the television industry. Not only have they served the

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[43/] For a cable operator with unused public access channels that equal or exceed the number of qualified local noncommercial educational television stations required to be carried (only one station for more than 80 percent of the cable systems), compliance with Section 5 will not involve any loss of cable channels. Because this is a circumstance in which a cable operator can comply with Section 5 and not suffer any of the alleged constitutional harm, appellants' facial challenge to Section 5 should be summarily rejected. *See Rust* v. *Sullivan*, 111 S. Ct. at 1767.

[44/] These limitations are also especially significant in light of the minimal burden that would be imposed on cable systems by an *unlimited* requirement to carry public television stations. *See supra* pp. 13-14.

[45/] The burden posed by Section 5 is further minimized by ongoing improvements in the channel capacity of cable systems. While the average system has a capacity of about 36 channels, some cable systems have as many as 150 useable channels. Technological developments have placed channel capacity of this magnitude within reach of nearly all cable systems, and further developments promise to provide virtually unlimited channel capacity (500 or more channels) within a few years. *See* J.A. at 109-120, 311-318. Thus, in the not too distant future, most cable systems will have the capacity to carry all broadcast signals and all cable programming. J.A. at 318.

educational and informational needs of local communities since noncommercial spectrum channels were allocated in 1952, but local governments and citizens have supported the continued provision of these services through substantial tax dollars and voluntary contributions. *See* 1992 Cable Act § 2(a)(8). In light of the economic structure and incentives of the cable industry, it cannot seriously be argued that Congress has overstepped its bounds in preserving this locally supported educational service by adopting modest must carry rules for public television stations.[46/]

Finally, appellants contend that the channel position aspects of the must carry rules do not serve the goal of promoting competition in the video services market. At the outset, it is difficult to conceive how positioning requirements burden any First Amendment interest, because they do not suppress any speech. They are quintessential structural regulations. At most, the channel positioning requirements are a reasonable time, place and manner restriction (with the emphasis on place). Viewed (charitably) in that light, the channel positioning provisions of Section 5 are clearly justified. If left unregulated, cable operators will have every incentive to shunt public stations to even less desirable channels than they currently occupy. Indeed, Congress cited evidence that over 200 noncommercial educational stations were repositioned since 1985 by cable operators. *See*

[46/] This analysis is not affected by Judge Williams' dissenting view that the leased access scheme created by § 612 of the 1984 Cable Communication Policy Act, 47 U.S.C. § 532 (1988), is a less restrictive means of achieving the congressional interests underlying must carry. The leased access regime requires dedication of up to 15% of a cable operator's channel capacity to unaffiliated programmers. That percentage will almost always be more onerous than the *de minimis* requirements of Section 5. *See supra* pp. 13-14. Further, because cable operators retain the discretion to decide which unaffiliated programmers will obtain access under § 612, that provision does not address the anticompetitive practices and incentives attacked by Section 5. Accordingly, leased access provisions are not less restrictive than Section 5, nor are they as effective in achieving the governmental interests addressed by Section 5.

1992 House Report at 71; *see also* FCC Signal Carriage Survey at 19. Under these circumstances, the channel position requirements are clearly no broader than necessary to support the government's interest in meaningful access to public television services.

CONCLUSION

For the reasons stated above, the Court should affirm the district court's judgment upholding the constitutionality of Section 5.

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No. 93-44

IN THE
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OCTOBER TERM, 1993

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,
v.
FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF FOR INTERVENOR-APPELLEES CONSUMER FEDERATION OF AMERICA, *ET AL.*

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QUESTION PRESENTED

Whether Congress may require cable operators to carry the signals of a limited number of free over-the-air broadcast television stations?

RULE 29.1 LIST OF PARENT COMPANIES AND SUBSIDIARIES

Pursuant to Rule 29.1, Consumer Federation of America, National Council of Senior Citizens, International Association of Machinists and Aerospace Workers, AFL-CIO and the Office of Communication of the United Church of Christ, through undersigned counsel, hereby certify that they have no parent companies, subsidiaries, or affiliates that have any outstanding securities in the hands of the public.

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Bowen v. Kendrick, 487 U.S. 589 (1988) 11

Buckley v. Valeo, 424 U.S. 1 (1976) 15

CBS v. DNC, 412 U.S. 94 (1973) 12, 14

CBS, Inc. v. FCC, 453 U.S. 367 (1981) 9, 14

Capital Cities Cable v. Crisp, 467 U.S. 691 (1984) 17

Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984) 31

Chicago Cable Communications v. Chicago Cable Comm'n., 879 F.2d 1540 (7th Cir. 1989), cert. denied, 493 U.S. 1044 (1990) 8

Community Cablevision Company v. FCC, No. CV 92-3104-R (C.D. Cal.) 11

Daniels Cablevision, Inc. v. U.S., 1993 U.S. Dist. LEXIS 12806 (D.D.C. 1993) 35

FCC v. League of Women Voters, 468 U.S. 364 (1984) 42

FCC v. Midwest Video Corp., 440 U.S. 689 (1979) 18

FCC v. NCCB, 436 U.S. 775 (1975) 8, 15

KFKB Broadcasting Ass'n, Inc. v. Federal Radio Commission, 47 F.2d 670 (D.C. Cir. 1931) 28

Metro Broadcasting Co. v. FCC, 497 U.S. 547 (1990) 12, 15, 20, 21, 27

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) 8, 38

PruneYard Shopping Center v. Robbins, 447 U.S. 74 (1980) 9

Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), cert. denied, 476 U.S. 1169 (1986) 30, 31

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) 6, 14, 15, 16

Rust v. Sullivan, 111 S.Ct. 1759 (1991) 10, 42

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) 6

Turner Broadcasting, Inc. v. FCC, 819 F.Supp. 32 (D.C.C. 1993) 10, 16, 38, 39, 42

UCC v. FCC, 359 F.2d 994 (D.C. Cir. 1966) 13

UCC v. FCC, 707 F.2d 1413 (D.C. Cir. 1983) 28, 30

United States v. Midwest Video, 406 U.S. 649 (1972) 13, 18

United States v. O'Brien, 391 U.S. 367 (1968) 6, 10, 29

United States v. Southwestern Cable Co., 392 U.S. 157 (1968) 8, 17

Viacom International, Inc. v., FCC, No. C-93-2984 (N.D. Cal.) 11

Ward v. Rock Against Racism, 491 U.S. 781 (1989) 6

AGENCY MATERIALS

1990 Cable Report, 5 FCC Rcd 4962(1990) 7

Analysis and Compilation by State of Minority Owned Commercial Broadcast Stations, National Telecommunications and Information Administration (1993) 20

"Cable System Broadcast Signal Carriage Survey," Staff Report by the Policy and Rules Division, Mass Media Bureau, FCC (1988) 13, 17

Implementation of Section 4(g) of the Cable Television Consumer Protection Act of 1992 (Home Shopping Station Issues), 8 FCC Rcd 5321 (1993) 30

Implementation of of the Cable Television Consumer Protection and Competition Act of 1992, 8 FCC Rcd 2965 (1993) 31, 32

Implementation of of the Cable Television Cable Television Consumer Protection and Competition Act of 1992 (Rate Regulation), 8 FCC Rcd 5631 (1993) 37, 38

Policy Statement on Comparative Broadcast Hearings, 1 FCC 2d 393 (1965) 20

Revision of Programming and Commercialization Policies (TV Deregulation), 98 FCC2d 1076 (1984) 19, 23, 27

TV Deregulation (Reconsideration), 104 FCC 2d 357 (1986), rev'd on other grounds sub nom., *ACT v. FCC*, 707 F.2d 741 (D.C. Cir. 1987) 30

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17 U.S.C. §§101, *et seq* 7

47 U.S.C. §§303(a) *et seq.* 22, 28

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47 U.S.C. §315 43

47 U.S.C. §317 28

47 U.S.C. §325(b)(1) 33

47 U.S.C. §325(b)(2)(A) 33

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47 U.S.C. §532(c)(2) 35

47 U.S.C. §312(b)(1)(A)-(B) 40

47 U.S.C. §325(b)(2)(A) 33

LEGISLATIVE REPORTS

H.R. Rep. No. 628, 102d Cong. 2d Sess *passim*

H.R. Rep. No. 628, 102d Cong. 2d Sess *passim*

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C.F.R. §76.7(a) 11, 31

MISCELLANEOUS

1988 Broadcasting/Cablecasting Yearbook 22

1992 Broadcasting/Cablecasting Yearbook 17

Chicago Tribune, *"Making The Right Video Connections,"* Jan. 9, 1987 35

Comstock, Chaffee, Katzman, McCombs, and Roberts, *Television and Human Behavior* (1978) 22

Fratrik and Helregel, *1993 NAB TV Financial Report* (1993) 39

Hollywood Reporter, *Cablers Cut Only 4 Percent of Stations; Study Details Carriage Landscape in the Wake of Retrans Negotiations*, Oct. 28, 1993 33

Robichaux, *Highway of Hype: Despite Many Claims for 500 Channel TV, Long Road Lies Ahead*, Wall St. J., Nov. 29, 1993 7

Television Digest, *20% of TV Stations Opt Exclusively for Must-carry*, July 19, 1993 39

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BRIEF FOR INTERVENOR-APPELLEES CONSUMER FEDERATION OF AMERICA, *ET AL.*

STATEMENT

Intervenor-Appellees Consumer Federation of America, National Council of Senior Citizens, International Association of Machinists and Aerospace Workers, AFL-CIO and the Office of Communication of the United Church of Christ ("CFA, *et al.*") adopt the Statement contained in the Brief of Appellees Federal Communications Commission and the United States of America.

SUMMARY OF ARGUMENT

Intervenor-Appellees CFA, *et al.* have entered this litigation on behalf of television viewers, whose First Amendment right to receive information is "paramount." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

This case is not simply a dispute between and among competing program providers. In fact, it will have a profound impact on American democracy and self-governance. It will help determine how citizens work, learn and play.

Cable carriage of free, over-the-air TV is necessary to insure that *all* Americans receive access to a diverse range of broadcast service. Indeed, while all citizens have a stake in the outcome of this case, it is the 40% of American households which do *not* receive cable television service which will be most adversely affected if the viability of free TV is impaired. Along with the 60% of households which currently receive cable, they share a distinct First Amendment right to receive access to "the widest possible dissemination of information from diverse and antagonistic sources [which] is essential to the welfare of the public...." *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

CFA, *et al.* generally adopt the views advanced by the federal Appellees. In this brief, however, they wish to stress three points:

First, with respect to the constitutional standard to be employed, CFA, *et al.* urge that in no event can cable television providers be afforded the same constitutional status traditionally applied to the expressive activities of the print medium. There are important differences between the nature of cable and the newspaper medium at issue in cases such as *Tornillo*.

This Court has frequently recognized that where government has helped create monopoly power which limits access for speakers, structural regulation to promote diversity advances First Amendment goals. Since must-carry is self-effectuating, and is not directed at the subject matter or viewpoint of what is carried on any cable system, it is not the type of content-based regulation which could trigger strict scrutiny.

In the event that this Court determines to apply *O'Brien-Ward* type intermediate scrutiny here, CFA, *et al.*, argue that must-carry easily passes muster. Appellants fall far short of the burden they must meet in mounting a facial challenge, as must-carry is narrowly tailored to advance important interests without imposing unnecessary additional restrictions.

Second, as to the interests advanced by must-carry, CFA, *et al.* emphasize that government has not only an important, but a compelling interest in furthering the public's right of access to a variety of information from diverse sources. The 1992 Cable Act advances this objective. Based on extensive ongoing oversight, Congress made findings of unprecedented detail about the nature of the incentive that cable operators have acquired to interfere with the free flow of information and their exercise of that power. It is the economically marginal stations and non-commercial stations which are especially vulnerable to cable's predation; must-carry insures that those stations, which often provide important additional source and viewpoint diversity, are available for all Americans.

Third, as to the operation of must-carry, CFA *et al.* call this Court's attention to the careful manner in which the 1992 Cable Act was crafted so as to narrowly tailor relief no broader than is necessary to advance these important priorities. In particular, they point to the close operational relationship between the must-carry provisions in Sections 4 and 5 of the 1992 Cable Act and the retransmission consent scheme set forth in Section 6. By modifying copyright provisions governing cable's use of broadcast signals, Congress gave larger, more powerful stations the opportunity to withhold their signals and to seek compensation for making them available. This self-executing, market driven process has created a strong incentive for broadcasters which may

not have needed the advantage of must-carry to opt against claiming mandatory carriage. In theory, and in actual operation, must-carry privileges have been employed only by those stations which were likely to have been denied carriage.

Several parties echo Judge Williams suggestion (in his dissent below) that there are less restrictive alternatives to achieve the same purposes as must-carry. But these devices do not adequately fulfill the same objectives. The newly-strengthened leased access mechanism provided in the 1984 Cable Act does not help insure access to TV service for the 40 percent of homes not subscribing to cable, does not help maintain a public broadcasting system and is in any event fraught with operational uncertainties. A/B switches do not work. Finally, Judge Williams' suggestion that direct subsidies could be provided is not only unwieldy, but ultimately far more intrusive in terms of the First Amendment.

ARGUMENT

Appellants CFA, *et al.* appear here on behalf of television viewers in the 40% of U.S. households which do not subscribe to cable, as well as the 60% of those that do receive cable. They ask this Court to sustain Sections 4 and 5 of the Cable Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"), because it advances important First Amendment rights, specifically the public's right to receive information from diverse sources of information. The government has not only an important, but a compelling interest in advancing both this right and the statutory right of the public to receive free, locally-based, over-the-air broadcast stations.

CFA, *et al.* submit that Sections 4 and 5 of the 1992 Cable Act, should, at most, be subjected to an intermediate *O'Brien-Ward* standard of scrutiny. It is clear, that under

that standard, Sections 4 and 5 pass constitutional muster. Must-carry is narrowly tailored to serve the interest of the government in protecting the public's right to receive information from free, over-the-air broadcast television. The must-carry provisions work in tandem with the retransmission consent scheme in Section 6 to insure that the small, economically marginal stations are preserved through must-carry, while the larger, more viable stations which may not need must-carry can opt against claiming mandatory carriage.

Contrary to Judge Williams' suggestion, there is no "least restrictive alternative" to must-carry. Leased access channels do not help insure access to TV service for those who do not subscribe to cable, do not assist public television stations and would likely be unaffordable for the smaller stations which are most in need of must-carry. A/B switches are unwieldy. And the direct subsidies Judge Williams suggests invite far more government intrusion into First Amendment rights than must-carry ever could.

I. STRICT FIRST AMENDMENT SCRUTINY DOES NOT APPLY TO THE MUST-CARRY PROVISIONS, WHICH SHOULD BE EVALUATED, AT MOST, UNDER THE *O'BRIEN-WARD* INTERMEDIATE SCRUTINY STANDARD.

A critical threshold question in this case concerns the proper level of first amendment scrutiny applicable to must-carry. The cable interests argue that their medium is entitled to be evaluated under the same First Amendment standards as are newspapers and other print media. *See, e.g.*, Brief of Time Warner Entertainment Company at 14 ("Time Warner Br."). Moreover, they argue that must-carry is a content based regulation, and therefore must be examined under a "strict scrutiny" standard. *Id.*

This Court has recognized, however, that each communications medium "must be addressed for First Amendment purposes by standards suited to it, for each may present its own problems." *Southeast Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975). *Accord, e.g., Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969).[1] The specific problems and characteristics of cable and the must-carry provisions make clear that strict scrutiny of these provisions is inappropriate, and that at most, intermediate scrutiny as in such cases as *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), and *United States v. O'Brien*, 391 U.S. 367 (1968), should be applied here.[2]

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[1]While Appellants and supporting *amici* generally acknowledge this principle, *see, e.g.*, Brief of Turner Broadcasting System, Inc. at 35 ("Turner Br."), Time Warner Br. at 12, Brief of United States Telephone Association *et al.* at 8 ("Telephone Companies Br."), *amicus* Citizens for a Sound Economy advances the view that this Court should overrule these decisions and assess First Amendment claims without regard to the individual characteristics of the particular medium of expression under consideration. *See generally*, Brief of Citizens for a Sound Economy ("CSE Br."). Leaving aside the disruptive impact of jeopardizing decades of settled law in disparate areas of commerce and expression, this proposition would be extremely unwise. For one thing, it would make it much more difficult to proceed with routine, non-content based regulation with respect to the mass media. Every day, local, state and federal bodies at least indirectly facilitate or restrict speech by reasonably (or unreasonably) granting (or denying) licenses, permits, franchises, variances, etc. It is impossible to assess each of these decisions without taking into account the specific characteristics of the medium seeking such benefits.

[2]*Amici* CSE and Telephone Companies argue that utilizing a different First Amendment standard for cable than for other media would somehow impede the growth of new electronic communications technologies, which will deliver information largely over fiber optic wire and coaxial cable. CSE Br. at 11; Telephone Companies Br. at 9-12. This

A. The Cable Medium Is Fundamentally Different From Newspapers, And Should Therefore Be Subject To Different First Amendment Standards.

Because there are important differences between the nature of the newspaper medium at issue in *Tornillo* and the cable industry, this Court should reject Appellants' argument that regulation of both should be evaluated pursuant to identical First Amendment standards. While economic constraints clearly apply to both media, anyone can publish a newspaper without seeking government permission. Unlike cable, newspapers do not need special rights-of-way controlled by government, detailed systems of government franchising and special copyright legislation.[3] Indeed, a cable operator with a government franchise obtains a "virtual monopoly over its area" which is granted by the government it-

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argument assumes too much. Much of the technology to which they refer is nascent; for the next decade at least, broadcasting and cable television will remain the primary source of news and information for the vast majority of the American public. Moreover, there is no guarantee, and quite a bit of skepticism, that these technologies will soon, if ever be available to, or desired by, the public. *See* Robichaux, *Highway of Hype: Despite Many Claims for 500 Channel TV, Long Road Lies Ahead*, Wall St. J., Nov. 29, 1993 at A1, col 6. If these technologies live up to their promise of offering unlimited, non-discriminatory two-way access, future courts will have no problem granting the highest level of First Amendment protection to them.

[3]It is indeed ironic that Appellants here seek to rid themselves of any obligation to carry over-the-air stations after capitalizing on years of free use of those signals pursuant to the compulsory copyright laws. Copyright Revision Act of 1976, 17 U.S.C. §§ 101, *et seq.* The cable industry's ability to carry broadcast stations free of charge during its nascent years has undoubtedly been one of the primary reasons for the industry's rapid growth. 1990 Cable Report, 5 FCC Rcd 4962, 5038 (1990).

self. *Chicago Cable Communications v. Chicago Cable Comm'n.*, 879 F.2d 1540, 1550 (7th Cir. 1989), *cert. denied*, 493 U.S. 1044 (1990). *See also* §II.A., *infra*.

In the context of broadcasting, this Court has recognized that where government has helped create a monopoly with respect to a communicative function which limits access and diversity, structural regulation to promote diversity and access is permissible and should not be subject to strict scrutiny. *See Associated Press v. United States*, 326 U.S. 1 (1945); *FCC v. NCCB*, 436 U.S. 775 (1975). The same rationale applies to cable as well, as this Court has already suggested in upholding previous FCC cable rules. *See e.g., United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968). As *Amicus Curiae* American Civil Liberties Union ("ACLU") has pointed out, any contrary rule would threaten not only the constitutionality of other efforts to promote access and diversity such as cable leased access rules adopted pursuant to 47 U.S.C. §532(b), but would also call into serious question the propriety of the government-granted monopoly itself. *See* Brief of American Civil Liberties Union at 6, 9-10 ("ACLU Br.").

B. Strict Scrutiny Is Inapplicable To Must-Carry.

Appellants assert that strict scrutiny applies because the must-carry provisions affect the content of what is carried by cable operators. Time Warner Br. at 14-31; Brief of Daniels Cablevision, Inc. at 5-15 ("Daniels Br."); Turner Br. at 23-27; Brief of the National Cable Television Association at 16-34 ("NCTA Br.");Brief of Discovery Communications Inc. at 23-32 ("Discovery Br."). In support of that argument, they claim that the must-carry provisions are analogous to the newspaper right-to-reply provisions struck down in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). Time Warner Br. at 23-25; Daniels Br. n.34; Turner Br. at 30-31, n.53 and accompanying text; NCTA

Br. at 18; Discovery Br. at 47-48.

Appellants' claim ignores the fact that this Court has frequently declined to apply strict scrutiny to rules that affect the content of expression in some manner. This Court, *inter alia*, has upheld laws requiring reasonable access to broadcast time for federal candidates, *CBS, Inc. v. FCC*, 453 U.S. 367 (1981), as well as a statute effectively banning nude dancing. *Barnes v. Glen Theaters, Inc.*, 111 S.Ct. 2456 (1991).

Like the laws at issue in *CBS, Inc.* and *Barnes*, must-carry does not constitute the type of content-based regulation that triggers strict scrutiny.[4] Must-carry is not directed at the subject matter or viewpoint of what is carried on any cable system. It does not require, for example, that an operator permit a reply to attacks on a political candidate as in *Tornillo*, or limit "violent" or "indecent" programming. It applies whether a local broadcast station is independent or network-affiliated, English or Spanish-language, religious or secular--indeed, regardless of its content or subject matter. As such, must-carry is structural regulation aimed at increasing access and diversity, not content restriction which triggers strict scrutiny. *See PruneYard Shopping Center v. Robbins*, 447 U.S. 74 (1980) (rejecting First Amendment challenge to law mandating access to shopping centers for speech-related activities). Both because of the characteristics of must-carry itself and the nature of the

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[4]Contrary to the suggestion of Appellants, *see* Time Warner Br. at 15, this conclusion is not based on reflexive deference to Congress' view or intent that the must-carry provisions are not content-based regulations warranting strict scrutiny. CFA, *et al.* agree that where First Amendment rights are at stake, the Court must itself make this determination by examining the nature of the rules and the medium at issue.

cable medium, therefore, strict scrutiny is not applicable.

C. At Most, Intermediate Scrutiny In The Context Of A Facial Challenge Applies To Must-Carry.

The court below rejected strict scrutiny, and concluded that the must-carry provisions should be subjected to the *O'Brien-Ward* intermediate level of scrutiny. *Turner Broadcasting, Inc. v. FCC*, 819 F.Supp. 32, 45 (D.D.C. 1993). Under that standard, must-carry must be sustained if it is narrowly tailored to accomplish an important or substantial government objective. *See O'Brien, supra*, 391 U.S. at 377. Thus, the court implicitly recognized that just as there was an incidental effect on expression and its content in the noise regulation in *Ward* and the draft card rules in *O'Brien*, there is no more than an incidental effect here. The *O'Brien-Ward* standard permits appropriate deference to Congress' regulatory objectives in enacting must-carry while safeguarding against any incidental incursions on First Amendment interests.

To the extent that intermediate scrutiny is applied in this case, however, it is important to keep in mind that this is a facial challenge to Congress' must-carry provisions. As this Court has recognized, a facial challenge is "the most difficult challenge to mount successfully" because the "challenger must establish that no set of circumstances exist under which the Act would be valid." *Rust v. Sullivan*, 111 S.Ct. 1759, 1767 (1991). In other words, even if a cable operator could show in an individual case that must-carry is not narrowly tailored to achieve an important government objective in light of the burden on expression in that case, the cable interests cannot prevail here unless they could establish that must-carry can *never* be so justified, either

specifically or in general.[5]

Under these circumstances, it is clear that the must-carry provisions on their face meet the *O'Brien-Ward* standard. As discussed below, must-carry promotes important governmental interests and is narrowly tailored to achieve that objective.

II. THE MUST-CARRY PROVISIONS FURTHER THE GOVERNMENT'S IMPORTANT INTEREST IN ADVANCING THE PUBLIC'S FIRST AMENDMENT RIGHT TO RECEIVE INFORMATION FROM FREE, OVER-THE-AIR BROADCAST TELEVISION.

The public has a distinct and "paramount" First Amendment right to receive a variety of information from diverse sources. They also have a specific statutory right

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[5]It is of particular salience to note that the FCC has adopted rules allowing broad latitude for granting waivers from must-carry wherever they can be justified in an individual case. 47 C.F.R. §76.7(a). Moreover, because this case was resolved on summary judgment, there were no issues of material fact genuinely in dispute in the court below. In this context, CFA, *et al.* submit that the ACLU's suggestion that this case be remanded for factual findings is misplaced. ACLU Br. at 17. The appropriate time to have raised any such concerns would have been before the court below when it considered the motions for summary judgment. In any event, any specific factual issues on must-carry can, and may yet, be raised in challenges to the must-carry rules as they have been applied. It is in this specific context where such factual matters can be explored. As this Court has recognized, a ruling that a statute complies with the First Amendment on its face does not preclude an as-applied challenge. *See, e.g., Bowen v. Kendrick*, 487 U.S. 589 (1988). Indeed, two cases challenging the must-carry provisions as-applied have already been brought in two different federal district courts in California. *See Community Cablevision Company v. FCC*, No. CV 92-3104-R (C.D. Cal.); *Viacom International, Inc. v. FCC*, No. C-93-2984 (N.D. Cal.).

under the Communications Act of 1934 to receive such information from free, over-the-air broadcast stations, which, unlike cable systems, must serve all local residents and not just their paid-up customers. This Court has recognized that government has not simply an important interest, but a compelling interest in furthering these rights. *See Metro Broadcasting Co. v. FCC*, 497 U.S. 547 (1990), *Red Lion Broadcasting Co. v. FCC, supra*, *CBS v. DNC*, 412 U.S. 94, 102 (1973).

In challenging the must-carry provisions of the 1992 Cable Act, Appellants and their supporting *Amici* seek to emasculate these crucial rights. Congress has found that, without carriage over cable systems, many over-the-air stations will be at risk. *See* 1992 Cable Act, Section 2(a)(16).[6] The greatest impact of lost cable carriage would

be felt by economically marginal UHF stations. "Cable System Broadcast Signal Carriage Survey," Staff Report by the Policy and Rules Division, Mass Media Bureau, Sept. 1, 1988. The ownership and management of these stations are disproportionately composed of those without other media interests, and persons from a diverse range of ethnic and social backgrounds, including minorities and women. Thus, these stations make an especially significant contribution to diversity in the marketplace of ideas. Reduced advertising revenues (and, in the case of noncommercial stations, viewer contributions) which would accompany the loss of cable carriage would reduce funds available to these stations for local and other programming. H.R. Rep. No. 628, 102d Cong., 2d Sess. 26-28 (1992)("H.R. Rep."); S. Rep. No. 92, 102nd Cong., 1st Sess. 1-2 (1991)("S. Rep."). Congress has found that there is also a good chance that these stations may not be able to survive. *Id.*; *see also* 1992 Cable Act, Section 2(a)(16).

This prospect is to the detriment of television viewers, "who are most directly concerned with and intimately affected by the performance of a [broadcast] licensee." *UCC v. FCC*, 359 F.2d 994, 1002 (D.C. Cir. 1966). In the absence of must-carry protections, television viewers will be less likely to receive what has been theirs for decades: access to free over-the-air television and the quality local programming it often provides. And the 40% of the cable households that do not receive cable (disproportionately the

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[6] "There has been considerable discussion in this case about the appropriate degree of deference to be afforded to Congressional findings. This Court has recognized that: "We must pay close attention to the expertise of the Commission and the fact-finding of Congress when analyzing the nexus between minority ownership and diversity. *With respect to this complex empirical question, we are required to give great weight to the decisions of Congress and the experience of the Commission. Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 569 (1990) (emphasis added). For several reasons, similar deference is appropriate here. First, the Congressional findings here do not focus on the issue of whether must-carry is content-based. *CFA, et al.* agree that in the case of findings of that type, an independent judicial determination is appropriate. *See, supra*, note 4. Second, as was the case in this Court's *Metro Broadcasting* decision, the detailed and weighty findings in this case relate to complex, empirical questions which Congress has explored with almost unprecedented thoroughness. Finally, the findings do not concern such sensitive First Amendment-specific issues as whether particular types of speech have good or bad effects. Rather, they are essentially economic and industry-related facts particularly within Congress' competence, several of which this Court has already acknowledged. *See United States v. Midwest Video*, 406 U.S. at 664 (noting that controlling cable's potential "competitive impact" on "broadcast services" justified regulation of cable); *Capital Cities Cable v. Crisp*, 467 U.S. 691, 714 (1984) (acknowledging important federal interest in "protecting noncable households from loss of regular television broadcasting service due to competition from cable systems").

young, the old and the poor), will be left without over-the-air television, which is their primary source of news and information. The likely consequence of such action would be an acceleration of trends leading to a society of information haves and have-nots.

A. The Government Has A Compelling Interest In Advancing The Viewing Public's Distinct And "Paramount" First Amendment Right To Receive Information From Free, Over-The-Air Broadcast Television.

An essential First Amendment right this Court must consider in determining the constitutionality of the must-carry provisions is the public's "paramount" right to *receive* information. *CBS, Inc. v. FCC*, 453 U.S. at 395-396; *CBS v. DNC*, 412 U.S. at 94, *Red Lion*, 395 U.S. at 390. It has long been understood that the government has a compelling interest in furthering that right. *See generally, Red Lion, supra, CBS v. DNC, supra, Metro Broadcasting supra*. In this case, where the future of the nation's over-the-air broadcast system is at risk, protecting that right is critical. *See Metro Broadcasting, supra*; *Red Lion*, 395 U.S. at 390.

It is similarly indisputable that the public has an equally important First Amendment right to receive access to "the widest possible dissemination of information from diverse and antagonistic sources [which] is essential to the welfare of the public...." *Associated Press v. United States*, 326 U.S. at 20. Moreover, this Court has expressly found that the government has an interest in furthering the public's interest in receiving diverse viewpoints on over-the-air broadcast stations:

> [s]afeguarding the public's right to receive a diversity of views and information over the airwaves is...an integral component of the FCC's mission.

Metro Broadcasting, 497 U.S. at 567.[7] *See FCC v. NCCB*, 436 U.S. at 775, quoting *Buckley v. Valeo*, 424 U.S. 1, 50-51 (1976), quoting *Red Lion*, 395 U.S. at 393 (efforts to "enhanc[e] the volume and quality of coverage" of public issues'...[made available to the public on broadcasting stations] may be permissible where similar efforts to regulate the print media would not be").

However, when one entity has editorial control over every channel within a particular medium of expression, the public's right to the kind of source diversity that insures access to different perspectives is seriously threatened. This Court has recognized this problem in both the print and broadcast contexts. *See FCC v. NCCB*, 436 U.S. at 790 (affirming the lower court's ruling upholding newspaper-broadcast crossownership ban because ban was "designed to 'increas[e] the number of media voices in the community' and not to restrict or control the content of free speech." (citation omitted)). *Associated Press*, 326 U.S. at 20. ("[s]urely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom."); *Red Lion*, 359 U.S. at 390 (citing *Associated Press*, 326 U.S. at 20) ("[i]t is the purpose of the First Amendment to reserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that

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[7]CFA, *et al.* are strong supporters of the Fairness Doctrine in broadcasting because it guarantees that different points of view will be presented in broadcasters' overall programming. *See Red Lion, supra*. However, it bears emphasis that the best way to achieve diversity is by structural and ownership rules which allow access for many different voices. *See, e.g., Metro Broadcasting, supra*. Thus, viewpoint neutral alternatives (such as must-carry) help reduce the need for reliance on viewpoint based regulations like the Fairness Doctrine.

market whether it be by the Government itself or a private licensee."); *see generally*, *Metro Broadcasting*, *supra*. Thus, the First Amendment serves to ensure that there is wide access to the marketplace of ideas, and protects against manipulation of this marketplace by private entities.

The 1992 Cable Act is wholly consistent with this purpose. Based on its oversight of the operation of the 1984 Cable Act, Congress found that the cable industry had become an entrenched, anticompetitive bottleneck, and as a result, diversity was being stifled. 1992 Cable Act, Sections 2(a)(2),(4),(5),(15),(16). As the court below recognized, cable operators' bargaining power and market influence "provides [them] with both the incentive and present ability to block non-cable programmers' access to the bulk of any prospective viewing audience; unconstrained, cable holds the future of local broadcasting at its mercy." *Turner Broadcasting System*, 819 F.Supp. at 46.

Congress enacted the must-carry provisions specifically to diminish cable's insidious market power by insuring nondiscriminatory access to independent broadcast voices. *See* 1992 Cable Act, Section 2(b)(5); H.R. Rep. at 26-28; S. Rep. at 1-2. The purpose of these provisions was to insure viewers' access to increased and diverse sources of information, 1992 Cable Act Section 2(b)(1), as well as more speech on important public issues, which this Court has said "is the essence of self-government." *Red Lion Broadcasting*, 395 U.S. at 390.

B. Must-Carry Insures Access To Free, Over-the-Air Broadcast Television.

This Court has recognized that regulation of cable signal carriage serves the "important and substantial interest" of public access to over-the-air broadcast stations:

> In crafting this regulatory scheme, the Commission has attempted to strike a balance between protecting non-cable households from loss of regular television broadcasting service due to competition from cable systems and ensuring that the substantial benefits provided by cable of increased and diversified programming are secured for the maximum number of viewers.

Capital Cities Cable, 467 U.S. at 714 (citation omitted)(holding that Oklahoma's law barring the retransmission of out-of-state alcohol television commercials over cable systems was pre-empted by federal law).

Thus, as a general matter, insofar as the federal interest in assuring universal access to a diverse range of viewpoints requires affirmative intervention to insure the viability of free, over-the-air broadcasting, the courts have construed the Communications Act of 1934 as giving Congress and the FCC the power to regulate cable as "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." *United States v. Southwestern Cable Co.*, 392 U.S. at 178.[8]

Like the cable signal regulations this Court upheld in *Crisp* and *Southwestern Cable*, the must-carry provisions at issue here further the interests of viewers in receiving ac-

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[8]While there have been significant changes in the nature of the cable industry since *Southwestern Cable*, the core symbiosis between over-the-air broadcasting and cable remains unchanged - cable enables a significant amount of the population to receive clear broadcast signals, and broadcasters provide cable systems with local and community-based programming that their subscribers are constitutionally entitled to receive. In fact, as cable penetration has crept towards 60% of American homes, the entire viewing public is even more dependant on cable to provide the information that is at the core of the First Amendment.

cess to over-the-air broadcast stations.[9] Congress found that without guaranteed carriage over cable systems, many over-the-air stations will be at risk. 1992 Cable Act, Section 2(a)(14)-(16). This is because, in the case of commercial stations (especially those smaller and economically marginal stations), advertisers will be reluctant to buy advertising time on a station that will not be available to a large percentage of their viewing audience. *See* Declaration of Jim Paymar ¶7, submitted as Appendix A to the Motion to Affirm of Appellee Association of Independent Television Stations, Inc. In the case of public television stations, viewer contributions will likely decline for essentially the same reason. Declaration of Marilyn Mohrman-Gillis ¶8, Joint Appendix at 391. The consequent diminution in revenues not only reduces the funds available to these stations for news programming and other local services, but, as Congress found, puts the economic viability of these stations in grave peril. 1992 Cable Act, Section 2(a)(14)-(16).[10]

While the economic damage to these stations will be great, the First Amendment consequences to the viewing public will be immeasurable. Absent must-carry, smaller

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[9]Nothing in the 1984 or the 1992 cable legislation has undercut the ruling in *Southwestern Cable*. Nor did this legislation alter this Court's holding that, because cable systems so extensively carry broadcast signals, the policies of the Communications Act governing broadcasting can be made applicable to cable. *See United States v. Midwest Video Corp.*, *supra*. In *FCC v. Midwest Video Corp.*, 440 U.S. 689, 700 (1979), this Court reiterated that cable television has become "enmeshed in the field of television broadcasting."

[10]In addition, those stations owned by minorities and females are newer, and thus tend to be concentrated in the pool of economically marginal stations. *See infra* §II.C.

stations will either be forced to decrease local programming or go dark, leaving cable subscribers with less local programming addressing issues of community concern that free, over-the-air stations are statutorily required to provide in their role as public fiduciaries. More importantly, as discussed below, those stations will be unavailable as a source of crucial information on local issues for the 40% of the viewing public that does not subscribe to cable and which rely on over-the-air television as their primary source on these issues.

C. The First Amendment Rights Of Both Cable Subscribers And Those Who Do Not Subscribe Are Affected By Must-Carry.

As discussed in Section A above, the First Amendment rights *most directly* at issue in this case are those possessed by the viewing public. And, to the extent that any over-the-air broadcaster is denied carriage, viewers' access to the fruits of Title III of the Communications Act is impeded.

Upon closer scrutiny, it can be seen that the harm is particularly concentrated on less advantaged segments of the audience. The stations that have most commonly been denied cable carriage are public stations and UHF stations with smaller audiences. "Cable System Broadcast Signal Carriage Survey," Staff Report by the Policy and Rules Division, Mass Media Bureau, Sept. 1, 1988. Those stations typically tend to address the needs of specialized segments of the audience, for example, non-English speaking and other minority communities. *Revision of Programming and Commercialization Policies (TV Deregulation)*, 98 FCC2d 1076, 1092 (1984).

Moreover, since the stations that are most at risk are typically newer and serve smaller audiences, they are more likely to reflect the FCC's relatively recent policies directed

at increasing diversity of ownership in broadcasting.[11] As such, these are the very stations that, having been licensed with the objective of broadening diversity of programming available to the public, may most effectively fulfill the FCC's goals of achieving ownership diversity.[12] This Court has recognized, for example, that "many minority broadcasters" are "late entrants who often have been able to obtain only the less valuable stations and "serve geographically limited markets with relatively small audiences." *Metro Broadcasting*, 497 U.S. at 553-54. *See also*, National Telecommunications and Information Administration, *Analysis and Compilation by State of Minority Owned Commercial Broadcast Stations*, 1993.[13] Such stations will often be the least likely to be voluntarily chosen for cable carriage by operators seeking to maximize profits; the absence

[11]FCC policies disfavor multiple ownership, 47 C.F.R. §73.3555(d), and media cross-ownership. 47 C.F.R. §73.3555(c). Policies for the award of new licenses favor owner-operators, especially those without other media interests, as well as owner-operators reflecting a broader cross-section of backgrounds and experiences. *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965).

[12]The number of UHF stations has almost doubled in the last decade; more than 350 new UHF stations have gone on the air in that time. 1992 Broadcasting/Cablecasting Yearbook at G-3. In fulfillment of FCC policies promoting diversity in programming, the mechanisms used to award new broadcast licenses have, since 1978, favored minority applicants who promise to serve as owner-operators. *See Metro Broadcasting Co., supra*; *Policy Statement on Comparative Broadcast Hearings, supra*. Licenses awarded prior to that time reflect less ownership diversity.

[13]This is also true of stations operated by women. An unpublished informal survey conducted by the Association of Independent Television Stations showed that 13% of general managers of independent stations are women. This rate considerably exceeds that of larger stations.

of must-carry would therefore impose particularly destructive damage to policies promoting viewpoint diversity through expanded ownership.

The loss would not just be detrimental to those audiences that are served by specific stations. In fact, *all* citizens are better off when minority viewpoints are presented and become a part of the public discourse. Alternative viewpoints enrich the public by challenging the way in which people view the world and exposing them to new ideas. This Court has recognized that the diversity these stations provide promotes the First Amendment interests of the entire viewing public:

> [t]he benefits of such diversity are not limited to the members of minority groups...; rather, the benefits redound to all members of the viewing and listening audience.

Metro Broadcasting, 497 U.S. at 568.

1. Appellants Ignore The First Amendment Rights Of Those Who Do Not Subscribe To Cable.

Appellants blithely assume that those who do not subscribe to cable have no stake in outcome of this case. This is simply not true. As described above, the greatest impact of must-carry is upon the viewing choices and information sources for the 40% of Americans who choose not to subscribe or do not have the means to subscribe to cable.[14] It is this group of viewers which will be most aggrieved in the long run if carriage is denied to broadcasters which then cannot remain viable.

Households that do not subscribe to cable have a

[14]Cable is completely unavailable to 10% of the viewing public. S. Rep. at 3 (citing report by Paul Kagan Associates).

particular need for broadcast service. For one thing, they do not get cable; broadcasting is all they have. Title III of the Communications Act guarantees these people access to free, over-the-air service;[15] absent must-carry, they must pay to subscribe to cable, if they can, or forgo their right to share in what is a central element of our culture.[16] Furthermore, while over-the-air television service is the primary source of information on public affairs for most Americans, it is especially important to those without cable. *See* Declaration of Gene Kimmelman, submitted as Attachment A to CFA, *et al.*'s Motion for Summary Judgment.[17]

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[15]In addition, non-subscribers tend to be poorer than those who choose to buy cable. Not only are they are less able to afford cable, but other alternative sources of entertainment and information, are also less available to them. These same families are less likely to be able to afford to travel, to see movies, and to avail themselves of other cultural outlets. Thus, they are especially dependent on television for access to other educational, cultural, dramatic, and entertainment programming, as well as informational programming. *See* Declaration of Gene Kimmelman, submitted as Attachment A to CFA, *et al.*'s Motion for Summary Judgment. Non-cable households typically have more children. *Id.* Their needs for educational and instructional programming are especially pronounced. Indeed, Congress has recently and specifically recognized these special needs by imposing additional children's programming obligations upon broadcasters in the Children's Television Act of 1990, P.L. 101-437, *codified at* 47 U.S.C. §§303a *et seq.*

[16]It is hard to overstate the importance of broadcasting to fundamental literacy and to any understanding of the shared elements of our culture. *See* G. Comstock, S. Chaffee, N. Katzman, M. McCombs, D. Roberts, *Television and Human Behavior* (1978). Most Americans place principal reliance on television for news. *See Broadcasting/Cablecasting Yearbook* A-2 (1988).

[17]Families in the lowest income bracket are far more likely to own television sets than telephones. *Id.*

Non-subscribers also have a particular need for access to the stations most adversely affected by loss of must-carry protection: public stations,[18] UHF stations seeking to address niche markets, foreign language stations, and other stations that are not affiliated with a network. *Id.* These are precisely the stations which, out of competitive necessity, seek out and attempt to serve smaller audience segments less demographically attractive to major advertisers. *Revision of Programming and Commercialization Policies (TV Deregulation)*, 98 FCC 2d at 1092.

The reduced "economic viability of free local broadcast television" which Congress found to be the likely outcome of non-carriage, 1992 Cable Act, Section 2(a)(16), would deny these viewers broad access to free over-the-air reception of entertainment, as well as news, public affairs and other programming, including programming of local origin, which promotes their First Amendment rights.[19]

2. The First Amendment Rights Of Cable Subscribers Would Also Be Adversely Affected By The Absence Of Must-Carry.

Cable subscribers are also adversely affected by the unavailability of over-the-air television stations on cable. To the extent that loss of must-carry jeopardizes the eco-

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[18]*See* 1992 Cable Act, Section 2(a)(7). In this connection, CFA, *et al.* stress that none of the several arts and instruction oriented cable TV networks share public television's statutory mandate to provide local service, and to present programs which may not be commercially viable. In 47 U.S.C. §396, Congress found, *inter alia*, that "it is in the public interest to encourage the development of programming that involves creative risks and that addresses the needs of unserved and underserved audiences, particularly children and minorities."

[19]Despite their viewers' investment through taxes and voluntary contributions, their access to public broadcasting will also be jeopardized.

nomic viability of free local broadcast television and its ability to originate quality local programming, those stations will be just as unavailable to subscribers as to non-subscribers.

Broadcast stations that are not carried on cable systems because of loss of must-carry will also impede subscribers' access to those stations that are not put out of business entirely. Congress has found that "[c]onsumers who subscribe to cable television often do so to obtain local broadcast signals which they otherwise would not be able to receive, or to obtain improved signals." 1992 Cable Act, Section 2(a)(17). This phenomenon is not limited to a few rural and exurban residents. Those who reside in cities are often unable to receive over-the-air signals because of interference caused by large buildings, terrain obstructions and other phenomenon.[20]

Even those subscribers who are so located as to be able to receive satisfactory over-the-air reception are largely unable to receive stations not carried by their cable system. That is because it is not practical and feasible for most Americans to operate and install the wires and switches required to receive over-the-air service as well as cable on the same TV set. *See* 1992 Cable Act, Section 2(a)(18) (finding that use of so-called "A/B" switches "is not...feasible...."); *infra*, §III.B.2. This problem is especially acute for viewers who, by virtue of age or physical impairment, are less capable of understanding and/or manipulating A/B switches or other equipment necessary to receive an over-the-air signal. *See* Declaration of Gene Kimmelman. Thus,

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[20]*See* Testimony of Preston R. Padden, *Must-Carry: Hearing before the Subcommittee on Communications of the Committee on Commerce, Science and Transportation*, U.S. Senate, 101st Cong., 1st Sess. 62-63 (October 25, 1989).

despite Appellants' arguments to the contrary, the loss from non-carriage for cable subscribers is both very real and quite substantial.

D. Appellants Erroneously Equate The Viewing Public's First Amendment Rights With So-Called "Viewer Preference."

To the limited extent that Appellants and their *Amici* recognize any other First Amendment rights other than their own rights as speakers, they erroneously reduce viewers' rights to have access to a wide range of information and ideas into a passive concept of "viewer preference." They argue that must-carry will result in the elimination of programming that is more popular with viewers than that shown on certain broadcast stations which will now gain carriage. *See, e.g.*, NCTA Br. at 16; Turner Br. at 28-30; *Amicus Curiae* Brief of The New Inspirational Network at 26-27 ("INSP Br.").[21] The essence of this claim is that the First Amendment interests of the viewing public can best be served when left solely to the whims of the economic marketplace and the profit-minded motives of cable operators.

This argument is wrong for several reasons:

First, the First Amendment rights of *all* viewers are not served through the marketplace alone. While the 60% of the audience which subscribes to cable may, in the aggre-

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[21]The New Inspirational Network ("INSP") decries the possibility that its programming will not be carried by cable systems if must-carry is upheld. INSP Br. at 4-8. But the must-carry provisions do not require the operator to choose any particular cable programmer. Instead, they give the cable operator sole discretion to choose what programming it wants for its channels which are not reserved for must carry. Thus, as it was prior to the passage of the 1992 Cable Act, INSP's carriage depends on the needs and the desires of individual cable operators.

gate "prefer" (*i.e.*, choose to watch) certain kinds or categories of programming, this is simply reflective of what subscribers have selected from among the limited choices which the cable operators provide them. But these program offerings are not driven by viewer choice alone; what best serves the economic interests of the cable operator is not always consonant with what the largest number of subscribers themselves might be willing to purchase. Cable operators interested in selling "premium" (pay-TV) channels can tailor even their "free" channel offerings to cater to demographically attractive socioeconomic groups.[22] Similarly, vertically-integrated operators have ownership interests which can influence the selection of a less popular advertiser supported channel because it is more profitable for them to carry their own offering.[23]

The public interest standard of the Communications Act contemplates a more affirmative intervention to insure that the needs of *all* segments of the community are met, most especially those who are too old, too young or too poor to be recognized in the marketplace. It is these demographically unattractive segments of the community that are least likely to be served adequately by a cable operator intent on maximizing his profit margin. *See* discussion at §II.C., *supra*.

Second, there is a distinct and important difference between so-called viewer preferences as measured imper-

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[22]As local cable advertising grows in importance, the demographic make up of the subscriber base is increasingly significant to the operators.

[23]For example, if there are two similar shopping, sports or cooking channels available, an operator might well choose the one in which it has an ownership stake even if more subscribers would prefer the other.

fectly by cable operators and true viewer needs and wants (*e.g.*, informational, educational and local public affairs programming). While the former may be important, this Court has not been reluctant to uphold government action intended to advance the latter over the former. *See, e.g., Red Lion, supra*. Certain kinds of programming that help inform the electorate on matters relating to self-governance, certain cultural programming and certain other programming which appeals only to smaller segments of the audience is not without societal import just because more people choose to watch other material. This Court has recognized that:

> The Commission has never relied on the market alone to ensure that the needs of the audience are met. Indeed, one of the FCC's elementary regulatory assumptions is that broadcast content is not purely market driven;...."

Metro Broadcasting, 497 U.S. at 571.

Over the past decade, the FCC has placed greater reliance on the marketplace to serve the needs of the viewing public. *Revision of Programming and Commercialization Policies (TV Deregulation)*, 98 FCC 2d at 1076. However, it has done so with the clear understanding that the free market will not always fill those needs. *Id.* at 1077 ("Our action here, however, does not constitute a retreat from our concern with the programming performance of television licensees. Thus,...we are by this Order retaining the obligation of licensees to provide programming that responds to issues of concern in the community.")(citation omitted). Broadcasters remain obligated to fulfill the needs of the communities they serve even though such a service may not be in their financial best interests. *UCC v. FCC*, 707 F.2d 1413, 1427-1428 (D.C. Cir. 1983)("The clear intent of the Act was that the award of a broadcasting license

should be a 'public trust.'"). *See also, KFKB Broadcasting Ass'n, Inc. v. Federal Radio Commission*, 47 F.2d 670 (D.C. Cir. 1931).

An especially clear example of this broader view of viewers' needs is found in The Children's Television Act of 1990, *supra*. In the wake of FCC and Congressional oversight that disclosed a dearth of age-specific informational programming directed at children, Congress specifically required broadcasters to provide programming that meets the educational and informational needs of children.[24]

Finally, Appellants' arguments about viewer preference implicitly ignore the 40% of the population that does not subscribe to cable. While the direct effect of must-carry may be to change what the cable subscriber sees, the more important effect is that it insures that *all* of the viewing public, will be able to derive information from free, over-the-air stations that are charged with serving the public interest. *See supra*, §II.C.

III. THE MUST-CARRY PROVISIONS OF SECTIONS 5 AND 6 OF THE 1992 CABLE ACT ARE NARROWLY TAILORED TO SERVE IMPORTANT GOVERNMENT INTERESTS.

Must-carry easily meets the *O'Brien-Ward* standard. *See United States v. O'Brien*, 391 U.S. 367, 377 (1968).

Sections 4 and 5 of the 1992 Cable Act are precisely targeted to help assure that all Americans, including subscribers and non-subscribers to cable, have adequate access to a diverse and healthy free over-the-air local TV service. In particular, the must-carry sections work in tandem with the "retransmission consent" mechanism provided in Section 6 of the 1992 Cable Act in a narrowly tailored way to provide mandatory carriage only for stations likely to be dropped or otherwise subjected to discrimination from cable operators.

[24]There are numerous other instances in which Congress and/or the FCC have acted where the marketplace has failed to meet specific viewer needs. *Inter alia*, Section 312(a)(7) of the Communications Act requires broadcasters to share their use of the spectrum with federal candidates, giving those candidates a limited right of access. *See CBS Inc. v. FCC, supra*. Section 317 imposes sponsorship identification requirements on political and commercial programming. 47 U.S.C. §317.

Echoing Judge Williams' dissent below, several of the Appellants suggest that there are three putatively less-restrictive alternatives which might achieve the same objectives. But two of these - leased access and A/B switches - just do not do the job. And the third - direct federal subsidies for local broadcasters - is both ineffective and much *more* restrictive of First Amendment protections.

A. The Must-Carry And Retransmission Consent Provisions Work In Tandem In A Narrowly Tailored Manner To Insure That Viewers Receive Local Broadcast Stations While Minimizing The Number Of Instances Where Mandatory Carriage Must Be Imposed.

Appellants assert that the must-carry provisions are overbroad because they protect all broadcasters.[25] For ex-

[25]Discovery also argues that the must-carry measure is overly broad because it affords relief to all broadcasters, even those which in fact offer little local programming. Discovery Br. at 45.

If the claim is that the FCC does not require such community responsive programming for all broadcasters (including home shopping stations specifically mentioned by Discovery), the assertion is simply incorrect. For, while the FCC has in recent years eliminated requirements that TV stations provide a specific quantity of news and public affairs programming, the Commission has at all times insisted that broadcasters air programming responsive to the local needs of the community of license. *TV Deregulation (Reconsideration)*, 104 FCC 2d

ample, likening Sections 4 and 5 to the rules invalidated in *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986), Time Warner characterizes the 1992 Cable Act as "grossly overinclusive" because it allegedly mandates carriage of local stations regardless of whether or not those stations are truly "imperiled." Time Warner Br. at 49.

This is not so. Under the Congressionally-crafted scheme described in Sections 4-6 of the 1992 Cable Act, continued viewer access to broadcast stations is insured, but this is done by a series of self-limiting measures. In contrast to the rules considered in *Quincy*, the 1992 Cable Act mandates carriage only where it is needed, in proportion to the size of the system,[26] and provides for waivers when

357, 366-67 (1986), *rev'd on other grounds sub nom. ACT v. FCC*, 707 F.2d 741 (D.C. Cir. 1987); *UCC v. FCC*, 707 F.2d at 1430 n.54; *see also, Implementation of Section 4(g) of the Cable Television Consumer Protection Act of 1992* (Home Shopping Station Issues), 8 FCC Rcd 5321, 5327 (1993) ("*Home Shopping Order*") ("[T]hese stations have been able to meet the Commission's standard on public affairs programming responsive to issues concerning the local community....").

If the argument is that the statute should be interpreted to require more, or that some broadcasters do not adequately comply with existing FCC regulations, the short answer is that this is not a valid basis upon which to mount a *facial* challenge. Rather, it merely suggests that something is wrong with enforcement of the law, not the law itself. As it happens, CFA, *et al.* and others have devoted much effort to improving compliance with, and enforcement of, the broadcast provisions of the Communications Act. Their success or failure might conceivably be relevant to a challenge to the law as it is applied, but it surely does not relate to the facial constitutionality of the 1992 Cable Act.

[26]As is more fully described in the Brief of Appellees Federal Communications Commission and the United States, under Section 4(b) of the 1992 Cable Act, no more than one-third of the total number of

circumstances warrant.[27]

More fundamentally, the overinclusion argument entirely overlooks the complex interrelationship between must-carry and the retransmission consent measure codified as Section 6 of the 1992 Cable Act.[28] This market-oriented "must-***not*** carry" mechanism is designed to induce more popular TV stations to choose to forego mandatory carriage. Recognizing that it is not necessary to force cable operators to carry many of these stations, Congress created the retransmission consent alternative. Under this scheme, set out as Section 6 of the 1992 Cable Act, commercial broadcast-

usable activated channels must be dedicated to must-carry. Systems with 12 or fewer channels need only carry three local commercial stations. *Id.* Carriage of non-commercial stations is similarly limited under Section 5(b).

[27]In implementing Sections 4 and 5, the FCC has designed an additional safety valve in the form of a broadly available waiver process which can be employed to minimize burdens arising from unusual or unanticipated discontinuities. Under FCC rules "any interested party" may file an informal petition asking the FCC to "waive any provision of the rules relating to cable television systems." 47 C.F.R. § 76.7(a).

[28]The FCC, whose construction of the purposes of Act is entitled to deference, *see, e.g., Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), regarded the two provisions as so closely related that it implemented them in a single rulemaking proceeding. *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd 2965 (1993) ("*FCC Must Carry Order*"). In this regard, the FCC observed that, "While each of the provisions is distinct and functions in a separate fashion, they are related in that, with respect to local cable carriage, for example, television broadcasters on a system-by-system basis must make a choice once every three years whether to proceed under the mandatory carriage rules or to govern their relationship with cable operators by the retransmission consent requirement." *Id.* at 2966.

ers choose either must-carry or an option they have not previously had: no right to mandatory carriage, but the right to seek compensation for allowing cable carriage. Thus, by altering the compulsory copyright license formerly granted to cable systems, broadcasters can now gamble that cable operators will be willing pay them to obtain signals heretofore available free of charge.

The Senate Report describes how this market-driven process should work:

> [M]any broadcasters may determine that the benefits of carriage are themselves sufficient compensation for the use of their signal by a cable system. Other broadcasters may not seek monetary compensation, but instead negotiate other issues with cable systems, such as joint marketing efforts, the opportunity to provide news inserts on cable channels, or the right to program an additional channel on a cable system.

S. Rep. at 35-36.[29] Thus, retransmission consent not only minimizes the intrusion on cable operators, but it is implemented without direct governmental involvement in the selection process.[30]

Retransmission consent became fully operative on

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[29]The House Bill did not contain a retransmission consent provision. The Conference agreement adopted the Senate provision. H.R. Rep. No. 862, 102d Cong., 2d Sess. 76 (1992) ("Conf. Rep.").

[30]Retransmission consent is not available to noncommercial stations. 47 U.S.C. §325(b)(2)(A). This exception reflects Congress' understanding that noncommercial station are intended to operate outside of market forces. It also reflects the substantial government interest in ensuring that cable subscribers have access to noncommercial stations both because of the educational and informational programming they provide and the significant amount of taxpayer money expended to support noncommercial stations. *See* 1992 Cable Act, Section 2(a)(7).

October 6, 1993. 47 U.S.C. §325(b)(1). By now, it is apparent that the scheme works more or less as it was intended. The vast majority of commercial stations appear to have opted for retransmission consent rather than must-carry.[31] Moreover, as had been contemplated, stronger stations, (such as network-owned or affiliated properties) have proven far likely to opt for retransmission consent than weaker independent stations.[32]

Must-carry works. It has been employed only by those stations which truly need such protection. And, under the combined must-carry/retransmission consent regime, the public has received access to free, local TV service while keeping governmental intrusion via must-carry to a bare, and indirect, minimum.

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[31]A National Association of Broadcasters ("NAB") survey found that more than 80% of all television stations were seeking retransmission consent rather than must carry with at least one cable system. *20% of TV Stations Opt Exclusively for Must-carry*, Television Digest, July 19, 1993, at 1.

[32]The NAB survey, *see* note 31, *supra*, found that 90% of network affiliates were seeking to enter into retransmission consent agreements, while only 20% of the independent stations were attempting to reach such agreements. *Id.* A subsequent study found that most stations opting for retransmission consent were reaching satisfactory arrangements, and that only 64 stations, or 14% of the total, placed complete reliance on must-carry to secure full ADI carriage. Of those 64, there were no Fox affiliates, seven (11 percent) were ABC affiliates, five (8 percent) were CBS affiliates, three (5 percent) were NBC affiliates, and 49 (77 percent) were independent stations. *Cablers Cut Only 4 Percent of Stations; Study Details Carriage Landscape in the Wake of Retrans [sic] Negotiations*, The Hollywood Reporter, Oct. 28, 1993 at 4.

B. Suggested Alternatives To Must-Carry Will Not Insure That Viewers Will Continue To Receive The Same Quality And Amount Of Service Provided By Local Broadcast Stations.

Many of the Appellants and their supporters adopt Judge Williams' position that there are less restrictive alternatives to achieve the objectives which motivated adoption of the must-carry provisions of the 1992 Cable Act. *Turner Broadcasting*, 819 F.Supp. at 57. Analysis of these arguments, however, actually underscores the effectiveness and narrow tailoring which characterizes must-carry as enacted.

1. Leased Access

Several parties assert that the leased access scheme set out at 47 U.S.C. §532 is a less restrictive alternative to must carry because it minimizes government interference in the choice of speakers. *See, e.g.*, Discovery Br. at 48; *see also* INSP Br. at 26; Telephone Companies Br. at 24.

The assertion reflects a fundamental misunderstanding of the regulatory scheme established by Congress in the 1984 and 1992 Cable Acts.[33] When the leased access and must-carry provisions are assessed in light of Congress' overall regulatory scheme and the particular governmental

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[33]As is explained in the text, the 1992 amendments somewhat modify the leased access provisions first adopted in 1984. But, while the current version is more enforceable, it is not fundamentally different. Even so, notwithstanding their willingness to tolerate this substantially similar regime for the last 9 years, several of the plaintiffs have now (unsuccessfully) challenged the constitutionality of the current version of leased access in proceedings now on appeal in the D.C. Circuit. *See Daniels Cablevision, Inc. v. United States*, 1993 U.S. Dist. LEXIS 12806 (D.D.C. 1993), app. filed Nov. 15, 1993. Of these, only Appellant Discovery directly advances the self-servingly inconsistent position that leased access is also a desirable, less restrictive, alternative. Discovery Br. at 47.

interests furthered by each of those provisions, it is clear that leased access is not an alternative to must-carry.

a. Regulatory History Of Leased Access

The leased access mechanism first established in the 1984 Cable Act is an important device to promote diversity in the marketplace of ideas. However, it serves different purposes, and could not substitute for, or supplant, must-carry.

Leased access resembles must-carry to the extent that it involves a set-aside of a small number of channels which are removed from the editorial control of the cable operator. 47 U.S.C. §532(c)(2). However, unlike must-carry, leased access channels are - in theory - available to any programmer unaffiliated with the cable operator. 47 U.S.C. §532(b)(1).

Along with the set-aside for municipalities to operate "public, educational and governmental" channels, *see* 47 U.S.C. §531, Congress envisioned that these channels would represent "the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet...in the electronic marketplace of ideas" H.R. Rep. at 30. The House Report explained that:

> An important concept in assuring that cable systems provide the public with a true diversity of programming sources is leased access. Leased access is aimed at assuring that cable channels are available to enable program suppliers to furnish programming when the cable operator may elect not to provide that service as part of the program offerings he makes available to subscribers. Thus, section 612 establishes a scheme to assure access to cable systems to third parties unaffiliated with the cable operator, and thereby promotes and encourages an in-

crease in the sources of programming available to the public.

Id. at 39.

Thus far, leased access has not been widely utilized; programmers have had no effective means of enforcing their right to lease channels. Given the fact that cable operators remained free to exploit unutilized capacity for their own purposes, operators had sound reason to take advantage of the system of operator-established rates provided in the 1984 Cable Act to set prices at prohibitive levels.[34]

The 1992 Cable Act remedies shortcomings in the original Cable Act to make leased access channels a "genuine outlet" for diverse voices. S. Rep. at 79. Among other things, it authorizes the FCC to set maximum reasonable rates, terms and conditions, and provides a new enforcement mechanism. *See* 47 U.S.C. §532(c). In receiving comments filed in connection with the implementing rulemaking, the FCC indicated that potential lessees may ultimately provide, *inter alia*, home shopping, one-time pay per view, advertiser-supported national program feeds and premium pay program services. *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992 (Rate Regulation)*, 8 FCC Rcd 5631 (1993) ("*Rate*

[34]As the Senate Committee Report explained, "The cable operator is almost certain to have interests that clash with that of the programmer seeking to use leased access channels. If their interests were similar, the operator would have been more than willing to carry the programmer on regular cable channels. The operator thus has already decided for any number of reasons not to carry the programmer. For example, the operator may believe that the programmer might compete with programming that the [operator] owns or controls. To permit the operator to establish the leased access rate thus makes little sense." S. Rep. at 31.

Regulation Order"). Thus, there is now hope that leased access may begin to realize its potential.

However, success of the new medium is not assured. There are those who have argued that the FCC's implementation will allow prices to remain above a level which will make this medium cost-efficient. Indeed, the implementing regulations permit cable operators to charge higher prices for leased access than they charge their own affiliates to use other channels on the same system. *Rate Regulation Order* at 5649-51. And, significantly, in the event that demand for access channels exceeds supply, it is the cable operator who retains the discretion to choose who may obtain access.[35]

b. Leased Access' Limitation Versus Must-Carry

As valuable as leased access may become as an additional source of diversity, even if the number of channels is expanded, it cannot substitute effectively for must-carry.[36]

[35]While operators are prohibited "from setting terms and conditions for leased access use based on content," *id.* at 5942, they are free to select from among similarly situated applicants when supply exceeds demand.

[36]In his dissent below, Judge Williams suggests that leased access compares favorably with must-carry under the standards established in *Tornillo*. *Turner Broadcasting*, 819 F.Supp. at 61. But the factors he describes apply with no less force to must-carry. The fact that cable operators control many channels justifies must-carry as well as leased access. Similarly, viewers are, if anything, less likely to attribute the speech of "must-carried" broadcasters to the cable operator than the speech of a channel lessee. Finally, Judge Williams erroneously equates the "benefitted group" under leased access ("all unaffiliated programmers") with the beneficiaries of must-carry. *Id.* But as is discussed below, the objective promoted by must-carry is not access for *all* un-

First, leased access does *nothing* to advance the goal of providing continued access to free over-the-air TV service. While this is especially important for the 40% of the public which cannot, or chooses not to, subscribe to cable, the loss of the particular benefits which come from over-the-air television will also be felt by the 60% who do receive cable.

Contrary to what Judge Williams has suggested in his dissenting opinion below, *Turner Broadcasting*, 819 F.Supp. at 61, a Congressional concern in adopting leased access - a platform for unaffiliated programmers - is *not* co-extensive with the much more elaborate and specific objectives of must-carry. The fact that a few lessees may be able to program a few channels on a system does not advance the goal of preserving local television and making it available for all. *See* 1992 Cable Act, Sections 2(a)(8)-(9).

It bears particular emphasis that, contrary to some suggestion in Judge Williams' dissent, *Turner Broadcasting*, 819 F.Supp. at 65, there is no reason to expect that over-the-air broadcasters unable to obtain carriage without must-carry will be able to lease channels. The stations which are likely to be dropped absent must-carry are already economically marginal properties; they are not likely to be able to lease carriage they now receive free of charge.[37] And,

affiliated programmers, but access for free local commercial and non-commercial TV stations, precisely because they serve as fiduciaries of the public and are likely to provide service that is different from other unlicensed programmers not subject to the legal obligations of broadcasters.

[37]Using the FCC's estimate of 50 cents per subscriber per month as a likely leased access rate, *Rate Regulation Order* at 5950-51 n.1312, it would cost $11 million per year to lease a channel to serve all the cable households in the Philadelphia metropolitan area. The average annual

even if they attempt to lease channels, in the event that demand exceeds supply, the cable operator is under no obligation to lease channels to them.[38] While the FCC has attempted to prohibit discrimination based on content, it has not prohibited discrimination based on source. Since local broadcasters compete directly with cable operators for local advertising, the operators have powerful incentives to lease their channels to others.

Second, leased access does absolutely *nothing* to advance the goal of Section 5 to provide a national non-commercial TV service or to bring it to the taxpayers who finance it. It has no mechanism, for example, to insure access for non-market driven programming provided on public TV (often on UHF stations) which serves special artistic needs, provides a platform for experimentation and otherwise meets the needs of those who are not demographically attractive to commercial programmers.

Third, as implemented, there are many other practical obstacles to the broad availability of leased access as a substitute for must-carry. The current scheme already does not provide enough channels, and if there were no must-carry channels this problem would be exacerbated several-

pre-tax income of an independent television station in 1992 was $2,007,821; the average annual pre-tax income for a UHF station in 1992 was $500,000. Fratrik and Helregel, *1993 NAB TV Financial Report* 64 (1993).

[38]In this situation the cable operator will already have decided not to carry the station voluntarily. Where demand for channels exceeds supply, it is reasonable to assume that it will choose to lease to other applicants whose programming is more to the operators' liking, especially since local TV stations compete directly for advertising.

fold.[39]

The pricing mechanism favors home shopping services and satellite-delivered entertainment services which can spread programming costs simulcast on a large number of systems. *Rate Regulation Order* at 5631. These problems might be ameliorated somewhat by introducing more stringent price controls and the set aside of more channels. This, however, would reduce the claimed advantage of leased access versus must-carry by making the supposedly less restrictive alternative more restrictive.

Finally, as explained above, while leased access channels are set aside for unaffiliated programmers, if demand exceeds supply, cable operators still retain the discretion to select who may obtain access.

2. A/B Switches

Appellant Time Warner argues that so-called A/B switches represent an effective alternative to must-carry that will serve essentially the same interests with little or no interference with cable operators' speech. Time Warner Br. at 48.

An A/B switch is a mechanical device which can be installed to allow "consumers to shift between cable and their own antenna." H.R. Rep. at 54. Congress, however, has examined this alternative and has found that A/B switches and similar devices are "not an enduring or feasible method of distribution and [are] not in the public interest." 1992 Cable Act, Section 2(a)(18); *See* Declaration of

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[39]Almost 20% of systems have no leased access obligation under 47 U.S.C. §532(b)(1)(D) because they have 36 or fewer channels. *See* TV Factbook, Cable Systems Volume, Warren Publishing (1993 Edition) at F-3. Larger systems must set aside at most 10-15% of their channels. 47 U.S.C. §§532(b)(1)(A)-(B).

Gene Kimmelman. In the words of the House Committee Report, "these switches are cumbersome, often ineffective, and are unacceptable to consumers." H.R. Rep. at 54.[40]

3. Direct Subsidies

Further echoing Judge Williams' dissent in the district court, Appellants Time Warner and the NCTA also suggest that directly subsidizing the speech of local broadcasters could be an alternative to must-carry. Time Warner Br. at 48; NCTA Br. at 41; *see also Turner Broadcasting*, 819 F.Supp. at 57 (Williams, J., dissenting). Relying on the notion that government may constitutionally subsidize

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[40]Indeed, consider the following passage describing one of three different hook-ups diagrammed in a newspaper consumer-service column:

> In System 1, two converters are used, one to switch the 300-ohm, twin-lead antenna wire coming from the antenna to a 75-ohm F-connector for attaching to the antenna-in jack of the VCR. This connector pushes onto the jack on the back of the VCR. As a general rule, however, the closer you can put the converter to the antenna the better. The goal is to use as little twin-lead wire as possible.
>
> The second conversion is made as the TV set, where the 75-ohm coaxial cable has to be changed back to 300-ohm antenna wire to be attached by screws to the TV set (which, in this case, is a basic-model without an F-connector antenna input). The only problem someone with this set-up might find concerns the TV set's antenna. Because it's picking up signals, it could affect the audio and video quality of the signal sent from the VCR. If you can't detach the dipole antenna, do your best to minimize the amount of signal it's capable of picking up. Close the antenna into its smallest formation and keep it tucked down, letting the antenna attached to the VCR do all the work. Then, when you want to watch a program different from one you're taping, you can simply put the dipole antenna into the proper position for the channel you want.

"Making The Right Video Connections," The Chicago Tribune, Jan. 9, 1987, at 56.

speech it favors, they reason that subsidies are more desirable than must-carry because they do not infringe on the First Amendment rights of the cablecasters. *Turner Broadcasting*, 819 F.Supp. at 64-65 (Williams, J., dissenting).

But such direct subsidies would actually be far more intrusive than the self-executing must-carry provisions.

Direct subsidies from the government to some, but not all, licensed broadcasters would create a close, on-going relationship between the stations receiving funds and the government. Congress and the Executive Branch would have to determine which stations would receive subsidies, forcing judgments about the worthiness of the recipients of the funds. Determinations as to whether to give subsidies to broadcasters whose format is substantially devoted to religious programming would create almost unimaginable complications under the Free Expression and Establishment Clauses. These subsidies would, therefore, create a situation similar to the scheme held invalid in *FCC v. League of Women Voters*, 468 U.S. 364 (1984). In that case, as was explained in *Rust v. Sullivan*, the government "placed a condition on the *recipient* of the subsidy rather that [sic] on a particular program or service, thus effectively prohibiting the recipient from engaging in protected conduct outside the scope of the federally funded program." *Rust v. Sullivan*, 111 S.Ct. at 1774 (emphasis in original).

The subsidy approach is further complicated by the special role given over-the-air broadcasters in the political and electoral process. Under 47 U.S.C. §312(a)(7), broadcasters are required to provide reasonable access to federal candidates. *See CBS, Inc. v. FCC, supra*. Under 47 U.S.C. §315, broadcasters must provide "equal opportunities" to candidates, and sell time at preferred rates. Even if politicians and government officials overlook efforts to curry favor, the incentive will always exist for broadcasters

who are looking for a special subsidy.[41]

Must-carry has none of these complications. It is self-executing. Working in conjunction with retransmission consent, it does not involve any governmental involvement. Broadcasters have no reason to imagine that political favoritism will be rewarded under must-carry.[42]

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[41]The time-tested, even-handed scheme under which these policies have been administered has proven quite immune from such favoritism. However, a subsidy scheme in which benefits will be awarded selectively to some, but not all, broadcasters, perhaps by an agency lacking the traditions and safeguards of the FCC, is much more susceptible to misconduct.

[42]Counsel wish to acknowledge the assistance of law student interns Jason G. Wilson and Greta Thomasson.

CONCLUSION

The judgment of the three-judge District Court should be affirmed.

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No. 93-44

IN THE
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Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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REPLY BRIEF FOR APPELLANT DANIELS CABLEVISION, INC.

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REPLY BRIEF FOR APPELLANT DANIELS CABLEVISION, INC.

ARGUMENT

I. THE MUST-CARRY LAW IS SUBJECT TO STRICT-SCRUTINY REVIEW

According to the appellees, all legislated restrictions on speech or press, whether they target the constitutionally protected activity to purposefully burden the exercise of the guaranteed freedom, or whether they are laws of general applicability impacting on those uniquely guarded liberties only incidentally, are conveniently lumped together for judicial review under a single standard.[1] Content-related regulations nar-

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[1] Appellees, following the lead of the court below (J.S. App. 9a, 19a, 22a-23a), make a limited exception for those intrusions that dictate either the viewpoint or the subject-matter

rowly aimed at communicative activity and which, *on their face*, override the First Amendment's command, are said by appellees to be no different (for purposes of judicial evaluation) from those laws that are facially free of constitutional implication.[2] *Associated Press v. United States*, 326 U.S. 1 (1945), a vintage case in which a First Amendment immunity was raised in defense to application of the generally applicable antitrust laws, is, in appellees' universal view, the guiding precedent for *ad hoc* incursions by the Congress on select portions of the mass-media press, including content-based controls on fully protected communications lawfully published over the targeted medium. *E.g.*, Brief For Federal Appellees at 17 ("The proper framework for evaluating the First Amendment issues in this case is found in *Associated Press v. United States* . . .").[3]

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of the particular message. All other *ad hoc* burdens on speech or press, they say, are subject to examination under the "relatively lenient standard" of *United States v. O'Brien*, 391 U.S. 367 (1968), as "refined" by *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). *See, e.g.*, Briefs of NAB at 20-21, Federal Appellees at 11, 40-41. Indeed, the Government believes that *O'Brien* "applie[s] too demanding a standard", Brief for Federal Appellees at 13, and that an even "less demanding standard" should pertain. *Id.*

[2] *Cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217, 2233 (1993) (laws *selectively* burdening the exercise of freedoms guaranteed by the First Amendment "must undergo the most rigorous of scrutiny"); *see also id.* at 2226-27, 2232. Here, the Government insists that the constitutional guarantee survives, largely at the leave of the Congress, and may be withdrawn, provided only that there is demonstrated, *on balance*, good cause for the retraction.

[3] See also, the Brief for the Federal Appellees at 17, quoting the familiar passage from *Associated Press*, 326 U.S. at

Appellees steadfastly avoid treatment of the constraint by which the First Amendment limits the lawmaking powers of the Congress. Instead, they summarily *conclude* that the constitutional command, "make no law", is facilely overcome through a simple self-help mechanism—an in-house rhetorical exercise. The Solicitor General advocates that once a majority of the Congress identifies problem areas and sufficiently tars the targeted activity as, for example, "market dysfunction" or in need of supervision (Brief For Federal Appellees at 25), the label, alone, not only relaxes the constraint by which the First Amendment bars selective legislative intrusion, but also shifts the burden to the targeted speaker to show why he or she should be permitted to exercise the "previously" guaranteed, but now suspended, freedom. According to the Government, content-related burdens purposefully placed on the press, provided they are accompanied with plausible legislative "findings",

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20, "the First Amendment * * * rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society." No party to this appeal takes exception to that incontrovertible principle. Daniels strongly excepts, however, to citation of *Associated Press* for the proposition that Congress may selectively legislate content-based restraints on one component of the press at the prodding, and for the special benefit, of another faction of the media. When politicians curry favor with one part of the press by legislatively suppressing the speech-related freedoms of other competitive speakers and media, the intrusion openly mocks the principle of a free, independent press. Instead of furthering a "diverse and antagonistic" communications media and, thereby, a "free press" and a "free society", *id.*, the must-carry law militates toward a press—certainly the electronic model—that is beholden to, or at the mercy of, the political establishment.

need be examined *only* to determine whether, *on balance*, the enactment outweighs the speaker's First Amendment interests.[4] Suddenly, and without discussion, it is the putative speaker that must persuade the reviewing judge of its right *lawfully* to communicate, a freedom once thought to be *foreclosed* to *ad hoc* limitation by the legislature (except under the most compelling or extraordinary conditions).[5]

Since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), constitutional adjudication has focused primarily on the Constitution itself. *Id.* at 180.[6] Appellees contend, however, that by this Court's decision in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), the body of constitutional law has abruptly been reshaped to redirect that focus away from the Constitution and, instead, to those reasons given by the legis-

[4] The Court below declined even to question the relevant "findings" of the Congress (J.S. App. 15a), holding that "courts do not ordinarily review the adequacy of the record before Congress to support the laws it enacts." *Id.* In such manner, the legislative branch, the Constitution and the balance-of-powers doctrine notwithstanding, is made a unilateral force enabled, largely at its own discretion, to respect, or to infringe upon, the individual's First Amendment freedoms.

[5] It is reiterated that no appellee advocates here a strict-scrutiny test. Instead, and as they must, appellees argue that *selective, content-based* intrusions on the press, resulting from *ad hoc political* action, may be justified under the First Amendment, provided only that there is, *on balance*, good reason for the offending restraint. This, we submit, "is to trivialize constitutional adjudication". *Houchins v. KOED, Inc.*, 438 U.S. 1, 13 (1978).

[6] *See also McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) ("we must never forget that it is a constitution we are expounding").

lature for its *deliberate variance* from that once "superior paramount" instrument. *Marbury*, 5 U.S. (1 Cranch) at 176. Whereas, prior to *Ward*, the United States was a "government of laws", *Marbury*, 5 U.S. (1 Cranch) at 163, where the very highest order was a "written constitution", the "modern" version of government, advanced here by appellees, is one of "men", *id.*, where the principal duty of judges is no longer to interpret constitutional provisions, but rather to balance the competing interests to determine whether it is the guaranteed freedom or its abridgement that is the more substantial.[7] When the free exercise of First Amendment liberties is consciously geared to a substantiality test, as appellees unanimously urge, the standard is "so diaphanous and elastic as to invite subjective judicial preferences or prejudices . . . masquerading as judgments whether [the] legislation is directed at 'important' objectives or, whether the relationship to those objectives is 'substantial' enough". *Craig v. Boren*, 429 U.S. 190, 221 (1976) (Rehnquist, J. dissenting).[8]

Under appellees' theory of the First Amendment, the role of Article III courts, specifically when reviewing Article I enactments that *facially* exceed the legislative body's constitutionally limited powers, is that of a super-legislature, either to ratify the political will of elected representatives or to repeal those majority views.[9] A theme common to each of

[7] *Cf. Marbury v. Madison*, 5 U.S. (1 Cranch) at 177 ("an act of the legislature, repugnant to the constitution, is void").

[8] Daniels notes that *Craig* involved "equal protection" claims under the Fifth Amendment where a lesser constitutional scrutiny is in order.

[9] In either case, appellees would make it the subjective discretion of the reviewing jurist, and not the Constitution, that is decisive to the adjudication.

appellees' briefs is that courts, much in the style of legislative bodies, provide a forum where it is the popularity of, or public advisability for, the purposeful abridgement of the specially protected liberty, rather than its constitutionality, that is central to the adjudication. Under appellees' concept of American government, the Constitution is a secondary instrument, subordinate to the discretion of legislators, provided only that reviewing judges, applying their "super" discretion, concur in the *prudence* of the particular legislative excess before them. That concept not only guts the First Amendment, it rejects the most fundamental principle of constitutionally limited government. Note 7, *supra*.

In appellees' view, the peoples' prerogative to communicate free of *ad hoc* interferences by government, except in a few limited instances (*i.e.*, where the message itself is mandated), is little more than a factor of sorting out the respective interests of the rival principals—the "right" of the targeted individual balanced against society's interest in suppressing that right.[10] Appellees would have judges subjectively decide on a case-by-case basis which interest, society's or the individual's, is the more substantial. Any

[10] Daniels, of course, acknowledges that there are circumstances, exceptional though they be, where a compelling interest of society as a whole may lawfully mitigate freedoms constitutionally guaranteed to the individual. *See, e.g., Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 112 S. Ct. 501, 512-13 (1991) (Kennedy, J., concurring). No one here has claimed the must-carry law to present such a case. Indeed, the *one* contention common to the briefs of all appellees and their supporting *amici* is that the content-based restraint purposefully placed on the cable operators' freedom of speech and of the press is subject to review under something considerably less than a strict-scrutiny standard.

thought that the First Amendment establishes special preserves where the selective mischief of legislators and, particularly, the *ad hoc* will of political majorities, are "foreclosed", once the cornerstone of First Amendment jurisprudence, is altogether abandoned.[11] Appellees attribute this asserted flip-flop in constitutional law to this Court's action in *Ward*. Daniels respectfully suggests that appellees overreach. *See* Daniels' opening brief at 31-33.

II. THE MUST-CARRY LAW IS INCOMPATIBLE WITH THE SCARCITY DOCTRINE

A sub-tact taken here by the Government is to urge, again without meaningful discussion, that this case involves nothing more than the licensing of radio frequencies under the "public interest" standard of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-713, and, accordingly, should be governed under the Scarcity Doctrine as evolved through a series of broadcast-licensing cases commencing with *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943). *See* Brief for Federal Appellees at 13 ("the court [below] should have applied the less demanding standard of *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969)"). While other appellants here treat this argument more thoroughly, Daniels will show that *Red Lion* not only fails to support the

[11] *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring). *See also* Potter Stewart, *Or of the Press*, 26 Hastings L.J., 631, 633 (1975) ("the Free Press guarantee is, in essence, a *structural* provision of the Constitution"). When the various factions of the communications media must constantly importune the Congress, either for *ad hoc* favors or to mitigate previously imposed burdens, the result is anything but a free or independent press. *Cf. City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757-58 (1988).

must-carry law, the decision in that case, if it is at all apposite, is squarely at odds with the Government's position.

Underlying the Court's *Red Lion* opinion is the principle that a license to broadcast confers a special "privilege", 395 U.S. at 394, in return for which the uniquely favored licensee concedes a modest amount of its First Amendment freedom. *Id.* at 396-98. Thus, under *National Broadcasting Co., Red Lion*, and *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973), any permissible inroad on traditionally recognized "speech" and "press" freedoms is a necessary trade-off where the specially privileged licenses makes limited concessions for its use of the valuable, physically scarce radio frequency.[12]

In the case of the must-carry law, it is the proponent/beneficiary of the special-interests legislation, the already privileged broadcast licensee, that is still further, and quite uniquely, privileged. *See, e.g., Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1451, 1452-53 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986) ("Under [must-carry], local broadcasters are guaranteed the right to convey their messages . . . while cable programmers must vie for a proportionately diminished number of channels . . . . [M]ust-carry rules transfer control [of a cable system] to local broad-

[12] Even under the Scarcity Doctrine—that most permissive (and also most limited) of First Amendment standards—this Court has made clear that while the "licensee is . . . held accountable for the totality of its performance", it retains its day-to-day "journalistic independence", *Columbia Broadcasting Sys.*, 412 U.S. at 121, and that because "editors—newspaper or broadcast—can and do abuse [their editorial] power . . . is no reason to deny the discretion. . . ." *Id.* at 124.

casters who already have a delivery mechanism granted by the government without cost and capable of bypassing the cable system altogether").

The scheme of the must-carry law is *doublely* to advantage the already privileged licensee, and to do so by affirmatively restraining the speech liberties of those "lesser" persons *not* endowed with the valuable, scarce broadcasting license.[13] Under this special-interests regime, the very imbalance that the Scarcity Doctrine is calculated to mitigate is compounded; and, indeed, the gap between those limited few licensed to speak via the public airwaves and all other persons is substantially widened. Instead of moving in the direction of a greater parity between the specially privileged broadcast speaker and all other speakers, the must-carry law promotes an even greater disparity. The must-carry law classifies equally protected persons and fosters, as a matter of official policy, a speaker-elite; and that, alone, is "wholly foreign to the First Amendment". *Buckley v. Valeo*, 424 U.S. 1, 49 (1976).[14]

[13] *Cf. Red Lion Broadcasting Co.*, 395 U.S. at 389 ("as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused").

[14] *See also Columbia Broadcasting Sys.*, 412 U.S. at 127 n.21 ("We see no principal means under the First Amendment of favoring access by organized political parties over other groups and individuals"); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973) (where governmental classification "impinges upon a fundamental right explicitly or implicitly protected by the Constitution", the test is one of "strict judicial scrutiny"). The must-carry law, *on its face*, "impinges" upon the "fundamental right" of cable operators and cable programmers to communicate free of governmental intrusion, a liberty "explicitly . . . protected by the Constitution". *Id.*

CONCLUSION

The judgment of the court below should be reversed and the Court should declare the must-carry provisions of the 1992 Cable Act unconstitutional on their face.

Respectfully submitted,

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In The Supreme Court of the United States

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TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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REPLY BRIEF FOR APPELLANTS TURNER BROADCASTING SYSTEM, INC., *ET AL.*

Appellees' briefs all but ignore the First Amendment claims of the cable programmers. From the cable *programmers*' perspective, the constitutional vice of the must carry provisions [1] is that they guarantee a governmentally-favored class of speakers—local broadcasters—access to television audiences through means which necessarily restrict the ability of cable programmers to reach the same audiences. In short, the statute seeks to enhance the voice of certain speakers by burdening the speech of other, less-favored speakers. While the government and the broadcaster beneficiaries of the must carry provisions argue at great length that the allegedly "bottleneck" characteristics of the cable medium justify governmental regulation of the content of the programming cable operators offer their subscribers, they make little effort to explain why a federal edict guaranteeing even the least-viewed local broadcasters access to the alleged "bottleneck" facilities *ahead* of all other video programmers is consistent with the commands of the First Amendment.[2]

1. Appellees fail to rebut appellants' demonstration that Congress has in fact granted these special privileges to broadcasters at the expense of other video programmers because of the types of *programming* broadcasters offer—indeed, are *required* to offer by law.[3] In recognition of

[1] *See* Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"), Pub. L. No. 102-385, 106 Stat. 1460, §§ 4 and 5 (47 U.S.C. §§ 534 and 535).

[2] Indeed, access to cable systems is much more crucial to cable programmers than broadcasters. Broadcasters are granted free access to the airwaves, and for decades the public has received broadcast programming over-the-air in the absence of cable systems. And today, despite the ubiquitous availability of cable television, 40 percent of Americans still choose not to subscribe. Cable programmers, by contrast, generally cannot reach television audiences at all if not carried on a local cable system. *See* Turner Br. 4.

[3] *See* Turner Br. 23-28. As appellees Consumer Federation of America, *et al.* ("CFA"), point out, "the objective promoted by

the speech-specific nature of the must carry requirements and content-based justifications offered for them, the government urges the Court to extend the "*Red Lion* standard" [4] to cable television, which, the government asserts, "does not require content-neutrality" but only "viewpoint-neutrality." [5] The broadcasters are less willing to embrace an extension of *Red Lion* (NAB, for example, does not even cite *Red Lion*), but argue instead that the must carry requirements are aimed at preventing "anticompetitive conduct" and therefore, purportedly, are subject only to "rational basis" review. Remarkably, while the broadcasters assert that the exclusive test for determining "content-neutrality" is whether a statute's "purposes" or "justifications" are related to the content of expression, they at the same time urge the Court simply to *ignore* the numerous content-based justifications Congress has expressly offered for Sections 4 and 5. The broadcasters' incongruous assertions notwithstanding, these provisions are "content-based under controlling precedent." J.S. App. 54a (Williams, J., dissenting). *See* Point I, *infra*.

2. The government's bold request that the Court extend the *Red Lion* doctrine to cable television should be flatly—and forcefully—rejected. The melange of economic, technological, and regulatory factors the government relies upon in urging this result—factors that vary

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must-carry is not access for *all* unaffiliated programmers, but access for free local commercial and non-commercial TV stations, precisely because they serve as fiduciaries of the public and are likely to provide service that is different from other unlicensed programmers not subject to the legal obligations of broadcasters." CFA Br. 37-38 n.36 (emphasis in original). *See also* Public Broadcasters ("PBS") Br. 9 ("Because of 'the importance of local programming,' Congress saw 'a need to continue the existing "must carry" rules . . . .'") (quoting H.R. Rep. No. 934, 98th Cong., 2d Sess. 70 (1984)).

[4] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

[5] Govt. Br. 13. As the majority below acknowledged, "a law need not be viewpoint-based to be . . . considered content-based and subjected to strict scrutiny" (J.S. App. 16a).

among cable systems and geographic areas and which have changed, and will change further, with time—bears no relationship to the physical scarcity of the electromagnetic spectrum which has been held to permit certain governmental intrusions in broadcasting considered intolerable elsewhere. A holding that the government may engage in content-oriented regulation of speech whenever it deems "First Amendment interests" to be "threatened by market dysfunction" (Govt. Br. 14) would have momentous implications, and would place First Amendment *rights* in grave peril.[6] *See* Point II, *infra*.

3. *Even if* the Court were to decide that content-oriented regulation of cable programming is permissible under some "reduced" First Amendment standard, or were otherwise to conclude that mandatory access to cable systems might be permissible in some circumstances, the naked preference for the speech of licensed broadcasters over the speech of all other video programmers embodied in the must carry provisions would still fail to survive review. While there may be, as an abstract matter, governmental interests in "preserving" broadcast television, Congress may not legitimately promote the speech—or fortunes—of broadcasters by mandating that they have preferred access to television viewers at the expense of other First Amendment speakers.[7] Moreover, contrary to the government's assertions (Govt. Br. 2), Sections 4 and

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[6] *See* J.S. App. 67a-71a (Williams, J., dissenting) ("Use of the broadcast standards would be completely inappropriate.").

[7] *Banning* cable program networks would surely "further" the government's interest in "preserving" free broadcast television, but no one suggests that would be permissible. As appellants have already demonstrated, "local broadcasting" is thriving, and the public has access to a greater number of local broadcast stations today than ever before (both over-the-air *and* on cable systems). Turner Br. 39-41. But "even if local broadcasters were in perceptible peril, it would not follow that Congress could secure their survival by must-carry provisions." J.S. App. 66a (Williams J., dissenting).

5 are "specifically aimed" at promoting the interests of broadcasters—not television viewers. Like the rules struck down in *Quincy*,[8] the must carry provisions require carriage of all local broadcasters until the must carry quotas are filled—including the *least*-viewed broadcast stations—regardless of whether the operation of the provisions actually *thwarts* viewer interests and preferences by displacing programming cable subscribers would prefer to receive. *See* Point III, *infra*.

4. To the extent appellees offer arguments that purport to be unrelated to the nature of the programming broadcasters offer, these arguments all are premised on the assertion that decisions by cable operators to carry cable program networks instead of particular broadcasters can uniformly be characterized as "anticompetitive conduct" and enjoined in advance through sweeping prophylactic measures. As set forth in our initial brief (at 42-46) and further below, this assertion cannot withstand even minimal scrutiny.

The principal "economic" justification for must carry the broadcasters have concocted—and which the sponsors of the 1992 Cable Act obligingly incorporated in the legislative "findings"—is that cable operators have economic "incentives" to drop local broadcasters because cable operators and local broadcasters compete for advertising revenues. *See* 1992 Cable Act § 2(a)(15). Yet it is undisputed that cable operators voluntarily carry *most* local broadcast stations, including their *strongest* competitors for local advertising, even though operators could choose to carry additional cable program networks instead. Thus, operators' decisions not to carry *particular* broadcasters must be based principally on other factors—*i.e.*, the desire to attract and retain subscribers by offering an appealing package of programming.[9] Nonetheless, the

[8] *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

[9] Indeed, in enacting Section 6 of the 1992 Cable Act (the "retransmission consent" provision), Congress recognized—accurately

Act treats every decision by cable operators to carry CNN, Black Entertainment Television, C-SPAN, or The Family Channel in lieu of particular broadcast stations as "anticompetitive conduct" without any showing that particular programming decisions are *in fact* based on "anticompetitive"—rather than entirely legitimate editorial—factors. This approach is so patently overbroad as a response to purported "anticompetitive" behavior, and so remarkably insensitive to First Amendment concerns, as to be unsustainable under any level of First Amendment scrutiny. *See* Point IV, *infra*.

In short, this case does not necessarily require the Court to issue any sweeping proclamations regarding the First Amendment "status" of cable television or to attempt to articulate a "one-size-fits-all" standard for regulation of the cable television industry. It is enough for *this* case that "[c]able television . . . is engaged in 'speech' under the First Amendment, and is, in much of its operation, part of the 'press.'" *Leathers v. Medlock*, 111 S. Ct. 1438, 1442 (1991).

ARGUMENT

I. THE MUST CARRY PROVISIONS ARE CONTENT-BASED

It is undisputed that the must carry provisions do nothing other than dictate the content of the programming cable systems must offer their subscribers.[10] Further, as appellants already have demonstrated, the congressional findings and the legislative record make it abundantly clear that Congress has mandated that cable systems carry the programming of local commercial and noncommercial broadcasters—to the exclusion of other sources of video programming to the extent necessary—because of

—that cable operators not only would *voluntarily* carry broadcast stations that cable subscribers desire to receive, but would *pay* broadcasters for the privilege. 47 U.S.C. § 325(b).

[10] *See* CFA Br. 28 (acknowledging that "the direct effect of must-carry" is "to change what the cable subscriber sees").

its assessment of the "importance" of the types of programming broadcasters offer.[11] Thus, even under the test urged by appellees—that a regulation (even one that directly regulates the content of fully-protected speech) is "content-neutral" so long as it is *justified* "without reference" to the content of expression—the must carry provisions fail to escape strict scrutiny.[12]

Moreover, NAB's cynical suggestion that Congress could simply "excise" its actual, content-based justifications for Sections 4 and 5 and re-enact a constitutional statute (*see* NAB Br. 25) would not cure the numerous content-based features of the must carry provisions themselves. *First*, as Judge Williams noted below, Sections 4 and 5 *automatically* incorporate content requirements applicable to broadcast stations licensed by the FCC.[13] *Second*, whether certain broadcast stations qualify for must carry status on particular cable systems turns upon official review of the content of the programming they offer—*not* whether they have been victims of "anticompetitive conduct." For example, Section 4 allows commercial broadcast stations to demand carriage on cable systems even outside their television market as defined by the FCC if they show, among other things, that they provide "news coverage of issues of concern" or "coverage of sporting and other events of interest to the community." [14]

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[11] *See* Turner Br. 23-27 and *supra* at 2 n.3; Discovery Br. 23-32.

[12] *See Ward v. Rock Against Racism*, 491 U.S. 781, 791-92 (1989) (emphasizing that the justifications for the sound amplification guideline at issue "ha[d] nothing to do with content") (internal quotation omitted); *Forsyth County, Georgia v. Nationalist Movement*, 112 S. Ct. 2395, 2403 (1992).

[13] J.S. App. 51a-53a. *See, e.g.*, CFA Br. 19, 22 n.15, 23 n.18, 28 n.24.

[14] 47 U.S.C. § 534(h)(1)(C). The FCC is to "afford particular attention to the value of localism" in considering such petitions. *Id.* In its *Report and Order* implementing the must carry requirements, the Commission instructed that "[c]overage of news and other programming of interest to the community could be demonstrated by program logs or other descriptions of program offerings." *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965, 2977 (1993). Other parts of Sections 4 and 5 impose express content-based requirements. *See* Turner Br. 23-27.

In fact, numerous petitions have been filed with the FCC seeking to have particular broadcast stations included within or exempted from Section 4's carriage obligations vis-à-vis particular cable systems. A recent decision issued by the Commission, *In re WSBT, Inc., South Bend, Indiana, Memorandum Opinion and Order*, Docket No. CSR-3871-A (rel. Nov. 9, 1993), illustrates the statute's inevitable focus on programming *content*. In granting Station WSBT-TV's request that its must carry rights extend to a number of cable systems beyond the station's official television market, the FCC conducted a review of its "coverage of local events," noting, among other things, the station's "sponsorship of a contest entitled 'I Love to Read' involving six schools" in the communities at issue; the fact that it "has assigned the only full-time reporter to cover these communities from any television licensee either in South Bend or in Chicago"; its coverage of "scores and highlights from the high school teams . . . as part of its daily sports coverage"; as well as its broadcasts regarding "a pep rally, a new Juvenile Center, recycling in La Porte, a profile of the Mayor of the City of La Porte, local lottery winners, stories on the La Porte County Park authority, special election night broadcasts, and a remote news broadcast in 1992 from the La Porte County Fair." [15]

Here, the statute on its face regulates speech based on its content. Indeed, "the very basis for the regulation is the difference in content between" the types of programming Congress requires local broadcast stations to offer and the programming Congress believes operators would otherwise choose to carry.[16]

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[15] *Id.* at 2. NAB's assertion that the statute "*operates* without regard to the content of any expression" (NAB Br. 23, emphasis in original) is simply wrong.

[16] *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1516 (1993). As noted above and in the next section, the govern-

II. THE "*RED LION* STANDARD" DOES NOT APPLY TO CABLE TELEVISION, NOR WOULD IT JUSTIFY THE ACT'S MUST CARRY PROVISIONS

In an effort not only to sustain Sections 4 and 5 but to obtain a sweeping license to engage in content-oriented regulation of cable television and other emerging media, the government abandons the analysis of the majority below and urges the Court to extend the "*Red Lion* standard" to cable television.[17] The Court should decline the invitation. To conclude that the government may engage in content-oriented regulation of speech or the press whenever it deems it necessary to do so "to correct market failure in a market whose commodity is speech" (Govt. Br. 16-17), or whenever the government action purportedly is aimed at promoting "First Amendment interests"

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ment argues that content-based regulation of cable television should be permitted through an extension of *Red Lion*. The government does briefly assert, however, that the must carry provisions could be considered "content-neutral" because they "are not designed to express disagreement with the message of cable operators or programmers" and do not "single out any topic that cable operators may or may not discuss." Govt. Br. 38. The former simply indicates *viewpoint* neutrality, which, as the government and the majority below acknowledge, is insufficient to avoid exacting scrutiny. Nor is governmental action which promotes or restricts certain *types* of speech (*e.g.*, "local news," "children's programming," or "educational programming") content "neutral" so long as it does not single out particular "topics" of discussion. For example, the commercial publications at issue in *City of Cincinnati* presumably could have discussed a wide variety of "topics," such as the desirability of living in particular neighborhoods, the importance of furthering one's education, or specific information about artistic, musical, or sporting events. Similarly, the charitable solicitation at issue in *Riley v. Nat'l Fed'n of the Blind of North Carolina*, 487 U.S. 781 (1988), could involve a virtually unlimited range of "topics" and subject matters. *See Consolidated Edison Co. of New York, Inc. v. Public Serv. Comm'n.*, 447 U.S. 530, 537 (1980) (government has no power to regulate expression based upon "its message, its ideas, its subject matter, or its content").

[17] *See* Govt. Br. 13 (the district court reached "the correct result" but applied the wrong standard).

(*see id.* at 14), would be an extremely dangerous step with far-reaching consequences.[18]

A. The bundle of imprecise and variable factors the government relies upon in urging an extension of the *Red Lion* doctrine bears no resemblance to the physical scarcity of the electromagnetic spectrum, which has been held to differentiate over-the-air broadcasting. The principal factor the government relies upon—that few cable systems presently face direct local competition from another multichannel video programming distributor—is directly attributable to misguided governmental policies, not the laws of physics. As noted in *Quincy*, 768 F.2d at 1450, local cable monopolies more likely are attributable "to governmental action—particularly the municipal franchising process—than to any 'natural' economic phenomenon." In the 1992 Cable Act, Congress has now prohibited local authorities from granting exclusive cable franchises and from unreasonably refusing to grant competitive ones.[19]

B. In asking the Court to uphold the must carry provisions under the rubric of *Red Lion*, the government claims the must carry requirements "were specifically aimed at promoting the First Amendment interests of viewers—interests this Court has described as 'paramount'." Govt. Br. 2. But the must carry requirements mandate carriage utterly without regard to viewer inter-

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[18] Indeed, the premise of the government's argument—that the market for video programming is in such "dysfunction" as to justify abandoning traditional First Amendment principles—is especially alarming here, in view of the congressional finding that "[p]rogramming choices have . . . grown about 50 percent" since 1984 (S. Rep. No. 92, 102d Cong., 1st Sess. 3 (1991)) in the *absence* of must carry requirements. *See* Turner Br. 9-10.

[19] 1992 Cable Act § 7(a), 47 U.S.C. § 541(a). The government acknowledges that restrictive franchising practices have been a primary cause of local cable monopolies. *See* Govt. Br. 9, 27 (prior to the Act "most local authorities made exclusive franchises available to cable operators"); *id.* at 13 (few cable operators face head-to-head competition due to "exclusive franchise arrangements previously sanctioned by local governments").

ests and preferences. *Every* local broadcast station must be carried until the must carry quotas are filled, even if the result is to displace programming viewers would prefer to receive. Turner Br. 15-17. As President Bush noted in vetoing the legislation, the statute "requires cable companies to carry certain television stations regardless of whether the viewing public wants to see these stations."[20]

In *Quincy*, the D.C. Circuit held that one of the fundamental flaws of earlier must carry rules was that they "prevent[ed] cable programmers from reaching their intended audiences even if that result directly contravenes the preference of cable subscribers." 768 F.2d at 1453. In subsequently adopting revised, temporary must carry rules, the FCC at least attempted to address this concern by establishing a viewership standard that broadcast stations had to meet to qualify for mandatory carriage, though that was not enough to uphold their constitutionality.[21] Inexplicably, this third time around, Congress has chosen to enact a must carry scheme which again completely ignores viewer interests, and which, like the rules struck down in *Quincy*, "thwarts viewer preferences" (*Quincy*, 768 F.2d at 1461). *See* Turner Br. 17 & n.38. As *Quincy* noted, this "disregard of subscribers' viewing preferences

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[20] *See* 138 Cong. Rec. H1477 (daily ed. Oct. 5, 1992). The government's heavy reliance on *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), and its progeny in arguing that due to "the similarity and interrelatedness of cable and broadcast television, a comparable regulatory approach is appropriate for each" is misplaced. *See* Govt. Br. 27, 33. *Southwestern Cable* did not involve a First Amendment claim, nor did it involve any issue regarding the selection of broadcast versus non-broadcast programming. Indeed, at the time of the Court's early decisions regarding cable television, no cable program networks even existed. As the FCC subsequently recognized, the relationship between cable and broadcast television has changed dramatically with the emergence of cable as an independent provider of diverse video programming in its own right. *See* Turner Br. 5-7; Discovery Br. 4-5.

[21] *Century Communications Corp. v. FCC*, 835 F.2d 292, 297 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988).

is difficult, if not impossible, to reconcile with the Supreme Court's repeated admonition that the interests of viewers should be considered 'paramount' in the First Amendment calculus." 768 F.2d at 1453 (citing *Red Lion*).[22]

III. THE MUST CARRY PROVISIONS IMPERMISSIBLY BURDEN THE SPEECH OF CERTAIN SPEAKERS IN ORDER TO PROMOTE THE SPEECH OF OTHER, GOVERNMENTALLY-FAVORED SPEAKERS

As the district court below recognized, the must carry provisions inflict distinct constitutional injuries on cable *operators* and cable *programmers*, giving rise to related, but distinct, constitutional claims. J.S. App. 13a-14a & n.18. *See Quincy*, 768 F.2d at 1451-52.[23] As the FCC explained in concluding that must carry rules should be discontinued, must carry "protects one segment of the television industry by substantially limiting the ability of others to offer service to consumers."[24] For Sections 4 and

[22] The *Turner* appellants join the additional arguments set forth in the reply briefs of Time Warner and NCTA demonstrating that no basis exists for extending *Red Lion* to cable television.

[23] Appellees mischaracterize *Quincy* by suggesting that the court's decision was based solely on the "lack of administrative record support" demonstrating a substantial threat to local broadcasting. *See* Govt. Br. 4, 25 n.17. To the contrary, *Quincy* carefully articulated fundamental First Amendment concerns regarding the purposes and effect of the must carry rules at issue—particularly the fact that they sought to promote a governmentally-favored class of speakers by limiting other speakers' access to their intended audiences—and, though finding it unnecessary to reach the issue, strongly indicated that exacting First Amendment scrutiny should apply to such provisions. 768 F.2d at 1451-54. The Court concluded that even *assuming* the government may burden the First Amendment rights of cable speakers as a means to promote "local broadcasting," the government simply failed to show that any genuine threat to "local broadcasting" existed. *Id.* at 1454.

[24] *In re Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems*, 1 FCC Rcd 864, 880 (1986) (expressly recognizing

5 to be found constitutional, *both* the cable operators' and cable programmers' claims would have to be rejected.

None of the appellees cares to discuss, much less justify, the inconvenient fact that the must carry requirements result in cable subscribers losing all access to cable program networks such as C-SPAN, The Learning Channel, and Court TV, as cable systems are forced to make room for additional broadcast stations.[25] The government's brief makes no attempt to address the First Amendment claims and injuries of the cable *programmers* other than to assert that the burden on programmers is "minor" because the must carry requirements apply to "fewer than half" of the channels available for cable programming. Govt. Br. 15; *see id.* at 19 (referring to "the minor infringement on First Amendment interests in this case"); *id.* at 45 ("the limitation at issue merely restricts, to a limited extent, the channels aavilable to . . . cable networks, such as The Cartoon Network and The Sci-Fi Channel"). And, while the government describes the Court's decision in *Buckley*

"the impact on cable operators' and cable programmers' First Amendment rights" of must carry rules). In connection with the *Quincy* proceedings, the Commission stated that its earlier must carry rules were "intended to compel carriage of broadcast signals in place of alternate programming that subscribers, given a choice, might otherwise choose," and acknowledged that the rules "tak[e] cable channels out of the marketplace where nonbroadcast program originators might otherwise have been able to negotiate for their use." *See Quincy*, 768 F.2d at 1446.

[25] Turner Br. 15-17; Discovery Br. 2-4, 25; Court TV Br. 7-11. The government's argument that the programmers' position indicates that "in the absence of must-carry rules cable operators would drop numerous broadcast stations" such that "[i]f the programmers are right, then broadcast stations would be in serious jeopardy" (Govt. Br. 29) is unfounded. All parties agree that *most* broadcast stations are carried in the absence of must carry rules, and the results of the FCC carriage survey the government cites (*id.*) are undisputed. *See* J.S. App. 63a-64a. Nonetheless, cable program networks are injured when cable operators who already carry a large number of broadcast stations are forced to carry still *additional* broadcasters pursuant to the must carry requirements.

v. Valeo, 424 U.S. 1, 48-49 (1976), as standing for the principle that "the right of some to speak may not be secured by suppresing [sic] the rights of others," its attempt to distinguish *Buckley* is unavailing.

The government asserts, in essence, that because the Court in *Buckley* made reference to and distinguished the "fairness doctrine" upheld in *Red Lion* on the basis of broadcast principles, and because the government now argues that *Red Lion* should apply to cable television, the must carry requirements are consistent with *Buckley*.[26] This argument fails for the reasons set forth in Point II above: The "*Red Lion* standard" does not apply to cable television and, furthermore, provides no answer to the programmers' distinct claim that the First Amendment condemns the creation of a governmentally-imposed hierarchy of speakers. Turner Br. 28-30. The government's additional argument that the provisions at issue in *Buckley* limited speech "at the core of the First Amendment" while the must carry provisions merely restrict channels available to cable networks "such as The Cartoon Network and The Sci-Fi Channel" (Govt. Br. 15, 45) is baseless. The programming cable networks offer is indisputably fully-protected speech, and includes a wide range of political and public affairs programs unquestionably "at the core of the First Amendment."[27]

To the extent the broadcasters address the programmers' claims, they assert that the programmers' arguments

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[26] Govt. Br. 45. The Public Broadcasters make a similar argument. PBS Br. 40 n.37 (asserting that the *Buckley* principle applies only in "traditional free speech case[s]"). The Public Broadcasters' reliance on *FCC v. Nat'l Citizens Comm. for Broadcasting*, 436 U.S. 775, 799-800 (1978) (PBS Br. 39) also presumes that the reduced level of constitutional scrutiny applicable in the broadcasting context applies to cable television.

[27] *See* Turner Br. 9-12 (noting a variety of news, commentary, and informational programming offered by cable networks). C-SPAN's programming every day lies "at the core" of the First Amendment. CNN's carriage of the debate between Ross Perot and Vice President Gore concerning NAFTA is another recent example.

consist of nothing more than a complaint that broadcasters have been treated more favorably. *See* PBS Br. 39-40; NAB Br. 32-33. This simply misrepresents the programmers' position, as even the district court recognized.[28] As Judge Williams stated, "[g]iven the finite number of cable channels, replacement of the cablecaster's choice of programs with those of local broadcasters suppresses the alternative programs as completely as if Congress had ordered them shut down. . . ." J.S. App. 55a. NAB's reliance on the portion of *Buckley* upholding provisions "that discriminated between major and minor parties in public election financing" (NAB Br. 38) merely proves the programmers' point. With respect to those provisions, the Court in *Buckley* emphasized that "appellants have made no showing that the election funding plan disadvantages nonmajor parties by operating to *reduce* their strength below that attained without any public financing." 424 U.S. at 98-99 (emphasis supplied).[29]

While certain of the broadcasters rely upon *Leathers v. Medlock, supra,* in asserting that the programmers have no First Amendment claim, neither the court below nor the government on appeal has embraced this contention. A generally-applicable sales tax like that at issue in *Leathers* does not regulate *speech*, enjoin editorial decisions, or block a speaker's access to an audience. Although satel-

[28] The majority below explained: "The programmers do not merely contend that Congress has failed to provide a benefit to programmers that is has provided to others. Instead, the programmers contend that Congress has, by increasing broadcaster speech in a limited forum, *reduced* the speech of the programmers. This is a First Amendment claim." J.S. App. 14a n.18 (emphasis in original). *See* Turner Br. 27-28.

[29] If the appellees' views were correct, then the D.C. Circuit's applications of the principle set forth in *Buckley*—that government may not promote the speech of some by burdening the speech of others—to strike down broadcaster-protectionist regulation on three occasions were all in error, three rulings that this Court declined to review. *Century, supra; Quincy, supra; Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977).

lite broadcast services were exempted from the tax at issue in *Leathers* while cable television sales were not, this "discrimination among speakers" (NAB Br. 32) did not promote the speech of one group by imposing special burdens on the speech of another group; the financial benefit to one class resulted in no corresponding "loss"—of anything—to others. That certain groups or elements of the press may benefit financially as a result of being exempted from a general tax or regulatory burden cannot be said to *interfere* with the constitutionally-protected activities of other speakers.[30] *See also* Discovery Br. 25-26 n.9.

IV. THE MUST CARRY PROVISIONS CANNOT BE SUSTAINED AS A REMEDY FOR ALLEGED "ANTICOMPETITIVE" BEHAVIOR

Both the government and the broadcasters strive to concoct rationales, albeit different ones, for shielding the must carry requirements from meaningful judicial review; indeed, both urge the Court to adopt a standard of review even *less* demanding than that applicable to "time, place, and manner" regulations[31] or general regulations of conduct.[32] Both, though especially the broadcasters, appear to take the view that even legislation that specifically, purposefully, and directly regulates speech—and nothing but speech—is somehow immune from First Amendment scrutiny if its purposes may be characterized as "economic."

[30] *Accord Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 546 (1983) (concluding that "Congress is not required by the First Amendment to *subsidize* lobbying . . . . In these cases, Congress has not infringed any First Amendment rights or regulated any First Amendment . . . activity.") (emphasis supplied). *See also id.* at 549-50 ("'although government *may not place obstacles in the path of a* [*person's*] *exercise of freedom of speech*, it need not remove those not of its own creation.'") (emphasis supplied, citation omitted).

[31] *See Ward*, 491 U.S. at 791.

[32] *United States v. O'Brien*, 391 U.S. 367 (1968).

This is not the law, as this Court squarely held in *Riley*, 487 U.S. at 788-90 & n.5.[33]

We repeat: Sections 4 and 5 are content-based, speaker-specific, direct regulations of speech which properly merit "strict" or "exacting" First Amendment scrutiny, notwithstanding the purported "economic" justifications offered for the statute. Yet even under "intermediate" scrutiny, the government's burden of justification "is not satisfied by mere speculation or conjecture,"[34] and the government "must affirmatively establish" that a regulation burdening speech targets "no more than the exact source of the 'evil' it seeks to remedy."[35] Appellees' claims that the must carry provisions represent a "narrowly-tailored" means of redressing the "evil" of "anticompetitive conduct" by cable operators against local broadcasters are unsustainable under any First Amendment standard of review.

A. As indicated above, the central "economic" justification offered for the must carry requirements is that cable operators systematically deny carriage to local broadcasters in order to eliminate broadcasters' competition for local advertising revenues and to make room for cable program networks that permit cable operators to offer some advertising adjacent to their programming.[36] Therefore, the

[33] *See* Turner Br. 31-34. *See also Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 112 S. Ct. 501, 509 (1991) (the Court has "long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment").

[34] *Edenfield v. Fane*, 113 S. Ct. 1792, 1800 (1993) (government "must demonstrate that the harms it recites are real"). *See also City of Cincinnati*, 113 S. Ct. at 1510 & n.12 ("we require the governmental goal to be substantial, and the cost to be carefully calculated") (quoting *Bd. of Trustees of the State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989)).

[35] *Fox*, 492 U.S. at 480; *Frisby v. Schultz*, 487 U.S. 474, 485 (1988).

[36] *See* 1992 Cable Act § 2(a)(15). Most of the advertising seen on cable program networks is advertising of the cable networks themselves, not the local cable operator. Cable networks do, however, often negotiate to allow the operator to offer some local advertising adjacent to cable network programming. At the behest of broadcast interests, Congress has adopted provisions (as reflected in the must carry provisions themselves—*see* 47 U.S.C. § 534(b)(3)) which require cable operators to carry broadcast signals in their "entirety," including all broadcast advertising. *See* 17 U.S.C. § 111. To the extent legal obstacles prevent broadcasters from negotiating with cable operators to allow limited advertising inserts as cable networks do, there is no reason why such obstacles could not be removed.

argument goes, decisions by cable operators to carry cable program networks in lieu of local broadcasters are merely "anticompetitive conduct." Yet it is undisputed that cable operators carry *most* local broadcast stations in the absence of must carry requirements, including their *strongest* competitors for local advertising revenues, such as national broadcast network affiliates. *See* Turner Br. 42-46; J.S. App. 63a-66a. In addition, there are over 120 national and regional cable program networks operators can choose from; nonetheless, cable operators voluntarily choose to carry a host of local broadcast stations in lieu of available cable program networks despite the purported economic "incentive" not to.[37] In fact, because the overwhelming source of operator income is derived from *subscriber revenues*, not advertising (*see* Turner Br. 44), "[y]ou don't need a Ph.D. in Economics to figure out" (Govt. Br. 5) that an operator's overwhelming economic "incentive" is to attract and retain subscribers by offering an appealing mix of programming, including whatever broadcast programming subscribers wish to receive.[38]

[37] *See* PBS Br. 36 n.33. Moreover, some of the most widely-carried cable programming services—such as Turner's TBS—do not allow local advertising inserts at all.

[38] *See* INTV Br. 19 ("Generally, a cable system has a financial incentive to carry the network-affiliated stations because that carriage maintains or increases the cable system's subscriber base."); J.S. App. 65a-66a (citing evidence, *inter alia*, that broadcast television continues to account for 92 percent of all television advertising revenues). And, as Judge Williams also noted, "[t]aken at its best," the theory that cable operators deny carriage to local broadcast stations to weaken their ability to compete for advertising

B. That Congress believed, accurately, not only that cable operators would voluntarily carry local broadcast programming which cable subscribers wish to receive, but would *pay* to do so, is evidenced by Section 6 of the Act—the retransmission consent provision. *See* Turner Br. 14, 49. As appellees CFA, *et al.*, explain, "[r]ecognizing that it is not necessary to force cable operators to carry many of these stations, Congress created the retransmission consent alternative," pursuant to which broadcast stations can *withhold* their signals from cable operators if dissatisfied with the compensation offered by the operator.[39] Indeed, "[t]he vast majority of commercial stations appear to have opted for retransmission consent rather than must-carry."[40] Thus, as appellees acknowledge, it is generally the least-viewed, least-popular broadcast stations that will find it necessary to force themselves onto cable systems pursuant to the must carry provisions. Appellees' position appears to be *not* that this "market for speech" is "dysfunctional,"

"lend[s] *no* support to § 5 of the Act . . . as the educational stations do not advertise." *Id.* at 65a (emphasis in original).

[39] *See* CFA Br. 31-33 (noting that "more popular" TV stations will "choose to forego mandatory carriage"); *see also* INTV Br. 19-20 (stations that help an operator "maintain[] or increase[] the cable system's subscriber base" will tend to opt for retransmission consent instead of must carry, but other stations "do not have that luxury").

[40] CFA Br. 33 & n.31-32; Discovery Br. 43-44 & n.18. Moreover, as Congress also anticipated, powerful commercial broadcasters have leveraged their retransmission consent rights to demand carriage of broadcaster-affiliated cable program networks—so-called "ransom channels" (*see* Turner Br. 14-15 n.31)—in consideration for carriage of their broadcast signals, resulting in additional cable channel slots being allocated to the wealthiest broadcasters. *See* S. Rep. No. 92, 102d Cong., 1st Sess. 35-36 (1991) (noting that broadcasters opting for retransmission consent may negotiate for "an additional channel on a cable system"). The fact that a particular station opts for must carry rather than retransmission consent does not mean, however, that operators would necessarily refuse to carry such stations voluntarily. *See id.* at 35 ("many broadcasters may determine that the benefits of carriage are themselves sufficient compensation for the use of their signal").

but rather that market forces are functioning *too* effectively.[41]

C. In view of the foregoing,[42] decisions by operators not to carry particular local broadcast stations cannot be simplistically or uniformly characterized in advance as "anticompetitive conduct," and the sweeping prophylactic measures Congress has adopted are vastly overbroad. Turner Br. 42-46. INTV disingenuously suggests in connection with its "antitrust" discussion that the must carry provisions "provide for case-by-case determinations that appellants demand" (*see* INTV Br. 26, citing 47 U.S.C. §§ 534(d) and 534(h)(1)(C)), while failing to point out that it is *not* a defense under the statutory provisions for a cable operator to show that a challenged carriage decision is based upon legitimate editorial considerations rather than alleged "anticompetitive" factors.[43]

D. The must carry provisions bear no resemblance to "per se" rules of antitrust enforcement. A cable operator's very *raison d'etre* is to choose from among the enormous

[41] *See* CFA Br. 25 (asserting that "First Amendment interests" should not be left "to the whims of the economic marketplace"). Contrary to CFA's related assertion, broadcasters are by no means unique as providers of "cultural programming and certain other programming which appeals only to smaller segments of the audience." *Id.* at 27. Many cable program networks, including A&E, BET, Lifetime, and numerous others, provide a wealth of programming aimed at minorities and women, foreign language programming, quality programming for children, performing arts programming, closed-caption programming for the hearing-impaired, and a variety of other specialized programming not aimed at "mass" audiences.

[42] We have already addressed appellees' assertions that "vertical integration" in the cable industry justifies the must carry requirements. Turner Br. 35-36.

[43] 47 U.S.C. § 534(d) simply provides a mechanism for a commercial broadcast station that qualifies for carriage under Section 4 to obtain an enforcement order. To the extent case-specific determinations are provided for under 47 U.S.C. § 534(h)(1)(C), the Commission is, as noted *supra* at 6 n.14, instructed to focus on "the value of localism"—not whether a broadcast station has been the victim of "anticompetitive" conduct.

variety of sources of video programming available in order to put together a package of programming that will be appealing to television viewers.[44] Unlike, for example, horizontal price fixing, which is so certain to be aimed at destroying competition as to warrant condemnation without inquiry into actual anticompetitive purposes or effects, there is nothing inherently suspicious about a cable operator choosing between competing sources of programming: To the contrary, as Judge Williams points out, that is what they do for a living. J.S. App. 58a.

CONCLUSION

The decision of the three-judge district court should be reversed.

Respectfully submitted.

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[44] It is undisputed that the supply of video programming alternatives available to cable operators vastly exceeds the capacity of virtually all cable systems and, consequently, editorial choices have to be made. Turner Br. 4-5. Decisions to carry certain programmers necessarily requires excluding others. Indeed, as indicated above, the essence of the cable programmers' First Amendment claims is that particular programmers have no right to enlist the injunctive power of the government to secure access to cable audiences at the expense of other programmers.

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TURNER BROADCASTING SYSTEM, INC., *et al.*,

Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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No. 93-44

IN THE

Supreme Court Of The United States

October Term 1993

TURNER BROADCASTING SYSTEM, INC., *et al.*,

Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Reply Brief for Appellant Time Warner Entertainment Company, L.P.

ARGUMENT

In responding to the challenges brought by appellant Time Warner Entertainment Company, L.P. ("Time Warner") and others against the constitutionality of the "must-carry provisions", the federal appellees[1] principally urge the Court to rewrite its decision in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), a decision heretofore considered inextricably linked to the unique, physically limited nature of the broadcast spectrum.[2]

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[1] The federal appellees will hereafter be referred to as "the government" and citations to their brief will be in the form of Gov. __.

[2] *See infra* note 10.

Under the government's reading of *Red Lion*, Congress may, whenever it perceives a "market in speech" to be "dysfunctional", take affirmative measures to advance whatever First Amendment interests it believes are hindered by the dysfunction. Further, the government proposes that whether the legislature's action is content-based does not matter. That is, essentially conceding that the must-carry provisions are content-based and thus not sustainable under the standard of review thereby applicable, the government tortures both the language and the logic of *Red Lion*, attempting to make its more lenient standard apply. However, there is no authority to support this extension of *Red Lion*, nor would any rational principle of law provide government, ostensibly constrained—not empowered—by the command of the First Amendment, with such unbridled power.

The appellees representing the broadcast industry do not subscribe to the government's expansive reading of *Red Lion*.[3] Instead, arguing that government's purpose always determines whether legislation is content-based, they contend that Congress did not intend to suppress speech; that therefore the must-carry provisions are content-neutral; and that these provisions should be subject to at most minimal judicial review. Given that the must-carry provisions alter the content of video programming that cable operators provide subscribers and replace it with content Congress largely selects, appellees' focus on something other than their effect is not surprising. In appellees' calculus, the freely exercised editorial decisions of cable operators are not relevant, nor is the government's deliberate choice to favor only broadcast television—the programming over which the government already exercises the greatest content control—at the expense of competing cable programming services. By arguing at length that

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[3] The briefs of National Association of Broadcasters ("NAB"), Association of Independent Television Stations, Inc. ("INTV"), and the public broadcasting entities (Association of America's Public Television Stations, Public Broadcasting Service and Corporation for Public Broadcasting) (collectively "PBS") will be cited as NAB __, INTV __, or PBS __. Collectively, Time Warner will refer to these particular appellees as the "broadcast appellees". General references to "appellees" means both the broadcast appellees and the government.

the must-carry provisions are not content-based, the broadcast appellees only emphasize the government's apparent concession.

Appellees also take the position that Congress's fact-finding is entitled to the highest level of deference from the courts, particularly its conclusion that the broadcasting industry is in imminent economic peril. Appellees' position is to be expected. Only under such a relaxed standard of review could Congress's "findings" be validated. Such deference, however, should not apply here in light of the substantial intrusion upon the First Amendment rights of cable operators and programmers. Moreover, appellees fail to indicate why an obviously less speech restrictive alternative—direct subsidies—does not require invalidation of the must-carry provisions. Essentially, appellees ask that these provisions be upheld merely because Congress has acted. Such has not been the law for nearly two hundred years.

I. MERE RATIONAL BASIS REVIEW SHOULD NOT BE APPLIED TO THE MUST-CARRY PROVISIONS.

The government principally contends that, by subjecting the must-carry provisions to analysis under *United States v. O'Brien*, 391 U.S. 367 (1968), the majority below applied too rigorous a standard of review. Gov. 13. Rather than an *O'Brien* analysis (or the strict scrutiny advocated by appellants), the government proposes that these provisions "should be analyzed under a different framework—this Court's precedents governing legislative efforts to correct market failure in a market *whose commodity is speech*", in particular, *Red Lion*. Gov. 13, 16-17 (emphasis added). In the government's view, Congress must act "to protect the 'paramount' First Amendment interests of viewers" and to ensure the availability of a diversity of programming and information, Gov. 17, and those actions, even if directly aimed at content, need only be "reasonable". *Id.*

The need to stretch existing law for a rationale under which content-based regulation outside the broadcast industry could survive is quite telling. To date, however, that industry is the only context in which such draconian and intrusive regulation has been allowed, and it has been allowed because of a single reason—the physically limited nature of the broadcast spectrum. Conceding

that a similar scarcity does not characterize cable, Gov. 22, the government seeks to rewrite the reasons why it has been allowed to regulate the content of broadcasters' programming in order to obtain a similar power over cable. The argument lacks any basis in law.

A. Cases upholding enforcement of generally applicable laws do not dictate rational basis review here.

The government contends that *Associated Press v. United States*, 326 U.S. 1 (1945), and *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), support applying rational basis review to "legislative efforts to correct market failure in a market whose commodity is speech". Gov. 17. Foremost, the government's argument is misguided, because these cases have nothing to do with "legislative efforts" regarding "markets" whose "commodity" is speech.[4] Rather, they involved attempts by courts to fashion relief under the generally applicable Sherman Act upon adjudicated violations of the Act. The government's preoccupation with these cases is thus perplexing. But even beyond this failing, these cases fail to help the government here.

In *Associated Press*, the membership by-laws prevented members from distributing news to nonmembers and, through onerous membership requirements, effectively blocked nonmember competitors from joining the association. The district court held, and this Court agreed, that AP's by-laws constituted unlawful concerted conduct in restraint of trade under the Sherman Act. 326 U.S. at 11, 18. Likewise, the Sherman Act violation presented in *Lorain Journal* was the result of a newspaper carrying out a plan to eliminate competition in a local advertising market presented by a new radio station. The district

[4] The government's use of the oxymoron—"commodity" of speech—demonstrates the disdain with which it treats cable's speech under the First Amendment. The relevant point, given grudging acknowledgment by the majority below and then ignored, is that regulation of video programming, unlike most regulation of printing presses or loudspeakers, regulates pure speech. *See* J.S. App. 12a (video signals "can only be used to convey a message").

court found a "purpose and intent" to destroy the station—conduct prohibited by § 2 of the Sherman Act. 342 U.S. at 148-49. This Court affirmed.

Contrary to the government's claim, it was not relevant in either case that the markets at issue to some degree implicated speech interests. The Sherman Act applied because unlawful conduct had impermissibly restrained trade. *Associated Press* clearly makes this point. 326 U.S. at 7 ("All are alike covered by the Sherman Act. The fact that the publisher handles news while others handle food does not . . . afford the publisher a peculiar constitutional sanctuary in which he can with impunity violate laws regulating his *business practices*.") (emphasis added). Thus, the print media are no more immune from a *general law* prohibiting business practices restraining trade in news than would be any other business from conduct creating unreasonable trade restraints. *Id.* at 18-19 (restraint on trade in news compares to restraints on trade in tiles, lumber, enameled ironware or women's clothes).[5]

Unlike a general law regulating *business* practices, the must-carry provisions selectively target certain members of the press and dictate the content of video programming they must deliver to the public. The government, though acknowledging the difference, Gov. 18, downplays its significance, proposing that "it should not matter" whether an infringement of First Amendment activity "results from a statute directed to the cable industry rather than from a specific decree implementing a general statute", because the remedies imposed in each case "directly altered the defendant speaker's communicative activity". Gov. 18-19. And, the government asserts that "there is no

[5] It is also an important distinction that both cases involved adjudications by neutral fact-finders based on full factual records. Various appellees, particularly INTV, and the court below, though analogizing the must-carry provisions to antitrust laws, fail to acknowledge that the government has not proven even a single anticompetitive violation in this context. Instead, Congress has assumed that all cable operators have engaged in anticompetitive conduct and enacted a prophylactic rule so broad as to encompass even those cable operators that have never dropped any local broadcast station.

suggestion that Congress was up to anything 'nefarious'". Gov. 19.

The government misses the point. This Court consistently has held that the distinction between general and specific laws is not inconsequential, but one of a constitutional dimension, requiring heightened judicial scrutiny in the case of the latter. *See Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 581-86 (1983); *Leathers v. Medlock*, 111 S. Ct. 1438, 1443 (1991).[6] This is so exactly because selective regulation of the press inherently presents the danger of governmental suppression. Thus, an improper purpose is presumed for such laws, and they are not tolerated, absent the most compelling reasons.[7]

As for the government's suggestion that remedies may directly alter protected speech activities, this Court made clear in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974),

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[6] *See also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217, 2226 (1993) (strict scrutiny applies under free exercise clause to laws that are not generally applicable and that burden particular religious practices, whereas more relaxed scrutiny applies to laws that are generally applicable and incidentally burden religious practices); *Cohen v. Cowles Media Corp.*, 111 S. Ct. 2513, 2518 (1991) (noting that generally applicable laws do not violate the First Amendment merely because their enforcement may have some incidental effects on ability to gather and report news); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987) (targeting members of the press "poses a particular danger of abuse by the State").

The reason is clear. With generally applicable laws, there is "no fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency". *Minneapolis Star*, 460 U.S. at 585. In contrast, those political constraints are absent when laws single out the press for regulatory burdens. *Id.*; *see also Leathers*, 111 S. Ct. at 1443 ("When such a law applies only to a single constituency, however, it is insulated from this political constraint.").

[7] *See Minneapolis Star*, 460 U.S. at 592 (illicit legislative intent not necessary to subject law singling out the press to heightened scrutiny); *see also Leathers*, 111 S. Ct. at 1443 (noting that in *Minneapolis Star* "[w]e found no evidence of impermissible legislative motive . . . apart from the structure of the tax itself").

that the First Amendment precludes any government compulsion that overrides editorial discretion.[8] The proponents of a right of enforced access relied upon *Associated Press* for the proposition that "the First Amendment acts as a sword as well as a shield". *Id.* at 251. In rejecting that argument, this Court indicated that, anytime government coercion is required to implement "a remedy such as an enforceable right of access", "this at once brings about a confrontation with the express provisions of the First Amendment", *id.* at 254. The Court also stated that "[t]he clear implication has been that any such compulsion to publish that which 'reason tells them should not be published' is unconstitutional". *Id.* at 256.[9]

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[8] This is not to say that the remedies involved in either *Lorain Journal* or *Associated Press* are analogous to the must-carry provisions. They are not. The injunction in *Lorain Journal* prohibited the newspaper from refusing to deal with advertisers because they proposed to advertise in or through another medium; the paper was free to refuse to print advertisements for any other reason. Thus, unlike the must-carry provisions, there was no general right of compelled access and the impact on First Amendment rights was at most incidental. And, this Court has elsewhere recognized that any First Amendment interest in advertising ordinary commercial proposals is subject to limitation. *See, e.g., Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 378 (1973).

The decree in *Associated Press* is even less analogous to the must-carry provisions. Confronted with the argument that the district court decree "interferes with freedom 'to print as and how one's reason or one's interest dictates'", 326 U.S. at 20 n.18, this Court concluded that "[t]he decree does not compel AP or its members to permit publication of anything which their 'reason' tells them should not be published". *Id.* In contrast, the First Amendment impact of the must-carry provisions is direct and severe, compelling Time Warner to publish certain material even if it would not otherwise choose to do so. *See also* J.S. App. 54a (Williams, J., dissenting) ("[a]pplication of a test for 'incidental' burdens on speech seems highly artificial here").

[9] In making clear that the remedy in *Associated Press* had not infringed upon any editorial function, the *Tornillo* opinion emphasized that "beginning with *Associated Press*, the Court has expressed sensitivity as to whether a restriction or requirement constituted the compulsion exerted by government on a newspaper to print that which it would not otherwise print". 418 U.S. at 256. Appellee NAB is thus incorrect in asserting that remedies can override editorial discretion and not even "be subjected to First Amendment scrutiny". NAB 49

B. This Court's decision in *Red Lion* does not support the government's rational basis framework.

The government also proposes that it is permitted to enact content-based regulation of cable under *Red Lion*, subject only to a rational basis standard of review. Gov. 13. Necessarily, it is the government's position that the physical scarcity of the broadcast spectrum was only incidental to the result in *Red Lion*. That position, however, is inconsistent with *Red Lion* itself, which makes quite clear that scarcity is the *very reason* why broadcasters receive a lower level of First Amendment protection than other media speakers. *Red Lion*, 395 U.S. at 388 ("[w]here there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish"). Moreover, no decision from this Court since *Red Lion* suggests otherwise.[10]

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n.82. In fact, the exact opposite conclusion was reached by the Court of Appeals for the District of Columbia in *Passaic Daily News v. NLRB*, 736 F.2d 1543, 1558 (D.C. Cir. 1984). Based on *Tornillo*, the court invalidated a remedial order imposed by the NLRB, because the order required the newspaper to publish an individual's column. *Id.* at 1557 (newspaper cannot be "compelled to publish that which it chose to withhold"); *see also id.* at 1558 ("the First Amendment erects a virtually insurmountable barrier between government and the print media so far as government tampering, in advance of publication, with news and editorial content") (quoting *Tornillo*, 418 U.S. at 259) (White, J., concurring)).

[10] The decisions are uniform that physical scarcity is the critical and defining characteristic justifying the level of governmental intrusion permitted in the broadcast medium. *See Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 566-67 (1990) ("[w]e have long recognized that '[b]ecause of the scarcity of [electromagnetic] frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium'") (quoting *Red Lion*, 395 U.S. at 390); *FCC v. League of Women Voters*, 468 U.S. 364, 377 (1984) ("[t]he fundamental distinguishing characteristic of the new medium of broadcasting that, in our view, has required some adjustment in First Amendment analysis is that '[b]roadcast frequencies are a scarce resource [that] must be portioned out among applicants'") (quoting *Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 101 (1973)); *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 799 (1978) ("*NCCB*") ("[t]he physical limitations of the broadcast spectrum are

Because physical scarcity is not at issue here, the government's newly found rationale should be rejected.[11]

The government's argument that *Red Lion* indicates that any content-based regulation of a dysfunctional "market in speech" need only satisfy rational basis scrutiny is also at odds with the decision in *League of Women Voters*. There, this Court invalidated a law prohibiting certain noncommercial educational broadcast stations from engaging in editorializing. 468 U.S. at 402. Emphasizing that, "[u]nlike common carriers", broadcasters have wide-ranging journalistic freedom under the First Amendment, *id.* at 378, the law was struck down under a test comparable to *O'Brien*. *Id.* at 402 (the "specific interests sought to be advanced . . . are either not sufficiently substantial or are not served in a sufficiently limited manner to justify the substantial abridgement of important journalistic freedoms which the First Amendment jealously protects").[12] The decision in *Democratic Nat'l Comm.* also struck down a governmental scheme for intruding too deeply upon the editorial function of broadcasters, concluding that a broadcast station need not grant a "right-of-access" to individuals interested in broadcasting

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well known"; "[i]n light of this physical scarcity, Government allocation and regulation of broadcast frequencies are essential"). If anything, the government's attempt here to expand the scarcity doctrine cuts against the prevailing trend in the law that has questioned its validity. *See, e.g., League of Women Voters*, 468 U.S. at 376 n. 11.

[11] In its submission to this Court in *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986) ("*Preferred*"), the government argued that *Red Lion* is confined to cases involving "scarcity of the electromagnetic spectrum" and that "[w]hatever one's views of *Red Lion*, it plainly has no application" to cable television. Govt. Brief (filed Feb. 24, 1986) at 20 n.13 (citation omitted) (a copy of this brief has been lodged with the Clerk of this Court). There have been no legal developments since that would justify the government's conversion.

[12] Ironically, as is true of the must-carry provisions, the Department of Justice initially declined to defend the law at issue in *League of Women Voters*, believing the law violated the First Amendment, only reversing course to defend it upon a change in Administrations.

editorial advertisements. 412 U.S. at 127.[13] If the rational basis framework now put forth by the government under the mantle of *Red Lion* does not even apply when government intrudes too deeply upon the editorial functions of broadcasters, there is certainly no reason why such a standard should apply when such an intrusion is applied to cable.[14]

The government's thesis also cannot be squared with *Tornillo* in this regard. Without ever citing *Red Lion*, *Tornillo* held that economic scarcity—or "dysfunction", in the government's parlance—did not justify "corrective" governmental action. The "dysfunction" in *Tornillo* was the prevalence of one-newspaper

[13] The Court noted that, if a broadcaster were compelled to grant such access and such access were subject to the fairness doctrine, "[t]he result would be a further erosion of the journalistic discretion of broadcasters in the coverage of public issues". *Id.* at 124.

[14] Appellees impugn the editorial activities engaged in by cable operators. *See, e.g.*, Gov. 43; NAB 31; PBS 38-39. Coming from the government, that is surprising. At the time of *Preferred*, it stated: "[s]urely this enterprise [cable] is every bit as much the enterprise of speech, of the communication of ideas, as are the traditional enterprises of newspaper and book publishers". Govt. Brief, *supra* n. 11, at 9. And, although appellee PBS may contest whether cable operators engage in editorial activity "of the kind exercised by newspapers", PBS Resp. to Time Warner's Statement of Material Facts ¶¶ 7-11 (J.A. 352-53), cable's membership in the press and the range of its editorial activities have been established in this record, J.A. 198-201 (establishing that Time Warner engages in a wide variety of protected editorial activity, including selecting programming from among the diverse array of available sources and originating its own programming), and recognized by this Court. *See Leathers*, 111 S. Ct. at 1442 ("[c]able television provides to its subscribers news, information, and entertainment. It is engaged in 'speech' under the First Amendment, and is, in much of its operation, part of the 'press'."); *Preferred*, 476 U.S. at 494 ("through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, respondent seeks to communicate messages on a wide variety of topics and in a wide variety of formats"); *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979) (cable operators possess a "significant amount of editorial discretion regarding what their programming will include"). On this point, it is also fundamentally inconsistent for the NAB to disparage the First Amendment editorial activities of cable and yet to claim that "paramount" First Amendment interests require government to be the arbiter of what programming subscribers should receive.

towns and the inordinate expense of starting a newspaper. 418 U.S. at 249 n.13 (effective competition existed in only four percent of the nation's large cities); *id.* at 251 (economic factors "made entry into the marketplace of ideas served by the print media almost impossible"). However, this failed to justify any governmental intrusion upon the editorial discretion of a member of the press. *Tornillo* thus forecloses the government's rationale for rational basis review.[15]

II. STRICT SCRUTINY SHOULD BE APPLIED TO THE MUST-CARRY PROVISIONS.

Although the government seeks to articulate a rationale that would justify intrusive, content-based regulation of cable, the broadcast appellees, particularly the NAB, resist that approach, arguing at length that the must-carry provisions are not content-based. This approach is not easy: these provisions require cable carriage of all local broadcast television stations and thereby fundamentally alter the content of programming provided to subscribers—an effect that under any "commonsense understanding of the term" would indicate that these provisions are content-based. *See City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1516-17 (1993).

The NAB argues that government's regulatory purpose *always* controls the appropriate First Amendment standard of review.

[15] Because physical scarcity is not present with respect to cable, the government and other appellees—in order to develop a theory of "dysfunction" different from the economic scarcity rejected in *Tornillo*—make reference to various governmental benefits cable has purportedly received. Gov. 27-29; PBS 29-31. These "benefits", if any, do not supply a basis for intrusive, content-based regulation of the cable industry. Newspapers and magazines today, for example, receive a massive subsidy from the federal government in the form of significantly discounted mailing rates. 39 U.S.C. § 3685. Necessarily, however, that benefit is not a sufficient basis to impose such restrictions. *See Turner Broadcasting System, Inc. v. FCC*, 113 S. Ct. 1806, 1807-08 (1993) (Rehnquist, C.J., in chambers) ("Congress plainly could not impose the must-carry provisions on privately owned newspapers"). If appellees' theory is actually that the must-carry provisions can be viewed as a condition on governmental benefits, Time Warner strongly disagrees with that view and invites the Court's attention to the more thorough response presented by appellant NCTA.

NAB 20 (citing *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) and *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)); *see also* NAB 22. If this were in fact the only criterion, it would seem rare that any legislation would ever be subject to strict scrutiny. For unless Congress made its legislation suspect by providing evidence of a content-based purpose, the legislation would be subject to review under *O'Brien*.

Although the NAB is wrong that only such a purpose results in strict scrutiny, remarkably, Congress provided exactly such evidence for the must-carry provisions by adopting "findings" that clearly reveal its judgments about the content of broadcast programming. *See, e.g.*, § 2(a)(11) ("[b]roadcast television stations continue to be an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate").[16] Recognizing that the must-carry provisions would be content-based even under its purpose test, the NAB thus crafts an exception—in an attempt to disclaim Congress's unexpected "error"—by arguing that content-neutral justifications do not "lose their content-neutral character merely because Congress made *additional* findings". NAB 24 (emphasis added). Elsewhere, the NAB characterizes the content-related findings as "ancillary". NAB 25. However, there is no principled basis for considering these findings to be any less indicative of a content-based purpose than any other finding.[17]

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[16] *See also* Time Warner Nov. 9, 1993 Br. at 18-19 & nn. 16-17 (citing certain content-based findings and legislative materials).

[17] The NAB also appears to concede that the findings pertinent to *noncommercial* must-carry obligations are content-based, NAB 25 n.40, but seeks to limit the "taint" of those findings. *Id.* ("Congress also made separate findings, relevant only to the *noncommercial* must-carry provision"; those findings "do not pertain to the commercial must-carry provision"). The government's overarching purpose to favor broadcasters because of their programming content cannot be so parsed. Indeed, the NAB's effort to segregate commercial broadcasters from public television stations ignores that broadcasters are the programmers over which government has the most content control. By mandating cable carriage of broadcast stations, Congress attempts to bootstrap its content regulation of the broadcasting industry into content regulation of the cable industry. And, the government's effort is no less suspect because Congress has chosen to favor an entire *group* of speakers as opposed to individual speakers.

The NAB also provides a glaring example of the flawed nature of its purpose test by suggesting that if the must-carry provisions were struck down because of the content-related findings referred to above, "Congress could simply excise those findings and re-enact a constitutional law". NAB 25. This point exactly makes Time Warner's point. *See* Time Warner Nov. 9, 1993 Br. at 15 ("[p]rovided Congress can cobble up an appropriate set of content-neutral 'findings', it can successfully shield virtually any statutory scheme from judicial review"). Under the NAB's governmental purpose test, thus, a creative (though careful) legislature could effectively subvert the First Amendment.

To guard against that danger, this Court has indicated that the government's purpose is not the determinant of whether legislation is content-based. *Discovery Network* and *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 112 S. Ct. 501 (1991)—two decisions that the NAB contends "expressly follow" its purpose test, see NAB 22—quite clearly make this point. In *Discovery Network*, the content-neutral justifications of safety and aesthetics did not prevent the legislation from being considered content-based. *Discovery Network*, 113 S. Ct. at 1516-17. In *Simon & Schuster*, the Crime Victims Board offered a nearly identical argument to that made by the NAB here, contending that the "Son of Sam" law cannot be constitutionally suspect unless "the legislature intends to suppress certain ideas". *Simon & Schuster*, 112 S. Ct. at 509. This Court flatly rejected that assertion.[18] The law was held to be content-based,[19] even though the Court declined to analyze it under *Ward* or *Renton*. *See* 112 S. Ct. at 511 n.**. The Court

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[18] *Id.* ("Simon & Schuster need adduce 'no evidence of an improper censorial motive'") (citation omitted).

[19] *Id.* at 508 ("[t]he Son of Sam law is . . . a content-based statute"). The State was therefore required to satisfy strict scrutiny. *Id.* at 509 ("'the State must show that its regulation is necessary to further a compelling state interest and is narrowly drawn to achieve that end'") (citation omitted).

indicated that those cases applied to laws having "*incidental effects* on some speakers". *Id.* (emphasis added). If anything, *Discovery Network* and *Simon & Schuster* strongly support appellants' position that the purpose test applies *only* when the effects upon speech are incidental and when strict scrutiny does not apply under other prevailing principles of the First Amendment (because they compel speech; because they impermissibly favor certain speakers over others; or because they single out the press). Indeed, it is counterintuitive to suggest that the proper approach for conducting judicial review is to examine the justification for a regulation before evaluating its impact.[20]

Appellants rely upon the line of cases that requires strict scrutiny for laws compelling speech.[21] Appellants also rely on that part of the decision in *Tornillo* that rejected *any* intrusion upon the editorial functions of members of the press. 418 U.S. at 258.[22] Under these cases, the must-carry provisions are

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[20] Based on *NCCB* and *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522 (1987) ("*SFAA*"), the NAB posits that even content-based laws do not trigger strict scrutiny, if accompanied by a neutral governmental purpose. *NCCB*, which upheld the newspaper-broadcast license cross-ownership ban, is inapposite; it relies upon government's regulatory authority over the physically limited electromagnetic spectrum. *NCCB*, 436 U.S. at 799 ("[i]n light of this physical scarcity, Government allocation and regulation of broadcast frequencies are essential"). In *SFAA*, the law at issue provided the United States Olympic Committee with certain trademark protection against commercial uses of the word "Olympic". The basis of trademark law—to allow entities to obtain property rights in a word and constitutionally to prohibit certain uses by others—is certainly not present here. *See* 483 U.S. at 532.

[21] *See, e.g., Riley v. National Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 795-96 (1988); *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 9 (1986) (plurality opinion); *Wooley v. Maynard*, 430 U.S. 705, 716-17 (1978); *Tornillo*, 418 U.S. at 256-58; *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 633-34 (1943). Some appellees argue that *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), controls the outcome in this case. *See, e.g.*, NAB 27-28; Gov. 45-46. For the reasons explained in the opening briefs of Time Warner and NCTA, Time Warner Nov. 9, 1993 Br. 22-23; NCTA Nov. 9, 1993 Br. 20-21, as well as in NCTA's reply brief, it does not.

[22] The NAB appears to argue that no significant editorial intrusion is present because "[i]n the near future, typical cable systems will have a capacity

constitutionally suspect for requiring cable operators to provide subscribers with programming the operators do not want to carry (and that subscribers often do not want to receive).[23] The NAB responds that such laws are not suspect unless the "government's purposes are related to communicative impact". NAB 28. This, however, is merely another way of arguing that *Riley* does not mean what it says.[24] Yet, *Riley* unequivocally establishes that: (1) compelled silence and compelled speech are equivalent under the First Amendment (487 U.S. at 796-97); (2) "a statute regulating how a speaker may speak directly affects that speech" (*id.* at 789 n.5); and (3) "[m]andating speech that a speaker would not otherwise make necessarily alters the content of that speech" and is "content-based" (*id.* at 795), all principles relevant here.[25]

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of 500 channels or more". NAB 1 n.2. As a factual matter, that is a gross exaggeration. Moreover, it incorrectly implies that constitutional adjudication should ignore injury *now* based upon speculation as to what might happen in the future. Here, the uncontroverted record indicates that, *at present* and for the immediate future, there are fewer channels than programming sources. *See, e.g.*, Klein Aff. ¶¶ 6-7 (J.A. 303) (noting that 128 cable programmers presently exist but that average channel capacity for cable systems is 40 channels); *id.* ¶ 8 (J.A. 304) (2,000 cable systems, serving one-third of all subscribers, currently have no excess channel capacity); *id.* ¶ 9 (J.A. 304) (documenting that even in a relatively small system of about 7,600 subscribers, it would cost more than $3 million to increase channel capacity from 52 channels to 61 channels). In any event, the NAB's point is irrelevant. The newspaper in *Tornillo* could certainly have added pages, but that did not alter the impermissible nature of government's intrusion upon its editorial function. The speech of cable operators and programmers is similarly infringed by requiring even one channel to be turned over to broadcast television stations.

[23] Although Time Warner focuses here upon the constitutional arguments offered from the perspective of a cable operator, Time Warner is also a cable programmer and has been directly injured in that capacity by the must-carry provisions. Time Warner respectfully invites the Court's attention to the more detailed legal discussions offered from the programmers' perspective by appellants Turner Broadcasting and The Discovery Channel.

[24] For the reasons discussed above, pp. 11-14, it is also misguided to say that Congress has not aimed at communicative impact here.

[25] The NAB persists in its effort to establish that *Riley* does not mean what it says by parading a list of government compelled disclosure requirements that

III. APPELLEES ADVOCATE UNDUE DEFERENCE TO CONGRESS, PARTICULARLY GIVEN THE FIRST AMENDMENT INTERESTS AT ISSUE.

The must-carry provisions purportedly further two governmental interests: enhancing diversity and preservation of local broadcasting. With respect to the first interest, appellees fail to answer the argument that a statutory scheme impairing the speech of a very diverse group of speakers (*i.e.*, cable programmers) to further the speech of a homogenous group of speakers (*i.e.*, local broadcast stations) cannot advance a diversity agenda. To the contrary, such a scheme affirmatively undermines that agenda.[26] And, it is an illegitimate exercise of governmental

might be suspect under this reading, including compliance with subpoenas, tax and securities laws, as well as common carrier obligations. The NAB's fears are unfounded. *First*, these laws are general laws that apply to all, not laws singling out the communicative activity of members of the press. *Second*, with the exception of common carriers who do not engage in any speech when acting in that capacity, these contexts clearly present compelling interests. *See, e.g., Branzburg v. Hayes*, 408 U.S. 665, 700 (1972) (holding that compelling governmental interest presented in context of subpoena); *In re Grand Jury Proceeding*, 842 F.2d 1229, 1236 (11th Cir. 1988) ("no doubt" that compelling governmental interest existed where subpoena served for tax investigation); *Bradley v. United States*, 817 F.2d 1400, 1405 (9th Cir. 1987) (upholding penalty against taxpayer who filed anti-war protest as return—government had compelling interest in maintaining sound tax system); *L.P. Acquisition Co. v. Tyson*, 772 F.2d 201, 207 (6th Cir. 1985) (take-over disclosure requirements provided for by state law served "state's compelling interest in protecting its residents"). *Third*, the Court has indicated that compelled disclosures of truth, at least in the commercial speech context, present less protected First Amendment interests. *See, e.g., Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985); *id.* at 651 n.14 ("[t]he right of a commercial speaker not to divulge accurate information regarding his services is not . . . a fundamental right").

[26] Cable television viewers will once again be relegated to the "vast wasteland" of broadcast television programming. *See* Time Warner Nov. 9, 1993 Br. at 44-45. In this respect, it is curious that a number of appellees contend this statutory scheme advances the "paramount" interests of viewers and listeners. Apparently, cable television viewers do not factor into that equation, because cable viewers are denied programming like "C-Span" that they want so that unwanted broadcast television stations (*e.g.*, broadcast religious or home shopping services) can obtain carriage.

power to further a diversity agenda at the cost of certain speakers' rights. *See* Time Warner Nov. 9, 1993 Br. at 45 & n.51.

With respect to the second interest—preservation of local broadcasting—appellants have shown that the system of local broadcasting is not at all in jeopardy. In response, appellees merely recite Congress's "findings" as if that somehow responds to that argument. Moreover, appellees urge that these "findings" are entitled to deference at a level that typically applies when legislation is reviewed under the rational basis standard.

The deference appellees suggest applies here amounts to essentially no scrutiny at all. That is, appellees ask this Court to uphold Congress's legislation merely because Congress has acted and given "reasons" for its action. That, erroneously, was the level of deference applied by the majority below—a level of deference that resulted in a judicial imprimatur upon this special interests' legislation.[27] However, deference to Congress does not mean abdicating meaningful judicial review. Moreover, this Court's decisions indicate that the degree of deference to be accorded Congress should vary inversely with the level of scrutiny applied. In other words, there is a correspondingly lower level of deference accorded to Congress's findings in the context of burdens imposed upon fundamental rights—rights that typically trigger strict judicial scrutiny.[28] Particularly in the First Amendment context, this principle is evident.[29]

[27] *See, e.g.*, J.S. App. 67a ("[i]f findings as scantily connected to the conclusion as these can justify must-carry, then the door is open—even in the area of First Amendment rights—to exercise of the most naked interest-group preferences") (Williams, J., dissenting).

[28] It would be anomalous for the Court to require, on the one hand, a compelling interest, but then, on the other hand, defer to virtually whatever interest Congress identifies because it has made certain "findings".

[29] *See, e.g., Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 129 (1989) ("whatever deference is due legislative findings would not foreclose our independent judgment of the facts bearing on an issue of constitutional law"); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829,

Meaningful judicial review is critical in any First Amendment case but it is especially so here, where Congress has purportedly taken corrective action in the name of the First Amendment,[30] proposing certain "findings" to justify that action.[31] Although Congress properly has the responsibility to amass factual data and make findings, courts must be especially chary of "predictive judgments" that justify infringement of First Amendment rights. To that end, had the majority below not erroneously accorded nearly complete deference to the findings referred to above, it would have concluded that the broadcasting industry was not in

843 (1978) ("[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake"). The NAB essentially concedes this principle by distinguishing the low level of deference applied in *Sable* and *Landmark* on the basis that strict scrutiny was triggered. NAB 46.

This is not to say judicial review is not appropriate unless strict scrutiny applies. For example, in the context of commercial speech, the court has required that the government "demonstrate that the harms it cites are real" *Edenfield v. Fane*, 113 S. Ct. 1792, 1800 (1993) (applying intermediate scrutiny and requiring that predictive judgments be sustained by meaningful evidence); *see also Lamprecht v. FCC*, 958 F.2d 382, 393 (D.C. Cir. 1992) (Thomas, J.). And, even in those cases where courts have been particularly attentive to Congress's factfinding, some independent review is appropriate. *See, e.g., Metro Broadcasting*, 497 U.S. at 579-80 (according great weight to legislative findings did not preclude court from engaging in lengthy review to conclude that findings were supported by "a host of empirical evidence").

[30] In our constitutional framework, the First Amendment is a constraint on Congress's power, not a source of power. *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2701, 2716 (1992) (Kennedy, J., concurring).

[31] That Congress declares its policies constitutional is of no import. *See Sable*, 492 U.S. at 129 (Court must decide whether Congress has violated the Constitution "particularly" when "the Legislature has concluded that its product does not violate the First Amendment"). The need for adequate review is underscored in this case, where the executive, a co-equal branch of the government, initially declined to defend the legislation on constitutional grounds.

imminent peril—a conclusion that requires invalidation of the must-carry scheme.[32]

Even if the governmental interests purportedly advanced by the must-carry provisions could be viewed as implicated on this record, appellees fail to indicate why these provisions do not fail on tailoring grounds. For one thing, a mandate to carry even the most unpopular broadcast stations does nothing to resolve their fundamental problem—no one wants to watch them.[33] For another thing, the legislation is remarkably overbroad. It protects all local broadcast stations whether or not those stations are truly economically imperiled. Finally, there is an obviously less speech restrictive alternative—subsidies for broadcast stations. Appellees do not contend that subsidies would be ineffective in advancing the government's purported interests.[34] Rather, the NAB argues that a subsidy "would be a serious drain on public resources", NAB 48-49, but that is certainly not an adequate basis to trammel particular speakers' First Amendment rights. The NAB also argues that a subsidy "would inject an unwanted governmental

[32] Amici ACLU agrees that the decision below should be vacated because, under *Sable*, the majority below failed to apply sufficient scrutiny. ACLU 15-18. However, ACLU suggests that this case should be remanded to the three-judge district court for that reason. This suggestion should be rejected. None of the parties disputes what comprises the record before Congress but rather whether this record provided an adequate factual predicate for the predictive judgments or "findings" Congress made—findings critical to determining the constitutionality of these provisions. That is, it is the conclusions to be drawn from the facts and not the facts themselves that are in dispute. These are issues of law, and it is certainly appropriate for this Court to make that evaluation as it often has when striking down legislation on First Amendment grounds. *See, e.g., Sable*, 492 U.S. at 129; *Landmark*, 435 U.S. at 843-44.

[33] The government admits this point when it acknowledges that "eventually" such stations will fail, even if carried on cable. Gov. 41 n. 28. Apparently, in the government's view, it is appropriate that this legislation forces cable operators to wait for that result, thereby depriving viewers of what they truly want to see until it occurs.

[34] Time Warner respectfully refers the Court's attention to the discussion by the Discovery Channel of another effective, yet less restrictive alternative, the A/B switch.

presence into what has long been a privately owned medium", NAB 49, an accurate statement with respect to the must-carry provisions and cable, but one that is completely disingenuous with respect to the broadcasting industry: the government's presence there is continuous, pervasive and already in place.

CONCLUSION

For the foregoing reasons, the must-carry provisions, 47 U.S.C. §§ 534 and 535, should be declared unconstitutional and the decision of the three-judge district court should be reversed.

December 21, 1993

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No. 93-44

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

REPLY BRIEF FOR APPELLANTS DISCOVERY COMMUNICATIONS, INC. AND THE LEARNING CHANNEL, INC.

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ARGUMENT

I. THE GOVERNMENT ERRS IN ARGUING THAT HEIGHTENED SCRUTINY DOES NOT APPLY

The Solicitor General contends that the district court was mistaken in applying the *O'Brien* test and instead "should have applied the less demanding standard" of *Red Lion* and *Associated Press* (Govt. Br. 13-14).

This contention is a marked departure from the Government's prior positions. In its brief to this Court

in *Los Angeles v. Preferred Communications*, 476 U.S. 488 (1986), the Solicitor General urged that the *Red Lion* analysis is confined to cases involving "scarcity of the electromagnetic spectrum" and "has no application" to cable television. Brief for the United States in No. 85-390, at 20 n.13. When issuing prior must-carry rules, the FCC explicitly held the *Red Lion* framework inapplicable to cable. *Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems*, 1 FCC Rcd. 864, ¶ 184 (1986). And in defending those prior rules before the D.C. Circuit, the Government affirmatively argued that *O'Brien* supplies "the correct test" (*Century*, 835 F.2d at 298).

Besides being novel, the Government's argument is wrong. In their opening briefs, appellants showed the inappositeness of *Associated Press* and its progeny. Whereas those cases involved conduct-regulating laws of general applicability, the must-carry law regulates speech, not conduct, and it aims specifically at the press. The Government concedes that the Sherman Act's status as a "statute of general applicability * * * was part of the rationale" of *Associated Press* (Govt. Br. 18). But it nevertheless discerns no meaningful difference between that case and this one, since *Associated Press* was "an as-applied challenge to a particular decree enforcing the Sherman Act" (*ibid.*). According to appellees, there is no distinction between the specific application of a general law to an industry (such as the press), and Congress' enactment of a statute that specifically targets the press. *See* Govt. Br. 18-19, INTV Br. 26-27.

Appellees' rejoinder is unpersuasive for two reasons. First, a general law can only be applied by

prosecutors and courts in specific cases. If the specific application of a general law were equivalent for First Amendment purposes to a law narrowly aimed at the press, this Court's insistence in *Associated Press* that the law be one of "general applicability" would be altogether meaningless.

Second, the must-carry law in any event is not equivalent to a judicial decree enforcing an antitrust law specifically against a member of the press. Such a decree could be entered only after a person had been found to have *violated* the antitrust laws. Needless to say, Congress made no finding that the hundreds of cable speakers whose speech is infringed by the must-carry law have committed antitrust violations. Quite the contrary: the evidence cited by Congress showed that 80% of cable systems had never dropped a single broadcaster. *See* Turner Br. 43. And there was no evidence that cable systems which dropped one or more broadcasters did so for anticompetitive reasons.

The must-carry law, far from redressing proven antitrust violations, is a purely prophylactic measure designed to suppress supposed anticompetitive "incentives." It broadly infringes the First Amendment rights of cable operators and cable programmers, regardless whether they ever have done, or ever will do, anything wrong. It resembles the "law of general applicability" at issue in *Associated Press* about as much as does a bill of attainder. Contrary to appellees' argument, therefore, the must-carry law is precisely the sort of statute that this Court has traditionally subjected to rigorous First Amendment review.

II. THE MUST-CARRY LAW IS UNCONSTITUTIONAL UNDER ANY FORM OF HEIGHTENED SCRUTINY

Whatever form of heightened scrutiny this Court deems appropriate, the statute's constitutionality hinges on the answers to two questions. The first is whether the Government has borne its burden of proving the existence of a problem necessitating a restriction of speech. The second question, assuming a problem exists, is whether Congress' solution addresses it in a narrow and careful manner. The answer to both questions is "no."

A. There Is No Problem Necessitating An Infringement Of Speech

1. In our opening brief (at 37-41), we showed that local broadcast television is currently thriving. Despite the absence of must-carry rules during the past eight years, broadcast stations have grown in wealth, number, and breadth of coverage. Even UHF stations, supposedly at greatest risk from predatory cable practices (INTV Br. 19), have doubled in number in the past decade, with 350 new UHF stations being added. *See* CFA Br. 20 n.12. The D.C. Circuit found no evidence in 1985 that "the economic health of local broadcast television is threatened by cable" (*Quincy*, 768 F.2d at 1455). Things have only gotten better for broadcasters since then.

In a feeble effort to show an existing problem, appellees rely on the 1988 FCC survey that Congress cited in positing 3,600 instances of noncarriage by cable systems nationwide. Govt. Br. 6, 40 n.27; NAB Br. 10-12; INTV Br. 18-19. We comprehensively discussed this survey in our opening brief (at 40-41). The

survey in fact reveals that cable operators carried 95% of the broadcast signals available for carriage, and 98% of the broadcast signals entitled to mandatory carriage under the FCC's 1986 rules. The survey, moreover, takes no account of broadcast stations that were *added* to cable systems; in fact, the number of broadcasters carried by cable systems increased by 7% between 1985 and 1990. And the survey is silent about the characteristics (*e.g.*, viewership) of the stations dropped, as well as the reasons why they were dropped. That being so, the survey justifies no inference that a single broadcaster was dropped for anticompetitive reasons.

Appellees do not rebut our arguments; they simply cite the survey as if it speaks for itself. They note Congress' finding that broadcasters who were dropped were usually replaced by a cable program network. Govt. Br. 6; NAB Br. 11; INTV Br. 18-19. But that creates no inference of anticompetitiveness. Since cable systems were carrying virtually all broadcasters anyway, the pool of uncarried broadcasters (as opposed to uncarried cable programmers) from which a replacement could be chosen was invariably small. And it is cable programmers, not local broadcasters, who are creating the kinds of innovative programming that subscribers increasingly want to see.

Some of the Government's *amici* cite their own experience in an effort to show that cable systems behave anticompetitively. The State of Connecticut notes that in early 1993—*after* passage of the 1992 Cable Act—two cable systems in southwest Connecticut announced their intention to drop five Connecticut broadcast stations (Conn. Br. 9-13). The systems had carried these broadcasters "for over a decade"

in the absence of must-carry rules (*id.* at 11). The 1992 Act, however, permitted these Connecticut broadcasters to be dropped: under the Act's odd definition of "local" broadcaster, they had no entitlement to mandatory carriage in the southwest corner of the State. *See id.* at 10-11.

Contrary to the State's assertion, this anecdote indicts rather than justifies the must-carry law. The fact that Connecticut's cable operators faithfully carried all local broadcasters for 10 years prior to the law's enactment supports our submission that it addresses a nonexistent problem. When Connecticut consumers expressed "their desire for continued carriage * * * of Connecticut's local broadcast stations," moreover, the cable operators rescinded plans to drop them. *See* Conn. Br. 12-13. This again shows the absence of a problem: if cable systems propose to stop carrying broadcasters that subscribers genuinely want to see, market forces alone suffice to ensure continued carriage.

More fundamentally, this Connecticut anecdote illustrates the essential vice of the must-carry law. The most logical explanation why a cable system would suddenly drop, in 1993, non-must-carry stations it had willingly carried during 1982-1992, is that it was forced to make room for must-carry stations that the Act foisted upon it. Indeed, the Act apparently required the two Connecticut cable systems to carry—regardless of local viewer preferences—stations from as far away as Poughkeepsie, New York; Riverhead, Long Island, and Newton, New Jersey. The Connecticut broadcasters, in short, were victimized by the very evil of which cable programmers like Discovery and The Learning Channel complain: lacking must-carry status, they risk being forced off cable systems to make room for Congress' preferred speakers.

Amicus Telemundo Group, a Spanish-language broadcaster, says that it has also encountered difficulty securing carriage on cable systems. Because its programming "is necessarily directed at the minority of the Nation's population that understands Spanish," it finds that certain cable operators "have strong incentives to exclude [its] signals and instead carry English-language programming on the limited number of available cable channels" (Br. 5). Once again, however, there is nothing in Telemundo's brief to suggest anticompetitive animus on any operator's part. Cable operators carry numerous and diverse foreign-language programmers. But there are legitimate reasons why a particular operator, considering its limited channel capacity and the characteristics of its subscriber base, would choose to carry English-language (or Chinese-language) programming instead of Spanish-language programming.

Appellees uniformly make the same error Telemundo makes. They assume, as a point requiring no proof, that any decision by a cable operator to carry a cable programmer instead of a broadcast programmer is *per se* anticompetitive. This assumption is illogical and wholly unjustified. The governmental interest that is alleged to support the must-carry law is not protection of marginal broadcasters from natural deaths, but protection of the local broadcasting *system* from *anticompetitive practices*. The fact that some broadcasters were not carried, or would not be carried, in the absence of such a law proves neither anticompetitive behavior by operators nor systemic damage to broadcasting.

2. Appellees tacitly concede that there is no evidence of an actual, current threat to local broadcasting. That is why they rely, with uniform emphasis, on Congress' "predictive judgment" about dangers that supposedly lurk down the road. Govt. Br. 31, 32; NAB Br. 13, 19, 41, 42, 45; INTV Br. 20-21. Cable systems are said to enjoy a "natural monopoly" giving them "bottleneck monopoly power" over "the only means by which a video speaker can reach its local audience." INTV Br. 6; NAB Br. 12; PBS Br. 35-36. And "Congress reasonably predicted," according to appellees, that "cable's incentive and ability to damage local broadcasting would increase in the future." INTV Br. 20; NAB Br. 13.

Such "predictive judgments" should be viewed skeptically where, as here, they substitute for hard evidence. This Court has held that the government's burden in justifying a restriction on speech "is not satisfied by mere speculation or conjecture"; it "must demonstrate that the harms it recites are real," *i.e.*, that "it is regulating speech in order to address what is in fact a serious problem." *Edenfield v. Fane*, 113 S.Ct. 1792, 1800, 1803 (1993). The FCC in *Century*, similarly embarrassed by its lack of proof, asked that the court defer to its "sound predictive judgment" about the need for must-carry rules. *See* 835 F.2d at 304. The D.C. Circuit wisely declined that invitation, holding that "speculative fears alone have never been held sufficient to justify trenching on First Amendment liberties" (*id.* at 300).

Here, as in the case of prior must-carry regimes, the Government has not "convincingly show[n] a problem to exist" (*Quincy*, 768 F.2d at 1455). The "predictive judgment" appellees impute to Congress is

based on two assumptions: that cable operators have and will continue to enjoy a "bottleneck monopoly" on distribution of video signals; and that cable systems will exploit "economic incentives" to use their monopoly power to destroy broadcasters. Neither assumption holds water.

a. The assertion that cable systems enjoy a "natural monopoly" (INTV Br. 6) is plainly incorrect. The claim that cable is a "natural monopoly" implies that "greater competition in cable markets would be infeasible and economically ruinous." Br. of U.S. Telephone Ass'n as *Amicus Curiae*, at 17. Congress made the opposite finding here, concluding that "cable markets, although currently concentrated, are not natural monopolies, and that competition should be encouraged as much as possible" (*id.* at 17).

Appellees' assertions that cable systems are "bottlenecks" controlling "the only means by which a video speaker can reach its local audience" (PBS Br. 35-36) are also wildly exaggerated. Americans watched television for dozens of years before cable existed. Even now, 40% of American households do not subscribe to cable. And cable is not the only alternative to conventional over-the-air reception. Millions of Americans currently subscribe to satellite or "wireless cable" service, which enables them to receive broadcast and other programming via satellite dishes. Through improvements in technology, moreover, Americans will soon have access to high-power direct broadcast satellite (DBS) service, "enabling viewers throughout the nation to receive approximately 150 channels of video programming using an 18-inch receiving dish." Br. of DirecTV, Inc., as *Amicus Curiae*,

at 1. *See* "Small-Dish TV Offers Wireless Revolution," Wash. Post, Dec. 18, 1993, at A1.

Nor is cable a "bottleneck" for those households that subscribe to it. No one disputes the existence of an "inexpensive hardware-store switch" (*Century*, 835 F.2d at 302), generally called an "A/B switch," that enables cable subscribers to alternate between cable and off-the-air reception of broadcast signals. The *Century* court, echoing the FCC's own findings, determined that consumers' switch-and-antenna capability represented a complete solution to the supposed "bottleneck" problem.

At the broadcasters' behest, Congress found that "the 'A/B' input selector antenna system is not an enduring or feasible method of distribution" (Act § 2(a)(18)). We showed in our opening brief (at 48-50) that Congress had no evidence to support this finding. It relied principally on the same 1986 study—commissioned by NAB—that the *Century* court considered and rejected. The D.C. Circuit termed this study "the spongiest of foundations for the FCC's asserted justification" and found it incompetent to justify even interim must-carry rules (835 F.2d at 300-302). The only subsequent evidence that Congress cited was a 1991 study by Mark Fratrik, NAB's in-house economist. Having been prepared by NAB's in-house economist, the Fratrik study is unlikely to have been biased in cable systems' favor. Yet even it shows huge improvements in consumers' switch-and-antenna capability between 1986 and 1991, demonstrating that A/B switches are more workable now than they were in 1987, when the FCC and the D.C. Circuit approved their feasibility.

Appellees recite Congress' comments on A/B switches and ignore our comments on the evidence. Govt. Br. 41; INTV Br. 15; PBS Br. 45. Appellee NAB tries to distinguish *Century* on the ground that "there was literally *nothing* in the record" of that case to support the FCC's conclusion. NAB Br. 15 n.32 (emphasis original). That statement is false: the *Century* court had before it, and rejected, the same NAB-commissioned study on which Congress in 1992 relied. Appellee PBS asserts that Congress' finding about A/B switches "drew on empirical studies conducted by the FCC after *Quincy* and *Century*." PBS Br. 34-35 n.30. That statement is false in two respects. Congress cited no empirical studies by the FCC concerning A/B switches. One of the studies Congress did cite, the 1986 NAB-commissioned study, pre-dated *Century* and was rejected by that court. And the only post-*Century* study that Congress cited was prepared, not by the FCC, but by NAB's in-house economist.[1]

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[1] As appellees note, Congress also "credited the FCC's conclusion that the cable industry encouraged its subscribers to take down their antennas and eliminate their capacity to receive signal[s] off-air." INTV Br. 18 (original quotation marks omitted). But this is ancient history. The FCC did censure this behavior by cable systems *in 1986*. For the past eight years, however, cable systems, pursuant to FCC rules (47 CFR § 76.66), have been informing subscribers about the need to *maintain* off-the-air reception capability. Appellees also observe that NCTA in the past has opposed A/B switch proposals. Govt. Br. 24 n.16; INTV Br. 18 n.14; NAB Br. 9. That opposition stemmed from concerns that mandatory provision and installation of A/B switches would impose significant costs on cable operators; it did not reflect a belief that A/B switches are unworkable in a technical sense.

Actual experience during the past year shows how illusory Congress' "bottleneck" theory is. The cable system in Corpus Christi, Texas, was forced to drop all three broadcast network affiliates after they refused retransmission consent. The system distributed thousands of A/B switches to its subscribers to enable them to receive broadcast signals during the blackout period. *Cable World*, Nov. 22, 1993, at 70. The broadcasters found that "being off cable more than six weeks didn't have [a] big impact" on them. *Warren's Cable Regulation Monitor*, Nov. 29, 1993, at 7. As the owner of the NBC affiliate put it: "As far as I know, 90 percent of my audience is getting the signal." *Cable World*, Nov. 8, 1993, at 12. When carried on cable, network affiliates normally capture about 70% of the total viewing audience; after a month off cable, the Corpus Christi network affiliates still had an audience share between 67% and 69%. *Warren's Cable Regulation Monitor*, Nov. 29, 1993, at 7. "I think we surprised a lot of young people," said one broadcast station owner. "They didn't know there were other ways to watch TV than through cable." *Ibid.* The local wireless operator also reported "a windfall of new subscribers," with several thousand subscribers switching from cable to satellite reception. *Cable World*, Nov. 8, 1993, at 12; *Cable World*, Nov. 22, 1993, at 70.[2]

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[2] The actual experience recounted in the text shows the error of appellees' assertion that A/B switches are difficult to install and/or operate. *See, e.g.*, NAB Br. 8-9; CFA Br. 24. Under FCC rules, a subscriber can get an A/B switch installed simply by telephoning his local cable system. *See* 47 CFR § 76.66(c). And operation of the device requires only flicking a switch.

In short, real-life experience shows that cable systems are not bottlenecks now. And there is even more reason to doubt Congress' "predictive judgment" that cable systems will be bottlenecks in the future. Most communities are now served by a single cable operator for two main reasons, both attributable to Congress. For decades, Congress has prohibited telephone companies from offering competing cable service. *See* 47 U.S.C. § 533(b). And Congress until 1992 permitted local franchising authorities to grant cable systems exclusive franchises.

The ban on telephone competition with cable has been declared unconstitutional under the First Amendment by a district court, and legislation to repeal the ban is pending. *See* Br. of U.S. Telephone Ass'n as *Amicus Curiae*, at 1-2. Congress in the 1992 Act forbade exclusive franchises (§ 7(a)(1)), and new companies have already sought approval to compete with current cable systems. *See, e.g.*, Conn. Br. 3 n.1. These new competitors join cable's existing competitors—satellite distributors—which are thriving. "Satellite dish sales are up 35%-40% since summer" and "satellite dish and programming distributors say [this] sudden peak in demand * * * is making it impossible to meet" customers' orders. *Warren's Cable Regulation Monitor*, Nov. 8, 1993, at 3. The first DBS satellite, moreover, was launched four days ago and will start broadcasting in April. *See* Washington Post, Dec. 18, 1993, at A1.

b. Secondly, even if there were merit in Congress' "predictive judgment" that cable systems will be the bottleneck of the future, there is no basis for assuming that they would abuse this position to broadcasters' detriment. In positing anticompetitive

incentives on operators' part, appellees rely almost entirely on supposed competition for advertising revenues. But neither Congress nor appellees lay out any economic logic to underpin this theory.

"Taken at its best, this theory would lend *no* support to § 5 of the Act (relating to noncommercial TV), as the educational stations do not advertise." J.S. App. 65a (Williams, J., dissenting). In the case of commercial stations, it is common ground that 80% of all commercial stations have declined must-carry protection and demanded payment for carriage under "retransmission consent" (Act § 6). *See* Discovery Br. 43; CFA Br. 33 nn.31-32. This is powerful evidence that competition for advertising revenues generally creates no incentive for cable systems to drop broadcasters. Indeed, cable systems have agreed to *pay* for the right to carry their most potent competitors for advertising dollars, despite their ability to refuse carriage to broadcasters that elect to forgo the must-carry privilege.

Appellees' theory about advertising revenues thus focuses on a very narrow slice of the broadcast industry: commercial broadcasters that are not popular enough confidently to withhold retransmission consent. But the relative unpopularity of such broadcasters makes their advertising revenues unfertile ground for poaching; and if such revenues did come up for grabs, powerful broadcast competitors would be as likely as cable operators to benefit. In any event, cable systems for the past eight years have had the same "economic incentives" to harm broadcasters that Congress thinks they have now. Yet as we have shown, and as appellees tacitly concede, there is simply no evidence that cable systems in the past have

damaged the local broadcasting system by anticompetitive acts.

B. If There Is A Problem, The Must-Carry Law Is An Unreasonable And Overbroad Solution

In assessing Congress' remedy, it is important to note the limited nature of the governmental interest at stake. The Solicitor General does not justify the must-carry law as mere welfare for local broadcasters who would fail in a freely competitive market. Nor could he. While that rationale might support a cash subsidy, it could not possibly justify aiding broadcasters by affirmatively *burdening* cable speakers' First Amendment rights.

The government's asserted interest is not to preserve particular marginal broadcasters, but to protect the local broadcasting *system* from *anticompetitive practices*. The question, then, is whether Congress can be said to have addressed this supposed problem in a "narrowly tailored" fashion by enacting a prophylactic rule giving all broadcasters a mandatory preference over all cable programmers on all cable systems. We think that question answers itself.

1. The must-carry law makes no sense either as a means of preserving localism or as a method of preventing anticompetitive practices. To the extent must-carry aims to ensure the survival of locally-originated programming, it is "grossly overinclusive" for the reasons stated by the D.C. Circuit in *Quincy* (768 F.2d at 1460). The statute indiscriminately prefers all broadcasters, even if they carry little local programming; and it penalizes all cable programmers, regardless of how much local programming they provide.

Nor is the must-carry law a "narrowly tailored" method of preventing anticompetitive acts. To the contrary: the statute prohibits cable systems from dropping a broadcaster *for any reason whatsoever*. If an operator wishes to substitute The Learning Channel for a local broadcaster that airs home-shopping commercials or sitcom reruns, the statute forbids it to do so, however innocuous its motivations. Viewer preferences and quality of programming are utterly irrelevant. This prophylactic approach might be said to prevent anticompetitive practices, as the Japanese internment law might be said to have prevented domestic insurrection during World War II. But neither law can be described as "narrowly tailored."

2. Although appellees say much about the need to ensure "access" to cable systems, they offer little explanation why an access rule must take a form that affirmatively discriminates against cable programmers. Appellee PBS, at a loss for an answer, simply asserts that cable programmers "lack standing to bring this facial constitutional challenge" because they "live in a harsh, competitive environment" that might preclude their carriage apart from section 5. PBS Br. 36 n.33. That is like arguing that a black person lacks standing to challenge a quota that makes it harder for her to get a job, on the theory that eliminating the quota would not guarantee her being hired.

Appellees seek to diffuse the law's discriminatory character by pointing to other provisions of the 1992 Act that help some cable programmers. *See* Govt. Br. 41-42; NAB Br. 34. These provisions bar certain anticompetitive practices against unaffiliated programmers (§ 12) and strengthen the leased-access provisions that "permit unaffiliated cable programmers to compel cable operators to grant them access" (NAB Br. 34). But if these "narrow, context-sensitive remedies" (*ibid.*) suffice to protect cable programmers, why are they not sufficient protection for broadcasters as well? Congress plainly decided that broadcasters merit *better* protection: an absolute guarantee of carriage, for free, even in the absence of anticompetitive practices, no matter how terrible the broadcaster's programming may be. The remedial provisions appellees cite merely underscore the must-carry law's discriminatory character.

Of all the appellees, NAB alone attempts to rationalize the discriminatory nature of Congress' remedy. It says that broadcasters merit greater protection because cable programmers "are not jeopardized by the same anticompetitive incentives" that cable operators assertedly have (NAB Br. 18, 33). These differential incentives allegedly center on two points: corporate affiliations and advertising revenues.

It is true that a cable system has little incentive to discriminate against a cable programmer with which it is affiliated. But if any discriminatory incentive exists, it is the same in the case of broadcasters and *unaffiliated* programmers, *i.e.*, independent programmers or programmers affiliated with other operators. Obviously, the vast majority of the 130 or so regional and national programmers seeking carriage on a cable system will have no affiliation with that particular operator. For the most part, therefore, cable programmers and broadcasters stand on precisely the same footing, and they merit precisely the same degree of protection.

Nor does differential competition for advertising revenues justify must-carry's discriminatory remedy.

The vast majority of advertising revenues earned by the cable industry are received by cable programmers. These revenues are derived from commercials inserted within the programmers' shows. It is of no consequence to the cable operator whether these revenues go to cable programmers or broadcasters; the operator does not receive the revenues in either event.

The only advertising revenues actually received by cable operators typically consist of "local avails." Operators routinely bargain with programmers for a few minutes of advertising time each hour, during which the operator is permitted to run local commercial advertisements. Apart from the must-carry law, however, there is no reason, economic or technological, why operators cannot negotiate the same deal with broadcasters. Indeed, operators have in fact negotiated such advertising arrangements in retransmission-consent discussions. *See Warren's Cable Regulation Monitor*, Nov. 15, 1993, at 10.

In short, there is no inherent reason why operators' desire to maximize advertising revenues should cause them to discriminate against broadcasters to the exclusion of cable programmers. A given broadcaster or cable programmer can agree, or disagree, to an operator's request for "local avails." If the operator discriminatorily refuses to carry someone that disagrees, the operator's behavior may be subject to appropriate sanction. But it should not matter whether the disagreeing party is a broadcaster or a cable programmer.

Finally, even if Congress were right in believing that broadcasters need greater protection, it would not justify the kind of discrimination worked by the must-carry law. The statute does not merely confer

on broadcasters a benefit that cable programmers do not receive, as would be true (for example) had Congress granted broadcasters a subsidy. Owing to cable systems' limited channel capacity, preferential access for broadcasters inevitably *burdens* cable programmers by making their own chances of securing access concomitantly smaller. This is the central vice of the must-carry law, and the feature that most compels its invalidation.

CONCLUSION

For these reasons and those stated in our opening brief, the judgment of the district court should be reversed.

Respectfully submitted.

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No. 93-44

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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REPLY BRIEF FOR APPELLANT NATIONAL CABLE TELEVISION ASSOCIATION, INC.

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The principal argument advanced by the federal appellees is that regulation of the press, at least to remedy "market dysfunction," is subject to little, if any, judicial scrutiny under the First Amendment. This doctrine—which would apply, by its terms, to *any* market involving the press—is dangerously broad and at odds with the established structure of First Amendment law. Regulation of those "in the business of expression," or regulation of inherently expressive conduct, is subject to *some* form of heightened judicial scrutiny with two, and only two, exceptions: regulation pursuant to neutral laws of general applicability and regulation of broadcasting. Neither exception applies here. The must-carry law plainly is *not* a neutral law of general applicability, and the "prevailing rationale" for broadcast regulation—a physical scarcity that forces government to deny willing speakers access to

a means of speech—concededly does not apply to cable television. As a law singling out speech or the press, therefore, the must-carry law must be subjected to heightened scrutiny.

The proper *level* of heightened scrutiny for a law singling out the press depends on whether the regulation dictates, or has the potential to dictate, the content of speech. A regulation of conduct with only an incidental effect on expression, or a regulation of the time, place, and manner of speech, receives only an intermediate level of scrutiny, so long as it can be justified without regard to content. *See Ward v. Rock Against Racism*, 491 U.S. 781 (1989). But a regulation of the content of speech itself—in the form of either forbidding speech or mandating speech that a speaker would not otherwise make—receives the highest degree of scrutiny. *See Riley v. National Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 795 (1988). These different levels reflect the fact that, while government retains reasonable control over *how* speech is uttered, it does not have, and should not have, comparable power over *what* is said: "The constitutional right of free expression is . . . intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us . . . ." *Leathers v. Medlock*, 111 S. Ct. 1438, 1444-45 (1991) (internal quotation marks omitted). Given that it is a law directly mandating speech, the must-carry law merits the highest level of judicial scrutiny.

The level of heightened scrutiny, however, is ultimately not dispositive here. In the final analysis, the justifications offered to support the must-carry law do not withstand *any* form of heightened scrutiny, much less strict scrutiny. Except for the interest in promoting diversity of speech—an interest that Congress may not serve by means of telling private entities to favor particular speakers—the law rests entirely on the asserted interest in preserving

the local broadcasting system. Whatever may be the weight of this interest, it is impossible to conclude that any present or foreseeable threat justifies a law applicable to every cable operator throughout the entire country. Even if we assume (contrary to any evidence) that some individual broadcast *stations* are presently in serious jeopardy, there is no evidence whatsoever that the broadcasting *system* faces collapse. The law thus is prophylactic in the most extreme sense: it protects against risks that are, at best, speculative and, at worst, fanciful. And, none of the appellees even tries to explain how Congress, if genuinely concerned about resistant cable systems, could permit stations to *prohibit carriage* unless those same systems are willing to compensate stations for the right to carry them.

1. A. The government rests its case largely on the argument that Congress has broad powers to correct what it regards as "market failure" in the marketplace for speech. To support this principle, however, it relies almost exclusively on cases involving regulation pursuant to laws of general applicability.[1] This Court, of course, has held that the press has no "constitutional sanctuary" from the obligations of general laws, *Associated Press v. United States*, 326 U.S. 1, 7 (1945), and we do not contend otherwise. But, as the government has to concede, the must-carry law is not a law of general applicability.

The government thus seeks to extend the *Associated Press* doctrine to laws singling out the press, arguing that the form of the law is essentially irrelevant. *See* Govt. Br. at 18-20. But this Court has made very clear that laws singling out the press require tougher judicial scrutiny than laws of general applicability, *see Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460

[1] The only cases not involving laws of general applicability are cases involving regulation of broadcasting. As we discuss at pages 7-9 *infra*, the rationale of those cases does not apply to cable television.

U.S. 575 (1983)—a case not even mentioned by the government. Only last Term, moreover, the Court expressed a similar view with respect to laws inhibiting the free exercise of religion. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 113 S. Ct. 2217 (1993). In ruling "that laws burdening religious practice must be of general applicability," *id.* at 2232, the Court confirmed that "[t]he principle underlying the general applicability requirement has parallels in our First Amendment [speech and press clause] jurisprudence." *Id.* (citing cases). It would thus require a substantial departure from established doctrine to hold that the First Amendment makes no distinction between regulation pursuant to laws of general applicability and regulation pursuant to laws applying only to a protected activity.[2]

The reason for heightened scrutiny is straightforward: laws targeting the press, even if cast as "economic regulation," raise constitutional concerns not presented by laws of general applicability. To begin with, the very ability of a legislature to narrow a classification, so as to focus it only on the press, makes the press increasingly dependent on political favor. As this Court has recognized, it is highly unlikely that a legislature would—or, as a matter of political reality, could—use a law of general applicability as a device to reward or punish members of the press on the basis of their speech. *See Minneapolis Star & Tribune Co.*, 460 U.S. at 585. But if the legislature may set standards with regard to the press alone, there is implicit, and perhaps explicit, pressure on its members to be attentive to their political fortunes. That pressure is

[2] There is, in fact, considerable authority for giving heightened scrutiny even to laws of general applicability, when a particular application of those laws inhibits speech. *See, e.g., Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984). It would be all the more startling, therefore, to declare that laws targeting speech or the press need *not* undergo heightened scrutiny.

inconsistent with the historical understanding that the press is to operate independently of legislative influence.[3]

General laws also provide at least two "structural" protections against improper interference with speech, by limiting the ability of government to impose discriminatory or unusually harsh standards with respect to speech or the press. First, as this Court has observed, "general application of [a] statute to areas unrelated to expression will provide the courts a yardstick with which to measure the . . . occasional speech-related decision." *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 761 (1988). Second, in addition to providing nondiscriminatory benchmarks, the case-by-case application of general laws—like the antitrust laws, *see Associated Press v. United States; Lorain Journal Co. v. United States*, 342 U.S. 143 (1951)—typically provides the press with the protection of a neutral factfinder. General laws (unlike targeted laws) thus assure evenhanded application of evenhanded standards, without the sort of political pressures that may influence legislative actions against the press.

The need for these added protections can readily be seen here. Although appellees suggest that the must-carry law simply carries forward established prohibitions against misuse of "bottlenecks," the law does nothing of the sort. If the government sought to hold cable systems liable under the general antitrust laws, alleging use of a "bottleneck" to injure competing broadcast stations, it would first have to establish that a cable system is an "essential facility" for broadcast stations—which, of course, are

[3] The must-carry law provides a direct example. Because the law is so specific, the opportunity for cable programmers and broadcasters to obtain carriage on cable systems ultimately turns upon the extent of their political influence among members of Congress. *See* J.S. App. 67a (Williams, J., dissenting) (expressing concern about exposing First Amendment rights "to exercise of the most naked interest-group preferences").

concededly available to viewers over-the-air.[4] Moreover, it would have to confront the fact that the vast majority of cable systems have not dropped *any* broadcast stations. And, even where cable systems have dropped stations, the government would have to show that the decisions to do so were improper under the antitrust standards applicable to industries generally. That inquiry would necessarily take into account, among other things, the limited capacity available to each cable system (making access to all potential users impossible), the pool of competing programmers seeking access, and the business justifications for the decisions. *See* P. Areeda & H. Hovenkamp, *Antitrust Law* § 736.2f-h, at 880-88 (1993 Supp.). Finally, were a violation proved, the government still would have to justify a remedy requiring the carriage of broadcast stations, rather than, for example, an order simply prohibiting discrimination. This process is wholly bypassed by the decision of Congress, after extensive lobbying, to decide these issues itself, for all cable systems, according to special standards applicable to that industry alone.

It may well be that, by proceeding under the general antitrust laws, government could not achieve its objectives in securing carriage for all broadcast stations. But that inability is grounds for greater, not lesser, judicial scrutiny. As this Court has pointed out, "inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." *Lukumi Babalu*, 113 S. Ct. at 2232. The same is true with respect to laws aimed only at conduct involving speech. If government chooses to target the press, or inherently expressive activities, by special legislation imposing stricter standards of behavior, then it must expect that its reasons

[4] Carriage on a cable system is in fact *more* essential for cable programmers than for broadcast stations, because they cannot reach their intended audience over-the-air. Yet the law imposes a preference for the latter at the expense of the former.

will undergo more rigorous judicial scrutiny. Appellees' efforts to modify that principle should be rejected.[5]

B. This Court traditionally has allowed the federal government to exercise broad regulatory powers over the broadcasting industry. *See, e.g., Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). These cases would seem of little help to appellees, however, given, *first*, that "spectrum scarcity" is "[t]he prevailing rationale for broadcast regulation" (*FCC v. League of Women Voters*, 468 U.S. 364, 376 n.11 (1984)) and, *second*, that "the cable industry is not characterized by the same kind of physical scarcity as broadcasting." Govt. Br. 22. The government nonetheless seeks to tie cable television and broadcasting together, arguing that the need to regulate cable television is likewise linked to "physical characteristics" and—in a bold stroke—that spectrum scarcity is *not* the "critical factor" allowing greater regulation of broadcasting. Neither argument is correct.[6]

It is true, of course, that cable systems string wires "over utility poles and through underground conduits." Govt. Br. 34 (quoting *Leathers v. Medlock*, 111 S. Ct. at 1441 n.1). But that fact does not present any circumstances remotely comparable to those presented by the scarce electromagnetic spectrum. As we have previously explained, NCTA Br. 30-31, the reason that "spectrum scarcity" allows for greater regulation of content with respect to holders of broadcast licenses is that the spectrum is too limited to accommodate all willing users: as a result, the speech of any particular user is subject to effective

[5] It may be that some laws addressing unique problems will have so *de minimis* or attenuated a relationship to speech that the traditional concerns about targeted laws do not arise. By any conceivable standard, however, the must-carry law is not such a law.

[6] As is the case with laws of general applicability (*see* note 2 *supra*), laws regulating broadcasting have also been subject to heightened scrutiny. *See FCC v. League of Women Voters*, 468 U.S. at 374-81.

silencing by competing users of overlapping spectrum, so that a free-for-all could readily make the entire medium unusable as a means of communication. In order to have any speech at all, therefore, the government *must* grant some applicants the right to use the spectrum and—equally important—must deny other applicants that right. That is simply not the case with respect to cable television: there are *not* more applicants for cable franchises than the poles and conduits can accommodate. Like entrants into most kinds of businesses, prospective cable operators face possible economic hurdles; unlike prospective broadcasters, they do not face immutable physical ones.

It is also too late to rewrite the history of broadcast regulation, as the government proposes, by detaching it from the "prevailing rationale" of "spectrum scarcity." *FCC v. League of Women Voters*, 468 U.S. at 376 n.11. *See also Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997, 3010 (1990) (regulation permitted "[b]ecause of the scarcity of [electromagnetic] frequencies") (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 390).[7] Although the Court has expressed a possible willingness to reexamine that rationale, *see FCC v. League of Women Voters*, 468 U.S. at 376 n.11, it has done so in the context of revisiting whether physical scarcity any longer remains a legitimate basis for the extensive degree of regulation tied to it. The Court has never suggested that broadcast licensees, and other members of the press, could be subject to broad regulation *regardless of physical scarcity*.[8] Absent that unique situation, the protections of the First Amendment should apply with full force.

[7] The Court in *League of Women Voters* specifically noted the *government* argument that "broad power to regulate broadcast speech" exists because of the "'special characteristic' of spectrum scarcity—a characteristic not shared by other media . . . ." 468 U.S. at 375. The government has taken this position on numerous other occasions as well. *See, e.g.*, Discovery Reply Br. 1-2.

[8] Notably, none of the broadcast appellees argues that the power to regulate broadcasting exists apart from the rationale of physical scarcity. Indeed, *despite* the existence of physical scarcity, appellee NAB is at pains to declare that government should keep its hands off the broadcast industry. *See* NAB Br. 48-49 ("massive governmental subsidy of local commercial broadcasters . . . would inject an unwanted governmental presence into what has long been a privately owned medium"); *id.* at 33 n.48.

The government further contends that the receipt of certain government benefits exposes cable operators to otherwise impermissible regulation. Govt. Br. 27-29. To a limited extent this argument is correct: government may place conditions on an award of government funds or property in order to assure that they are used for their intended purpose. *See Rust v. Sullivan*, 111 S. Ct. 1759 (1991); *Regan v. Taxation with Representation*, 461 U.S. 540 (1983). But it is not correct to say that government, by aiding a medium of speech, thereby accrues a broad, largely unreviewable power to determine who may speak, and what may be said, on that medium. Indeed, the two cases cited by the government to support that proposition (Govt. Br. 28-29) recognize no such power: *Red Lion* (395 U.S. at 400) is a case involving the unique circumstances of broadcast licensees (see pages 7-8 *supra*), and *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), is a case in which the Court applied not just *some* heightened scrutiny under the First Amendment but the compelling interest test—precisely the test that we urge here.

Apart from its lack of support, the idea that government can "purchase" the right to control the press is an unsound one. It is, as a practical matter, common for members of the press to receive government benefits, ranging from favorable postal rates to immunity from taxes. These benefits plainly give the recipients a competitive advantage—and may be challenged as discriminatory by those denied benefits (*see Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987))—but they have never been thought a basis for government to force access to the press. Thus, for example, the fact that

Arkansas exempts newspapers from its general sales tax, and thus aids them in any competition with members of the media not exempted, would not justify a law providing that newspapers sold in Arkansas had to set aside pages for speakers designated by the government. *See Leathers v. Medlock*, 111 S. Ct. at 1444 (tax scheme does not interfere with "First Amendment activities"). The same reasoning applies here.[9]

2. A. The fact that a law singles out the press, or inherently expressive activities, does not mean that it is always subject to strict scrutiny. If the law on its face regulates *how* speech is communicated to the public—that is, the time, place, or manner of speech—it is reviewed under the intermediate (though heightened) standard set forth in *United States v. O'Brien*, 391 U.S. 367 (1968), provided that it can be "*justified* without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. at 791 (internal quotation marks omitted). But, if the law on its face regulates *what* speech is communicated to the public, or carries with it a serious threat of such regulation, it is subject to strict scrutiny. *See Riley*, 487 U.S. 781 (1988); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). The must-carry law, which plainly regulates what speech is communicated and not how it is communicated, falls into the latter category.

The government, aided by other appellees, insists that *every* law regulating speech should be subject to the test

[9] We note, too, that the attempt by appellees to link greater regulation and the receipt of benefits is largely standardless. Appellees do not identify what level of benefit is enough to justify what level of regulation: they are simply sure that the benefits given to the cable industry are sufficient to support the must-carry law. To make this vague weighing a part of First Amendment law would leave judges with much the sort of untrammeled discretion that this Court repeatedly and properly has denied to executive officials. *See, e.g., Forsyth County, Ga. v. Nationalist Movement*, 112 S. Ct. 2395 (1992).

used in *Ward*: that is, no matter how apparent the regulation of content may be, the courts should look first to the justification for the regulation to determine the proper standard of review. *See* Govt. Br. 38-39; NAB Br. 22 ("government's purpose is *always* the controlling consideration in determining the appropriate level of scrutiny") (emphasis added). That is not the law, nor should it be. To start with, it offends common sense to say that, in order to determine the level of justification required for governmental regulation, a court should look initially to the *justification* rather than the *regulation*. The very reason that courts apply different levels of scrutiny to government actions is that certain actions (*e.g.*, dictating what speakers may or must say) are presumptively invalid, while other actions (*e.g.*, regulating sound levels or imposing zoning restrictions) are not. It is by looking at the *regulation*—what the law in fact does and how it does it—that courts typically judge how strong a justification the government needs in order to sustain it. The justification then determines whether the regulation *passes* the test, not what the test is in the first place.

The Court, therefore, has not turned *Ward* into an all-purpose test for analyzing every regulation of speech, but instead has used it to decide whether certain regulations of time, place, or manner are subject to strict scrutiny because they are "content-related." *See Boos v. Barry*, 485 U.S. 312 (1988) (regulation of "place"); *Ward* (regulation of "manner"). When the law is simply a regulation of content without more, however, the Court has decided to apply strict scrutiny without looking first to its justification. *See Riley*, 487 U.S. at 795; *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 112 S. Ct. 501 (1991). Thus, in *Riley*—a decision studiously ignored by appellees on this point—the Court stated flatly that "mandating speech that a speaker would not otherwise make necessarily alters the content of the speech," 487 U.S. at 795, and (without examining the purpose of the law) immediately concluded that it was "a

content-based regulation of speech." *Id.* The Court has followed a similar course, *i.e.*, looking first at the law itself and only secondarily at its motivation, in other constitutional areas requiring the closest judicial inquiry. *See Shaw v. Reno*, 113 S. Ct. 2816, 2824 (1993) ("[n]o inquiry into the legislative purpose is necessary when the racial classification appears on the face of the statute").[10]

B. The government also maintains that, although the must-carry law "may alter the content of programming to some extent" (Govt. Br. 37), it is nevertheless "content-neutral in the crucial constitutional sense." *Id.* This sleight-of-hand—making a law altering content into a "content-neutral" law—is flatly contrary to the teaching of *Riley* that a law "alter[ing] the content" of speech is necessarily "content-based." *See Riley*, 487 U.S. at 795. And, to the extent that the government is relying on the *Ward* test to effect this transformation, its reliance is mistaken for the reasons just discussed.

The government seems to believe, however, that laws compelling speech, or discriminating among speakers, should be of little concern provided that the laws are cast in sufficiently broad terms. According to this theory, the government could not order cable operators to carry particular *programs*, yet it is free to order carriage of entire *stations* (or, more broadly still, of *all* stations in a local community). But it is an odd principle that lessens First Amendment scrutiny as the amount of coerced speech increases. That inverted rule might be sensible, perhaps, if the First Amendment reflected only a concern that government might promote or extinguish particular mes-

[10] The *Ward* test, in any event, properly requires that justifications for the law "have nothing to do with content." *See Boos v. Barry*, 485 U.S. at 320. The express findings made by Congress—approving the "educational and informational programming" provided by noncommercial stations (*Findings* ¶ 8(A)) and the "local news and public affairs programming and other local broadcast services" provided by commercial stations (*id.* ¶ 11)—establish that the must-carry law cannot meet that test.

sages; but that is plainly not the only concern. At a more basic level, as this Court has recognized, the First Amendment is "intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us . . . ." *Leathers*, 111 S. Ct. at 1444-45.

The government simply refuses to accept that the marketplace for speech is essentially private.[11] Thus, in defending the favoritism shown to local broadcasters, the government points to Congress' "assumption that they have as much to say of interest or value as the cable programmers who service a given geographic market audience . . . ." Govt. Br. 38. But it never explains why the *government* should be deciding that the speech of some speakers is of equal—or, given the terms of the law, greater—"interest or value" than the speech of other speakers. Indeed, no prospect would seem more at odds with the First Amendment than having political bodies ultimately determine the relative value of speech offered by competing speakers.[12]

It is likewise apparent that the government gives short shrift to the First Amendment interests of cable operators and programmers. With respect to cable operators, the

[11] We are not dealing here either with the right of government to speak itself or its right to subsidize speech pursuant to its powers over government funds or property. As we have previously stated, in those circumstances, some latitude to make distinctions among types of speech or among speakers is appropriate. *See, e.g., FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978).

[12] The First Amendment, of course, is a restraint *upon* government, not an invitation to government to weigh the merits of different speakers. Although the government may well take actions consistent with First Amendment values, *see Associated Press v. United States*, there is no basis for the quite different idea that the First Amendment authorizes government to limit the speech of some in order to advance the speech of others, on the theory that "First Amendment interests lie on both sides of the dispute." Govt. Br. 17.

government dismisses them as primarily "passive conduits" for programming, rather than originators of programming. But, whatever its accuracy,[13] this characterization cannot help the government's argument, if only because it proves far too much. Businesses engaged in speech (*e.g.*, newspapers, magazines, book publishers, theatres, movie houses) routinely transmit speech originated by others: indeed, it is a fundamental activity of the press, and one fully protected by the First Amendment, to select and distribute a wide variety of entertainment and information from different sources. This Court has repeatedly recognized that cable operators, like other members of the press, are engaged in that function. *See Leathers*, 111 S. Ct. at 1442; *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986); *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979). And it is the *choice of material*—the very act of deciding what programming to offer viewers—that the must-carry law seeks to control.

The government has little to say about the claims of cable programmers, other than a suggestion that their speech (unlike the speech at issue in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam)) is not "speech at the core of the First Amendment." Govt. Br. 45. This is a red herring: there is no dispute that the speech of cable programmers is subject to full protection under the First Amendment, and much of its coverage, including all-news channels like CNN and public affairs channels like C-SPAN, plainly involves material of great public interest and importance. To distinguish *Buckley*, therefore, it is necessary to explain why the principle applied there—that government may not "restrict the speech of some elements of our society in order to enhance the relative voice of others" (424 U.S. at 48-49)—does not carry

[13] Cable operators, in fact, do originate programming. For example, local news channels may create considerably more programming than local broadcast stations, which may obtain most of their programming through syndication or network distribution.

equal weight in *any* case involving discrimination among providers of fully protected speech. Whether based on its notions of what is of "interest or value," or its stated desire to preserve "local" or "educational" programming, Congress has overtly discriminated here, erecting barriers to cable programmers in order that broadcast stations can be heard.

This case is not, therefore, "more closely analogous" (Govt. Br. 45), or analogous at all, to *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). The law in *PruneYard*, unlike the must-carry law, made no distinctions whatever among speakers seeking access to the shopping center: it did not enhance any speakers at the expense of others. Moreover, the owner of the shopping center in *PruneYard*, while required to allow speech on its premises, did not face any interference with its own speech. The must-carry law, by contrast, necessarily diminishes the amount of speech that cable operators may choose for their subscribers: for every channel that cable operators are forced by law to favor, they must disfavor the speech of a different programmer that they would prefer to carry. Unlike a law requiring shopping centers to permit pamphleting, or a law controlling the placement of papers in newsracks or on newsstands, the law directly threatens the right of those engaged in speech to choose what they wish to say to the public.[14]

3. The interests advanced by the government to justify the must-carry law do not pass any form of heightened

[14] There is no inconsistency between the fact that cable operators commonly have not denied carriage to broadcast stations and the claim of cable programmers that they face the prospect of exclusion on the basis of the must-carry law. The programmers do not have a right to be carried by cable operators; they have, instead, a right to compete for carriage *without discrimination ordered by the government*. The operators, in turn, have a right to select the programming for their subscribers *without having that choice preempted by the government*. Those rights are infringed by the must-carry law in every instance, regardless of how that discretion would otherwise be exercised.

scrutiny. *See Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986) (must-carry rules invalid even under *O'Brien* test); *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988) (same).[15] As an initial matter, the expressly stated congressional preference for "local" and "educational" programming is a form of naked content preference. The statute is invalid for that reason alone. But even taking them on their own terms, the interests advanced to support the statute are wholly inadequate.

The vague interest in promoting "diversity of information" (Govt. Br. 37)—reflected in the findings specifically approving the content of broadcast programming (*see* note 10 *supra*)—is clearly not an interest that could support the sort of coerced discrimination at work in the must-carry law. As a factual matter, there is little basis for a presumption that the programming of broadcast stations will add more to "diversity of information" than any programming excluded by the law. Indeed, given that cable programmers typically offer more specialized programming than broadcast stations, that conjecture seems almost certain to be wrong. But, in any event, it is generally not the business of government to decide what speech the public does or does not require. Although members of Congress may have strong views about whether it is better to have more cable programming or more broadcast programming on cable systems, that decision, like most decisions about what should be said and who should say it, is committed under the First Amendment to the private marketplace for speech. *Leathers*, 111 S. Ct. at 1444; *Riley*, 487 U.S. at 790-91.

[15] Arguing that the law is narrowly tailored, the government points to the fact that it leaves open more than half of the channels on each system. Govt. Br. 41. But that is only one part of the proper inquiry. The government, having bypassed application of the general antitrust laws, must show the need to impose prophylactic standards on *every* cable system, and to do so without regard to the interests of viewers in their communities or the viability of broadcasting in the community absent the must-carry requirements. *See, e.g., Minneapolis Star & Tribune Co.*, 460 U.S. at 566-68 (finding asserted interest did not justify special legislation singling out the press).

The must-carry law thus must rise or fall with the asserted interest in preserving the local broadcast system. This interest, however, depends entirely upon a "predictive judgment" (Govt. Br. 31): that, absent mandatory carriage, "the economic viability of free local broadcast television and its ability to originate quality local programming *will be* seriously jeopardized." *Findings* ¶ 16 (emphasis added). Rules based upon "predictive judgment[s]" are by their nature prophylactic, and "[b]road prophylactic rules in the area of free expression are suspect." *NAACP v. Button*, 371 U.S. 415, 438 (1963). It is especially important, therefore, that regulation of that kind "address what is in fact a serious problem." *Edenfield v. Fane*, 113 S. Ct. 1792, 1803 (1993).

The "predictive judgment" here is far too poorly grounded to meet that standard. Even the government acknowledges that the Court should give no deference to "conclusory statements," Govt. Br. 31 n.21, and Congress' finding about future harm to the broadcast system cannot be anything else. Although Congress pointed to figures showing that some cable systems have dropped broadcast stations in the absence of must-carry obligations, and determined that systems have the ability and some incentive to drop additional stations, it takes blind faith to leap from those findings to the conclusion that the *system* is in jeopardy. Indeed, any such conclusion is directly contrary to historical fact.

To begin with, Congress' own figures indisputably show that *most* cable systems have not dropped *any* stations at all. Moreover, even as to individual stations that have been dropped, there has been no showing that denial of carriage has caused any stations to fail. And, in any event, the failure of little-watched broadcast stations—the

stations, as the government concedes, most likely to benefit from must-carry requirements—would not portend the potential decline of the broadcast system as a whole. Just as the interest behind the antitrust laws is to protect "*competition*, not *competitors*" (*Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)), the interest here is in protecting broadcasting, not broadcasters; yet, as we have previously pointed out, the number of broadcast stations serving local communities has been rising, not falling. *See* NCTA Br. 40-41. Even appellees do not dispute that the *system*, at present, is alive and well.

The government insists, however, that cable operators have (and will act upon) a financial incentive, based on competition for local advertising revenues, to deny carriage to broadcast stations. But, whatever incentive there might be, it has clearly been overcome in almost every case by the contrary incentive to offer attractive programming to viewers. The fees paid by subscribers have been, and continue to be, the principal source of revenue for cable operators, and those revenues depend upon being attentive to the likes and dislikes of cable subscribers. There is accordingly no sound basis for predicting that cable systems, having voluntarily carried the overwhelming majority of broadcast stations, will suddenly strike a wholly different balance for anticompetitive reasons, dropping programming highly favored by consumers.[16]

That prediction, in fact, is utterly incompatible with Congress' simultaneous decision, completely ignored by appellees, to allow broadcast stations to *refuse* carriage of their signals without adequate compensation. *See* 47 U.S.C. § 325(b). If Congress truly believed that cable

[16] Even aside from the historical infrequency of such actions, the past occasions on which broadcasters have been dropped furnish no basis for such a prediction. There is no evidence whatsoever that the decisions to drop broadcast stations (any more than numerous decisions to drop *cable* programmers) have routinely been made for anticompetitive reasons—rather than, for example, to avoid duplication of programming or to satisfy viewer preferences.

operators are seeking opportunities to drop local broadcast stations, it would scarcely put in place a new system making it *harder* for cable operators to carry them. Yet, that is just what the retransmission consent provision does: it makes carriage of the most widely watched stations (those most likely to attract the advertising dollars ostensibly sought by cable systems) wholly dependent on the willingness of cable systems to pay compensation. Unless Congress is indifferent to carriage of those stations —a possibility flatly contrary to its purported concern for the welfare of the broadcasting system—the only logical explanation is that Congress fully expects cable systems to act on the incentive to carry popular programming, rather than on any incentive to harm stations in order to increase advertising revenues. In the end, therefore, even Congress seems to be unconvinced by its own findings.[17]

[17] We note that the "leased access" alternative discussed by Judge Williams, J.S. App. 50a-51a, 61a (dissenting opinion), while less discriminatory than the must-carry law, nonetheless constitutes a significant interference with the right of cable operators to select programming for their systems. The government (Govt. Br. 46) is naturally unenthusiastic about this alternative, because Congress in the must-carry law was not seeking to impose a level playing field but rather a field tilted towards local broadcast stations. To be a satisfactory alternative to the government, therefore, any law must *guarantee* a discriminatory result, *i.e.*, carriage of all qualifying stations.

CONCLUSION

The judgment of the three-judge district court should be reversed.

Respectfully submitted,

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OCTOBER TERM, 1993

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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AMICUS CURIAE BRIEF OF THE NEW INSPIRATIONAL NETWORK IN SUPPORT OF APPELLANTS

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United States v. O'Brien, 391 U.S. 367 (1968)	*passim*

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Cable Television Report and Order, 36 F.C.C.2d 143, *recons.* 36 F.C.C.2d 316 (1972), *aff'd. sub nom. ACLU v. FCC*, 523 F.2d 1344 (9th Cir. 1975)	9
Carter Mountain Transmission Corp., 32 F.C.C. 459 (1962), *aff'd sub nom. Carter Mountain Transmission Corp. v. FCC*, 321 F.2d 359 (D.C. Cir.), *cert. denied*, 375 U.S. 951 (1963)	8
Implementation of the Cable Consumer Protection and Competition Act of 1992, 8 FCC Rcd 2965 (1993)	10
Implementation of Section 4(g) of the Cable Consumer Protection Act of 1992, 8 FCC Rcd 5321 (1993)	23, 27
Staff Report, Policy and Rules Division of the Mass Media Bureau, *Cable System Broadcast Signal Carriage Report*, Sept. 1, 1988	19
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Legislative Materials — Page

Committee of Conference, H.R. Conf. Rep. No. 102-862, 102d Cong., 2d Sess. (1992) 15, 19, 21
House Comm. on Energy and Commerce, H.R. Rep. No. 102-628, 102d Cong., 2d Sess. (1992) 19, 22, 24

Periodicals

Flint, "Stations Stay for No Pay," *Broadcasting and Cable*, October 11, 1993, at 6 21
Maddox "Stations Cast Their Cable Vote," *Electronic Media*, June 21, 1993, at 1, 63 20
Moss, "October 6 Was No Doomsday," *Multichannel News*, October 11, 1993, at 14 21
"Broadcasters Opting for Retrans," *Broadcasting and Cable*, June 21, 1993, at 8 20
"October 6 Retransmission Consent Disruptions Minimized by Agreements," *Communications Daily*, October 6, 1993, at 1 21
"Putting a Price on Free TV," *Broadcasting and Cable*, June 21, 1993, at 7 20
"Some Heated Retransmission Consent Skirmishes Emerge, But Most Are Settled," *Communications Daily*, October 7, 1993, at 1 21

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On Appeal from the United States District Court for the District of Columbia

AMICUS CURIAE BRIEF OF THE NEW INSPIRATIONAL NETWORK IN SUPPORT OF APPELLANTS

INTEREST OF THE AMICUS CURIAE [1]

The Inspirational Network, Inc., is a not-for-profit corporation headquartered in Charlotte, North Carolina. It owns and operates The New Inspirational Network (both The Inspirational Network, Inc. and The New Inspirational Network are hereinafter referred to as "INSP"). INSP's programming, offered free of charge to cable operators, consists of a mixture of interfaith inspirational programs and family entertainment programs. Among the types of programs INSP offers its viewers are programs for children, variety programs, contemporary Christian music

[1] Letters of consent to the filing of this brief have been filed with the Clerk of the Court pursuant to the Supreme Court Rule

programs, and health and fitness programs. INSP makes a significant contribution to diversity in cable programming. Eighteen percent of INSP's programming comes from predominantly minority churches and INSP carries programs from various geographic areas of the country.

Since September 1990, INSP has devoted considerable resources to the development of INSP as a valuable contributor to the diverse, quality programming delivered to the nation's homes through cable television facilities. As part of this effort, INSP has built an $11 million state-of-the-art video and film production facility that is the largest such facility in the Southeast United States, acquired the rights to a broad range of programming for carriage on INSP, and hired a staff expected to reach 75 persons by the end of 1993. INSP's staff includes a team of seven Regional Managers of Affiliate Relations who work cooperatively with cable systems in all parts of the country in an effort to obtain widespread carriage for INSP.

As INSP will discuss further herein, the must carry provisions of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act" or the "Act"), Pub. L. No. 102-385, §§ 4-5, 106 Stat. 1471-1481 (1993), restrict INSP's ability to present its programming over cable systems and limit cable operators' editorial discretion to determine whether to carry the signals of cable networks, such as INSP, rather than the signals of local broadcast stations. INSP accordingly submits this Brief to assist the Court in its resolution of this case.[2]

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[2] As *amicus curiae*, INSP's Brief addresses only those issues in which INSP's particular experiences and knowledge can be of assistance to the Court. Accordingly, INSP herein focuses on the particularly damaging effects that must carry rules have on developing cable networks such as The New Inspirational Network, while also addressing such issues as the standard by which the Court should evaluate the constitutionality of the must carry rules and why the Court should invalidate those rules.

INSP's Brief is expressly not addressing other issues that may be raised in this proceeding and that were raised in the court 37.3.

SUMMARY OF ARGUMENT

The must carry rules' impact on new and developing cable networks, such as INSP, is even more immediate and dramatic than their effect on more established cable programmers. Since must carry requirements compel cable systems to devote a large portion of their channel capacity to the carriage of local broadcast stations, systems are especially reluctant to carry the programming of a newer cable network having less established subscriber loyalty and a shorter operating history. A newer network's inability to obtain carriage due to must carry obligations may therefore preclude the network from ever having the opportunity to present its programming to the public in a meaningful manner.

The Act's must carry requirements should be evaluated and invalidated under the strict scrutiny standard, since must carry rules favor certain classes of speakers over others based on the content of speech. Proceeding from the erroneous assumption that the Act's must carry requirements were purely "economic regulation," the District Court misconstrued applicable precedent and minimized the inherent content-related nature of must carry requirements and the impermissible burden that such requirements place on the First Amendment rights of cable operators and cable programmers.

Even if the Act's must carry requirements are evaluated using the balancing test of *United States v. O'Brien*, 391 U.S. 367 (1968), the rules should be found unconstitutional on First Amendment grounds. There is no "substantial" government interest in reimposing must carry, since even the reasons that Congress expressed for adopting new must carry rules demonstrate that those rules are primarily protectionist in nature, protecting broadcasters at the expense of cable operators and cable programmers. Moreover, the significant number of television broadcast-

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below, such as the criteria for granting a preliminary injunction, declaring an act of Congress facially unconstitutional, standing, and granting summary judgment.

ers who recently chose to forego their must carry rights, opting instead to obtain carriage pursuant to negotiated "retransmission consent" agreements, proves that broadcasters have concluded that they do not need to rely on must carry rules to ensure carriage on cable systems and that such rules are not in fact needed to ensure their carriage. Furthermore, Congress' assertion that must carry rules are needed to ensure the availability of local news and information programming ignores many cable systems' provision of such programming to subscribers, through the programming efforts of the cable operator or other non-broadcast users of the cable system.

The Act's must carry requirements would also fall under the final prong of the *O'Brien* test, since numerous alternatives exist to reimposing must carry rules that would have more effectively, and less intrusively, served Congress' goals. Must carry has in fact frustrated Congress' goal of increasing competition by reducing the marketplace incentive for broadcasters to produce and carry quality programming. Rather than relying on must carry, Congress could have ensured diversity in cable programming by encouraging competition between broadcasters and cable programmers.

ARGUMENT

I. MUST CARRY RULES PARTICULARLY INHIBIT THE ABILITY OF NEW NETWORKS, SUCH AS INSP, TO DISSEMINATE THEIR PROGRAMMING

INSP's interest in this proceeding is clear. The Act's must carry requirements have already caused and, if not overturned, will continue to cause irreparable harm to INSP. Since the time that Congress enacted the 1992 Cable Act, cable systems serving over *half a million subscribers* have already discontinued carriage of INSP's signal due solely to the requirements imposed on such systems by the must carry rules. Those requirements compel most cable operators to reserve a substantial portion of their cable channels for the signals of certain local

television stations.[3] Since a cable system has only a finite number of channels on which it can provide programming, reserving a percentage of those channels for the signals of local broadcasters necessarily restricts the ability of non-broadcast programmers to obtain cable carriage, by limiting the cable operator's ability to offer program services to subscribers that it determines will best serve the needs and interests of those subscribers. A cable operator's obligation to satisfy the Act's must carry requirements therefore restricts the operator's editorial discretion to add the signals of cable networks to its system.

This situation can be devastating for a new or developing cable network, such as INSP. Such a network's only viable manner of distributing its programming, and thereby surviving in the video marketplace, is to persuade cable operators to carry its signal. Any cable network's plans for creating programming, hiring employees, and continuing its existence as a communications medium are based on the expectation that the network will be able to persuade cable operators to provide the network's signal to subscribers. This expectation exists without regard to the method by which the network obtains its operating funds, whether through advertising sales, license fees from cable operators, donations from cable subscribers, or other methods. If the network is unable to obtain widespread carriage on cable systems, the network's voice will be stilled.

The must carry rules' impact on new and developing cable networks is therefore even more immediate and

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[3] The number of channels that must be reserved for local television stations depends primarily on the size of the television market and the channel capacity of the cable system. Moreover, a television station that qualifies for must carry status has the option to forego its must carry rights and elect instead to negotiate for carriage. Where a television station has elected for negotiated carriage, cable systems located within the station's local service area must have obtained the station's signed "retransmission consent" in order to carry the station's signal after October 6, 1993. *See*, 1992 Cable Act, § 6, 106 Stat. 1482-1483.

dramatic than their effect on more established cable programmers. Established programmers are legitimately concerned about cable operators' willingness to carry their signals, given the broadcast station carriage obligations imposed on operators by the must carry rules. At least, however, those networks have established widespread cable carriage and subscriber loyalty. When cable systems must, by law, devote a large portion of their channel capacity to the carriage of local broadcast stations, the systems are far more reluctant to carry cable networks with less established subscriber loyalty and operating history. A lack of cable carriage severely hinders these newer networks in their efforts to establish such loyalty and operating history. Therefore, a newer network's inability to obtain carriage due to must carry obligations may preclude the network from ever having the opportunity to present its programming to the public in a meaningful manner.

Having launched a major new programming effort as recently as 1990, INSP's future is placed in immediate jeopardy by the must carry rules. Prior to the passage of the Act, INSP found cable operators receptive to the concept of adding INSP to their program lineups. As a result, INSP experienced consistent viewership growth. However, beginning with the period shortly before the Act was enacted, and continuing since that time, there has been an unmistakable change in the willingness of cable operators even to consider carrying INSP, due solely to the reimposition of must carry rules.

In the *amicus* brief that INSP filed with the District Court in this proceeding, INSP supplied irrefutable proof that the must carry rules had already begun to impair INSP's ability to provide its programming to viewers. INSP provided the District Court with affidavits, executed by two of INSP's Regional Managers of Affiliate Relations, detailing numerous examples of how the must carry rules had caused cable operators to terminate, or severely

restrict, any contemplation of carrying INSP's programming in both large and small cable systems in all parts of the country.

Now that the Federal Communiactions Commission (the "Commission") has adopted must carry rules and those rules have actually gone into effect, the rules' impact on INSP has become even more pronounced. As Attachment A hereto, INSP has furnished a sampling of the letters it has received from cable operators providing notice that the must carry rules have compelled those systems to add programming of local broadcast stations, and to discontinue carrying INSP, often despite the preferences of cable operators and subscribers. Those letters state that:

1. "I appreciate your willingness to communicate your concerns and offer alternatives as we cope with the many decisions associated with the new must-carry rules in Jacksonville. . . . It is still our plan to discontinue carriage of the network on or about June 2, 1993." (Continental Cable of Jacksonville)

2. "We are required to add two local broadcast stations in each system to comply with the must-carry provisions of the 1992 Cable Act. Multivision will no longer carry INSP after June 1, 1993 on either system because of limited channel capacity. . . ." (MultiVision Cable TV)

3. "After reviewing our line-up, we have decided to remove the New Inspirational Network to make room for [a] must-carry station. Rest assured, this was not an easy decision, but one that had to be made to comply with the new regulations." (Paragon Cable)

4. "Please be advised that in order to comply with Federal "Must Carry" regulations, Comcast will cease transmission of the Inspirational Network in North Little Rock, Arkansas, effective July 1, 1993." (Comcast)

5. "[D]ue to retransmission and must carry responsibilities created by the 1992 Cable Act, effective 11 18 93, [we] will no longer carry the Inspirational Network." (Liberty Cable)

These letters are representative of the reactions that INSP's managers have heard from cable operators since the Act's passage. Now that the must carry provisions have become effective, preventing cable operators from adding INSP's programming, INSP's growth has been halted and its ability to present programs that provide needed programming diversity and viewer choice is severely limited. Indeed, its very existence as a programming "voice" has been placed in jeopardy.

II. THE DISTRICT COURT MINIMIZED THE SUBSTANTIAL FIRST AMENDMENT ISSUES INVOLVED BY REGARDING MUST CARRY AS MERELY "ECONOMIC REGULATION"

The essential history of must carry rules is one of governmental action designed to allay broadcast television stations' fear of competition from cable television. Until the advent of cable television, broadcast television enjoyed over two decades as the medium with the sole technology for providing video programming directly to the home. However, since the early 1960s, broadcasters have confronted the competitive threat posed by cable television, a medium that provides video programming using wires rather than the over-the-air broadcast spectrum.

The earliest efforts of the Commission to regulate cable television responded to broadcasters' fears of competition from cable by granting certain licenses to cable operators only if they could demonstrate that their cable systems would have no direct or indirect effect on the continued survival of local television stations. *Carter Mountain Transmission Corp.*, 32 F.C.C. 459 (1962), *aff'd sub nom. Carter Mountain Transmission Corp. v. FCC*, 321 F.2d 359 (D.C. Cir.), *cert. denied*, 375 U.S. 951 (1963). As the Court of Appeals recognized:

> "Since the mid 1960's, when the nascent cable television industry began to loom as a threat to ordinary broadcast television, the Federal Communications Commission has labored to protect the local broadcast media through regulation of the cable industry." [4]

The must carry rules can best be understood as another method by which Congress and the Commission have tried to minimize this perceived threat to broadcasters. "Must-carry rules in various forms have been major tools in this campaign to protect local broadcasting from cable," the Court of Appeals observed. *Century*, 835 F.2d at 294. Must carry rules provide a mechanism under which broadcasters can ensure that their signals are carried on cable systems. Accordingly, such rules not only diminish the marketplace threat broadcasters perceive from cable television, but also ensure that cable television systems will have to support the competitive position of broadcast television stations by giving them access to cable system channels in a manner that serves to exclude, by operation of law, cable networks that may be better able to provide desirable uses of such channels for the delivery of programming.

Twice, the Commission adopted versions of must carry rules at the urging of television broadcasters.[5] Twice, the D.C. Circuit struck down those rules as unconstitutional infringements on free speech.[6] Now, broadcasters have

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[4] *Century Communications Corp. v. FCC*, 835 F.2d 292, 293 (D.C. Cir. 1987), *cert. denied sub nom. Office of Communication of United Church of Christ v. FCC*, 486 U.S. 1032 (1988).

[5] *Cable Television Report and Order*, 36 F.C.C.2d 143, *recons.* 36 F.C.C.2d 316 (1972), *aff'd sub nom. ACLU v. FCC*, 523, F.2d 1344 (9th Cir. 1975); *Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems*, 1 FCC Rcd 864 (1986), *recons. denied* 2 FCC Rcd 3593 (1987).

[6] *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied sub nom. National Association of Broadcasters v.*

found a sympathetic ear in Congress, which responded by enacting must carry into law in Sections 4 and 5 of the Act. The Commission responded by adopting yet a third version of must carry rules.[7]

However, the must carry requirements mandated by the Act suffer from the same constitutional infirmities as their administrative ancestors. Given the inherently intrusive nature of must carry rules on the speech of cable programmers, such as INSP, and cable operators, any possible version of such rules would necessarily suffer from the same infirmities.

A. Any Must Carry Requirements Directly and Unavoidably Inhibit First Amendment Rights

The primary error of the District Court's decision was its conclusion that the Cable Act's must carry provisions are "essentially economic regulation . . . justified by the existing structure of the cable business itself. . . . *Turner*, 819 F. Supp. at 40. Relying on that conclusion, the District Court all but ignored the inherent content-related nature of must carry requirements and the impermissible burden that such requirements place on the First Amendment rights of cable operators and cable programmers.

Although the District Court acknowledged that it was "too well established to reconsider" Supreme Court precedent confirming that cable television regulation implicates First Amendment issues,[8] the District Court proceeded as if such precedent was irrelevant to its legal analysis. Before even commencing its inquiry, the District Court announced its conclusion that the 1992 Cable Act:

Quincy Cable TV, Inc., 476 U.S. 1169 (1986); *Century Communications Corp. v. FCC, supra.*

[7] *Implementation of the Cable Consumer Protection and Competition Act of 1992*, 8 FCC Rcd 2965 (1993).

[8] *Turner*, 819 F. Supp. at 41, citing *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986); *Leathers v. Medlock*, 499 U.S. 439, 111 S. Ct. 1438, 1442-1443 (1991).

> "is simply industry-specific antitrust and fair trade practice regulatory legislation: to the extent First Amendment speech is affected at all, it is simply a byproduct of the fact that video signals have no other function than to convey information. . . . So perceived, the Court concludes that the must-carry provisions are, in intent as well as form, unrelated (in all but the most recondite sense) to the content of any messages that these embattled cable operators, broadcasters, and programmers have in contemplation to deliver."

Turner, 819 F. Supp. at 41. The remainder of the District Court's decision developed a rationale to justify its conclusion, effectively minimizing the significance of any First Amendment issues raised by the 1992 Cable Act's must carry provisions.

However, as with the First Amendment implications of cable television in general, the First Amendment impact of must carry is not open to question. In both the *Quincy* and *Century* decisions, the U.S. Court of Appeals struck down previous versions of must carry rules as unconstitutional infringements on free speech. Although those cases did not determine the precise standard of First Amendment review applicable to must carry, the Court of Appeals left no question but that must carry rules directly impact First Amendment issues. The *Quincy* court explained:

> "The [must carry] rules coerce speech; they require the operator to carry the signals of local broadcasters regardless of their content and irrespective of whether the operator considers them appropriate programming for the community it serves. The difficulty is not so much that the rules force operators to act as a mouthpiece for ideological perspectives they do not share, *see Wooley v. Maynard*, 430 U.S. 705, 714 (1977), although such a result is by no means implausible. [Footnote omitted]. The more certain injury stems from the substantial limitations the rules work on the operator's otherwise broad dis-

cretion to select the programming it offers to subscribers. *See Miami Herald Co. v. Tornillo* [418 U.S. 241 (1974)]."

Quincy, 768 F.2d at 1452. *See also Century*, 835 F.2d at 304 (finding must carry rules unconstitutional, since the government must provide either empirical support or sound reasoning "when trenching on first amendment interests, even incidentally. . . ."). Since the *Quincy* and *Century* courts established that must carry implicates First Amendment interests and warrants the heightened legal analysis guaranteed of all restraints implicating First Amendment protections, the District Court improperly ignored applicable precedent in concluding that the Act's must carry provisions are merely "economic regulation . . . unrelated . . . to the content" of speech.

B. Must Carry Should Be Evaluated, and Invalidated, Using a "Strict Scrutiny" Standard

The District Court found "strict scrutiny" to be the incorrect test for assessing the constitutionality of must carry. However, must carry should be evaluated under the strict scrutiny standard, since such requirements favor one class of speakers over another based on the content of speech. *See Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (the "concept that government may restrict the speech of some elements of society in order to enhance the relative voice of others is wholly foreign to the First Amendment"). Under a strict scrutiny standard, the rules should be invalidated as an infringement on the First Amendment rights of cable programmers, such as INSP, and cable operators.

The District Court based its conclusion on an unduly narrow reading of Supreme Court decisions invalidating regulations affecting the content of speech. Pursuant to the District Court's understanding of the law, a regulation's constitutionality is subject to strict scrutiny analysis only where the regulation "tell[s] the speaker *what* to say or at least what to talk about." *Turner*, 819 F. Supp. at

42 (emphasis in original). However, as another U.S. District Court recently observed in a similar context:

> "a statute that directly abridges the right to engage in . . . speech must be evaluated under the heightened standards that have evolved under the Supreme Court's First Amendment decisions. This is true even when the abridgment is an incidental effect of a statute directed at non-speech activity, such as 'structural' economic regulation, if such a statute disproportionately impacts entities engaged in speech protected by the First Amendment. *See, e.g., Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705 (1986)."

Chesapeake and Potomac Telephone Company of Virginia v. United States, 1993 U.S. Dist. LEXIS 11822, *13 (E.D. Va. August 24, 1993) (finding the Communications Act's cable-telephone cross-ownership prohibition, 47 U.S.C. § 533(b), to be an unconstitutional abridgement of First Amendment rights).

Resting its analysis on the concept that must carry is only an economic regulation, the *Turner* Court wholly ignored precedent establishing that the Supreme Court looks to the *effect* of a regulation, not only to the *intent* of the regulators, in determining whether a regulation should be struck down as being content-based. In each of the last two terms, the Supreme Court has invalidated statutes having a direct impact on speech without regard to whether such an impact was intended by the statutes' drafters. As the Court recently explained, "just last Term we expressly rejected the argument that 'discriminatory . . . treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas.'" *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993) (invalidating ordinance prohibiting distribution of "commercial handbills" on public property), citing *Simon & Schuster, Inc. v. New York State Crime Victims Board*, 112 S. Ct. 501 (1991).

Contrary to the District Court's conclusion, must carry rules have a direct and unavoidable impact on speech.

Before enactment of the Act's must carry provisions, cable operators could choose to carry INSP, if they and their subscribers thought INSP provided a valuable service; since the Act's passage, that choice has been limited by government fiat. One reason for the District Court's misunderstanding of this impact was that its analysis virtually ignored the effect that must carry has on cable *programmers*, as opposed to cable *operators*. INSP's experiences of being dropped from cable systems serving half a million subscribers, and its difficulty in obtaining carriage on any new systems,[9] demonstrate how must carry rules have operated directly to inhibit INSP's speech by limiting the discretion of cable operators to determine whether they would rather carry the signal of a cable programmer or a local broadcast station.

Moreover, as discussed above, the *Quincy* court established the linkage between must carry rules and content, explaining:

> "Although not intended to suppress or protect any particular viewpoint, the rules are explicitly designed to 'favor[] certain classes of speakers over others' [citation omitted]. Their very purpose is to bolster the fortunes of local broadcasters even if the inevitable consequence of implementing that goal is to create an overwhelming competitive advantage over cable programmers. . . .
>
> Viewed from the perspective of the cable operator, the entity that delivers a preselected package of channels to paying subscribers, the must-carry rules are equally intrusive. The rules coerce speech; they require the operator to carry the signals of local broadcasters regardless of their content and irrespective of whether the operator considers them appropriate programming for the comunity it serves."

Quincy, 768 F.2d at 1451-1452.

Judge Williams' opinion in *Turner* also recognized that the District Court had little discretion to decide otherwise.

[9] *See* discussion on pages 4-8, *supra*.

since must carry rules are "content based under controlling precedent." *Turner*, 819 F. Supp. at 59 (Williams, J., dissenting). Following the precedent established by the *Quincy* court, Judge Williams found that must carry is inherently related to content, since the Act's must carry provisions:

> "extend the privilege of access only to a special class of unaffiliated programmers—local commercial and noncommercial television stations. Congress rested its decision to promote these stations in part, but quite explicitly, on a finding about their content—that they were 'an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate.' [citation omitted] . . . In other words, by virtue of provisions of law outside of the 1992 Act, the term used by the Act to define the benefitted class *automatically* entails content requirements.

Id. at 58 (Williams, J., dissenting) (emphasis in original).[10]

Furthermore, contrary to the District Court's view, the Supreme Court takes a broad view as to whether a regulation in fact tells a speaker what to say. For example, in *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781, 795 (1988), the Court struck down a North Carolina law requiring professional fundraisers to disclose certain information to potential donors. The Court held the law to be a content-based regulation of speech, explaining that "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech. . . ." Similarly, the Court in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), found a Florida statute compelling a newspaper to print an editorial reply to be content-based, even though the statute did

[10] Although Congress's reasons for bypassing the Court of Appeals in the instant proceeding are unclear from the Act's legislative history, *see, e.g.*, Committee of Conference, H.R. Conf. Rep. No. 102-862, 102d Cong., 2d Sess. at 98 (1992), it is indisputable that the District Court remains bound by the precedent the Court of Appeals established in *Quincy* and *Century*.

not go so far as to tell a speaker what he or she could or could not say. Since must carry rules mandate speech and treat speech differently based on the nature of the expressive activity (*i.e.* speech emanating from local broadcast stations as opposed to from non-broadcast cable programmers), must carry regulations are content-based under applicable Supreme Court precedent.

Regardless of the justification proffered for must carry rules, regardless of whether those rules allow a cable operator some limited flexibility to select programming for its cable system, and regardless of whether the rules are adopted by the Commission or by Congress, any must carry rules:

> "profoundly affect values that lie near the heart of the First Amendment. They favor one group of speakers over another. They severely impinge on editorial discretion. And, most importantly . . . the rules prevent cable programmers from reaching their intended audience even if that result directly contravenes the preferences of cable subscribers."

Quincy, 468 F.2d at 1453. Because the Act's must carry provisions favor one class of speakers over another and have far more than an incidental effect on freedom of speech, the appropriate standard for evaluating their constitutionality is the strict scrutiny standard. Applying this degree of scrutiny to the newly-enacted must carry rules, they cannot stand. *See R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2542 (1992) ("content-based regulations are presumptively invalid"); *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 540 (1980) (government action restricting First Amendment rights can be sustained only if it is "a precisely drawn means of serving a compelling state interest"); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1977) (government must show a subordinating interest which is compelling).

C. Even If Considered Under the *O'Brien* Test, the Must Carry Rules Still Cannot Pass Constitutional Muster

In the event that the Court chooses to evaluate the Act's must carry requirements using the balancing test of *United States v. O'Brien*, 391 U.S. 367 (1968) rather than the strict scrutiny standard, those requirements still remain unconstitutional on First Amendment grounds, for reasons similar to those enunciated in the *Quincy* and *Century* decisions.

In *Quincy*, as discussed above, the Court of Appeals invalidated the must carry rules finding they could not satisfy even the relatively lenient *O'Brien* standards. The *Quincy* Court said that the Commission had never proven the assumptions underlying its asserted rationale for imposing must carry rules, *Quincy*, 768 F.2d at 1457. Moreover, the Court of Appeals found that the rules were not sufficiently tailored to meet any perceived need and represented a "fatally overbroad response to the perceived fear that cable will displace broadcast television." *Id.* at 1459.

In *Century*, the Court of Appeals' most recent opportunity to address must carry, that Court found simi'ar infirmities in the Commission's second attempt at crafting a must carry rule. The *Century* court found that the rules failed the *O'Brien* test, since the Commission's judgment of the need for such rules had been based "not upon substantial evidence but rather upon several highly dubious assertions. . . ." *Century*, 835 F.2d at 300. In addition, the Commission had not shown that the means it chose to meet this need were congruent with the desired end. Not only were the rules adopted by the Commission broader than needed to achieve its asserted goa's, the *Century* Court said, but the Commission also had failed to consider adequately alternatives to those rules that might have done less damage to First Amendment rights. *Id.* at 304.

1. *Congress Has Not Proven, Nor Could It Have Proven, a "Substantial" Government Interest in Reimposing Must Carry Rules*

The must carry provisions Congress adopted in the Act, like their administrative predecessors, cannot satisfy even the *O'Brien* test. The Act's current must carry provisions are once again based on dubious assumptions that have never been adequately proven and that have in fact recently been disproven. The *Century* Court's criticism of the previous must carry rules applies here with equal force: "The need for a new saga of must-carry rules is more speculative than real. . . . Such speculative fears alone have never been held sufficient to justify trenching on first amendment liberties." *Century*, 835 F.2d at 300.

Expressing extreme deference to Congress,[11] the District Court declined to consider any evidence questioning the validity of Congress' assumptions that must carry requirements were in fact needed. However, the reasons that Congress asserted for adopting new rules demonstrate that those rules are primarily protectionist in nature, protecting broadcasters at the expense of the free speech rights of cable operators, cable programmers, and most severely, new and developing cable networks.

Throughout the Act's legislative history, Congress asserted that must carry rules were needed to help broadcast television to survive trying economic times and to protect broadcasters from cable operators' alleged tendencies to drop broadcast signals for anti-competitive purposes. As the Conference Committee proclaimed:

> "Given the current economic condition of free, local over-the air broadcasting, an affirmative must-carry

[11] "It is not the province of this Court to pass judgment upon the wisdom of the policies the national legislature has chosen to pursue in such endeavors." *Turner*, 819 F. Supp. at 48.

> requirement is the only effective mechanism to promote the overall public interest." [12]

This reference to the "public interest" is a strained one, suggesting that the public interest amounts to no more than the perceived need for local broadcasters to have a guaranteed profit. All of the other harms that Congress found would be caused by its failure to reimpose must carry rules, such as depriving television viewers of the benefits of universally available local television service or limiting the widespread availability of information from diverse sources, *id.* at 63, flow from the central premise that broadcasters need to be protected from cable operators.

Holding aside the questionable government interest in protecting one industry against another or granting access to one type of speaker to the detriment of another, the very premise of the government's argument is faulty: most cable operators continue to carry the signals of most local broadcast stations, nor are they even inclined, in the absence of must carry rules, to drop such signals in the future. The Act itself recognizes that broadcast programming "remains the most popular programming on cable systems" [13] and Congress confirmed in the Act's legislative history that "most cable systems have continued to carry a number of local over-the-air signals." [14] Congress' findings are consistent with the behavior patterns of cable operators found by the Commission itself.[15] The

[12] Committee of Conference, H.R. Conf. Rep. No. 102-862 at 75. *See also* House Comm. on Energy and Commerce, H.R. Rep. No. 102-628, 102d Cong., 2d Sess. at 51-52 (1992) (listing the financial harms caused to broadcasters by not being carried on, or having their signals repositioned by, cable systems).

[13] 1992 Cable Act, § 2(a)(19), 106 Stat. 1462.

[14] House Comm. on Energy and Commerce, H.R. Rep. No. 102-628 at 67.

[15] Staff Report, Policy and Rules Division of the Mass Media Bureau, *Cable System Broadcast Signal Carriage Report*, Sept. 1, 1988, at 11, 13.

Court of Appeals similarly determined that in the 16 months that elapsed between the time of *Quincy* and the Commission's second attempt to impose must carry rules, "cable companies generally did not drop the local broadcast signals that they had been carrying." *Century*, 835 F.2d at 303.[16]

The significant number of television broadcasters that recently chose to forego their must carry rights, and opted instead to seek carriage pursuant to negotiated "retransmission consent" agreements, proves that broadcasters have concluded that they do not need to rely on must carry rules to ensure carriage on cable systems. According to reports in broadcast trade publications, a substantial number, and perhaps a majority, of television stations, affirmatively *declined* to exercise their must carry rights, electing retransmission consent as permitted by the Act.[17] The inescapable conclusion is that contrary to Congress'

[16] Despite the broadcast parties' attempts to justify the need for must carry rules in the District Court proceeding, those parties themselves conceded that the primary mode of cable systems remained that of distributing the signals of television broadcast stations. *See* "Public Broadcasters' Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction and in Support of Public Broadcasters' Motion to Dismiss" at 52 ("In their original and still-preeminent distribution function, cable operators retransmit the signals of broadcast stations."); "Association of Independent Television Stations, Inc.'s Memorandum of Points and Authorities in Support of its Motion for Summary Judgment" at 2, 22 ("Cable television originated as a means of carrying broadcast signals and still functions largely in that role.").

[17] *See, e.g.*, Maddox, "Stations Cast Their Cable Vote," *Electronic Media*, June 21, 1993, at 1, 63 ("a majority of the group owners contacted . . . said they would go for retransmission consent"); "Putting a Price on Free TV," *Broadcasting and Cable*, June 21, 1993, at 7, ("[a]s expected, most commercial stations . . . took the retransmission consent route"); "Broadcasters Opting for Retrans," *Broadcasting and Cable*, June 21, 1993, at 8 ("NAB President Eddie Fritts predicted that 'a substantial number' of broadcasters would opt for retransmission consent rather than seek must carry").

belief that must carry is essential to prevent cable systems from dropping the signals of broadcast stations, broadcasters themselves disagree and deem that they have sufficient market power to ensure their stations' continued carriage.

Moreover, the experience of those broadcasters that elected retransmission consent further proves the point: when presented with the opportunity to refuse carriage to local broadcast stations seeking carriage pursuant to retransmission consent, *almost no* cable operators exercised their prerogative to refuse such carriage.[18] Accordingly, Congress was incorrect in concluding that certain marketplace factors existed that, absent must carry rules, would lead cable operators to discontinue carrying broadcast stations.[19] To the contrary, given the existence of a free market, most cable operators want to and intend to continue carrying local broadcast signals. As Judge Williams recognized in his dissenting opinion, "[s]o long as local broadcast programs continue to be so popular, it appears that cable simply cannot afford to drop broad-

[18] *See, e.g.*, "October 6 Retransmission Consent Disruptions Minimized by Agreements," *Communications Daily*, October 6, 1993, at 1 ("Expected 'massive disruptions' caused by loss of retransmission consent today . . . apparently aren't going to occur"); "Some Heated Retransmission Consent Skirmishes Emerge, But Most Are Settled," *Communications Daily*, October 7, 1993, at 1 (estimating that "at least 95% of cable subscribers saw no disruption at all, and . . . some cases where stations were dropped . . . were likely to settle by today"); Moss, "October 6 Was No Doomsday," *Multichannel News*, October 11, 1993, at 14. Indeed, the issue in retransmission consent negotiations became whether cable operators would *pay* broadcasters to carry their signals, rather than whether cable operators would refuse to carry the broadcasters' signals. *See, e.g.*, Flint, "Stations Stay for No Pay," *Broadcasting and Cable*, October 11, 1993, at 6 ("only a handful of stations continued to insist on cash, withholding permission from systems to carry their signals").

[19] *See, e.g.*, Committee of Conference, H.R. Conf. Rep. No. 102-862, at 75.

cast channels to any significant degree." *Turner*, 819 F. Supp. at 64 (Williams, J., dissenting).

Nor does the suggested government interest in fostering localism satisfy the *O'Brien* test. Congress' assertion that must carry rules are needed to ensure the availability of local news and information programming [20] impermissibly fails to consider cable systems' provision of such programming directly to subscribers, even without relying on the programming provided by television broadcast stations. Many cable systems produce their own local newscasts for carriage on local origination channels. In at least two television markets, Washington, D.C. and Long Island, New York, cable-only channels provide continuous 24-hour local news coverage. Many cable systems also present live coverage of local government meetings and hearings, bulletin boards providing information about local activities and community meetings, and independently-produced public access programming providing coverage of local events.

Accordingly, any Congressional interest in preserving the provision of local news and information should look not only to the local news and information that may be provided by local broadcast television stations, but also to the provision of such programming by cable systems. Even in the absence of must carry rules, local news and information programming will usually be available to cable subscribers as a result of the programming efforts of the cable operator and other non-broadcast users of the cable system.

Furthermore, to the extent that broadcast stations were not carried by cable operators prior to the reimposition of must carry, such stations were generally either: (a) low power television stations; or (b) new or developing full-power television stations garnering only small viewership

[20] *See, e.g.*, House Comm. on Energy and Commerce, H.R. Rep. No. 102-628 at 50, 53.

or transmitting from the fringes of metropolitan areas, providing only marginal signals to the majority of local residents. Under the must carry rules, however, many such full power stations and some low power television stations are entitled to cable carriage, despite the fact that the programming offered by INSP, or by some other non-broadcast source, may better meet the needs and interests of cable subscribers.[21]

The perceived problems leading to the adoption of the Act's must carry provisions simply do not exist on a scale sufficient to rise to the level of a "substantial" government interest.[22] Contrary to the fears that broadcasters have expressed since the earliest days of the cable industry,[23] broadcast signals remain an integral part of the service offered by cable systems. Cable subscribers expect that cable operators will carry the signals of most local broadcast stations and cable operators willingly comply with that expectation. In the absence of must carry rules, those local television stations providing valuable programming to cable viewers will continue to be carried by cable systems.

[21] *See, e.g., Implementation of Section 4(g) of the Cable Consumer Protection Act of 1992*, 8 FCC Rcd 5321 (1993) (*"Home Shopping Decision"*) (extending must carry rights to television stations providing "home shopping" services and Dissenting Statement of Commissioner Duggan questioning whether such stations serve the public interest).

[22] Indeed, any argument that the government's interest in reimposing must carry rules is sufficiently "substantial" to satisfy the *O'Brien* test is undercut by the existence of the retransmission consent provisions of the Act. If Congress' interest in reimposing must carry were truly to ensure that the public retained access to the diverse, local programming that broadcasters may provide, it would not have granted broadcasters the right to opt out of must carry in return for exercising a right to consent to carriage. The existence of the Act's retransmission consent provision further confirms that the must carry provisions were intended to serve broadcasters' private interests rather than any substantial government interest.

[23] *See* discussion on pages 8-9, *supra*.

Furthermore, despite Congress' apparent interest in the availability of diverse sources of information, it has simply ignored the vast diversity of programming already offered by many cable networks, and potentially offered by new cable networks, whose futures are imperiled by must carry rules. Congress used the term "diversity" as if it applies only to the programming provided by television broadcasters.[24] However, the diversity provided to cable subscribers must also be considered to include the wide array of news, public affairs, inspirational, documentary, sports, music, and children's programming, to name just a few, provided by most cable systems over non-broadcast cable networks. Whatever "diversity" may be added to the video marketplace by ensuring the survival of broadcast stations through must carry rules must be balanced against the loss of such diversity by stifling the development of new and developing cable networks that, like INSP, offer their own unique cable programming.

2. Assuming That Congress' Concerns Are Substantial, Must Carry Rules Remain an Inadequate Means of Addressing Those Concerns

If, for the sake of argument, the protectionist nature of must carry rules is disregarded, and Congress' purpose in reimposing must carry were deemed to be the promotion of competition and assurance of the availability of information from diverse sources, Congress has still chosen a method of advancing those interests that may achieve precisely the opposite results. If so, the must carry rules must fall under the final prong of the *O'Brien* test, requiring the least intrusive means of satisfying the governmental interest, even to the extent that the application of the *O'Brien* test to the must carry rules has been modified by *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) and *United States v. Albertini*, 472 U.S. 675, 689 (1985) (upholding a neutral regulation promoting a substantial

[24] *See, e.g.* House Comm. on Energy and Commerce, H.R. Rep. No. 102-628 at 51, 64.

government interest that would be achieved less effectively absent the regulation).[25]

The District Court was excessively and unnecessarily deferential to Congress in refusing to examine any evidence indicating that, in adopting must carry requirements, Congress may have chosen an ineffective method by which to accomplish its goals. The District Court stated simply that it was "unwilling to second-guess Congress' determination that the must-carry provisions are necessary to accomplish its objective." *Turner*, 819 F. Supp. at 47. However, the District Court should not have deemed its authority to be so limited as to preclude any questions concerning Congress' conclusion that must carry was the correct remedy for the perceived ill. This Court has frequently examined, and invalidated, Acts of Congress as infringements on free speech, when those Acts inadequately furthered Congress' goals. *See FCC v. League of Women Voters of California*, 468 U.S. 364 (1984). As another District Court recently explained:

> "It cannot be law that, whenever Congress passes a statute infringing on the right to free expression, it will be inferred by the reviewing courts that Congress considered and rejected the effectiveness of all less restrictive alternatives. Such a proposition would reduce the 'narrowly tailored' prong of the *O'Brien* test to a nullity. Rather, [a] court must undertake its own review of the record to determine whether Congress 'reasonab'y could have' found that [the law] was necessary to effectively accomplish Congress' purposes. *See San Francisco Arts & Athletics,*

[25] Television broadcasters who would obtain a government-mandated right to cable carriage under the must carry rules already have access to the public through their broadcast transmissions. Broadcasters' First Amendment right to speak is not affected by the lack of must carry rules, since even in the absence of cable carriage, such broadcasters already have a licensed transmission method available for their use. By contrast, INSP, like most cable networks, relies primarily on cable television channels to reach the public.

Inc. v. United States Olympic Committee, 483 U.S. 522, 539 (1977)."

Chesapeake and Potomac Telephone Company of Virginia, 1993 U.S. Dist. LEXIS at *27.

Initially, had the District Court undertaken such a review of the record, it would have found numerous alternatives to reimposing must carry rules that would have more effectively, and less intrusively, served Congress' goals. *See, e.g., Turner*, 819 F. Supp. at 57 (Williams, J., dissenting) (suggesting use of the Communications Act's leased access provisions, 47 U.S.C. § 532, as an "easy remedy, entirely consistent with the First Amendment"); *Century*, 835 F.2d at 304, n.6 (questioning whether the Commission "was correct to dismiss peremptorily the less restrictive alternatives to must-carry rules proposed during rulemaking").

Furthermore, had the District Court considered the issue, it would have found that re-imposing must carry has in fact *frustrated* Congress' goals of increasing competition by reducing the marketplace incentive for broadcasters to produce and carry quality programming. This is the case because in the absence of must carry obligations, broadcasters know that they must offer quality programming that viewers will want to watch in order to ensure the carriage of their stations on local cable systems. Broadcasters motivated to obtain cable carriage in such an environment are likely to ensure this result by improving their programming, differentiating their programming from the programming offered by other broadcasters in the market and by cable programmers, or offering a stronger over-the-air signal.

These incentives develop as a result not only of the competition among broadcasters, but also as a result of the competition between broadcasters and cable programmers such as INSP. INSP strives to provide programming that is distinctive in its quality as well as its diversity. In the absence of must carry, INSP, local broadcasters, and

other video programmers have had similar marketplace incentives to provide a mix of quality programming that cable viewers cannot obtain from any other source.

However, since broadcasters know they must be carried pursuant to the must carry rules, the desire to assure themselves of cable carriage no longer serves as an incentive for such stations to improve their product. Such broadcasters could provide programming for which there is limited public demand, transmit an over-the-air signal of only marginal quality, or offer only minimal service to the public, but would still know that their chances of success in the market would be substantially enhanced through cable carriage.[26] By contrast, in a video market without must carry, broadcasters whose programming does not attract large audiences are motivated to program for different market segments and thus to enhance both the diversity and the quality of programming available to television viewers.

In short, contrary to the assertions of Congress that must carry rules are needed to encourage competition, reimposing must carry rules has actually lessened competition and its attendant diversity benefits. Rather than relying on must carry rules, Congress could have ensured that diverse programming will be developed and transmitted to the public by encouraging competition between broadcast stations and cable programmers.[27]

---

[26] Indeed, this result may already be occurring, in light of the Commission's recent decision assuring must carry rights to television stations providing so-called "home shopping" services, whose programming consists almost exclusively of program-length commercials and shopping pitches. *Home Shopping Decision, supra.*

[27] In addition, as demonstrated by the recent round of negotiations between cable operators and broadcasters who opted for carriage pursuant to retransmission consent, broadcasters and cable programmers who compete for cable carriage in a world without must carry often agree to other mutually beneficial arrangements with the cable operator, such as providing programming and marketing support and jointly sponsoring community events. INSP

CONCLUSION

As discussed herein, the efforts of newer cable networks such as INSP to bring quality programming to viewers have been severely undermined by the 1992 Cable Act's must carry provisions. Accordingly, The New Inspirational Network and The Inspirational Network, Inc. herein urge the Court to REVERSE the decision in *Turner Broadcasting System, Inc. v. FCC*, 819 F. Supp. 32 (D.D.C. 1993) and to FIND UNCONSTITUTIONAL the must carry provisions of the Cable Television Consumer Protection and Competition Act of 1992.

Respectfully submitted,

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---

offers such benefits to cable operators, and intends to continue to offer such benefits, but broadcasters may have less motivation to do so absent a market-based incentive to obtain carriage on a cable system.

APPENDIX

APPENDIX

Letters from cable operators announcing that their cable systems must discontinue carriage of The New Inspirational Network due to the imposition of must carry requirements.

1. Letter from Continental Cablevision of Jacksonville, May 21, 1993
2. Letter from MultiVision Cable TV, April 20, 1993
3. Letter from Paragon Cable, June 16, 1993
4. Letter from Comcast Cable Communications, Inc., June 30, 1993
5. Letter from Liberty Cable, October 18, 1993

[LOGO]

CONTINENTAL CABLEVISION OF JACKSONVILLE
P.O. Box 17613-F • 5934 Richard Street
Jacksonville, Florida 32245-7613 • (904) 731-8810

May 21, 1993

Mr. Bill McCall
Manager
Southeast Affiliate Relations
The Inspirational Network
9700 Southern Pine Blvd.
Charlotte, NC 28273

Dear Bill:

Thanks very much for your letter and visit with George Thorry this past week. I appreciate your willingness to communicate your concerns and offer alternatives as we cope with the many decisions associated with the new must-carry rules in Jacksonville. I'm sure you can understand the uncomfortable environment we face as we try to allocate scarce resources, and continue to grow our business in a sea of regulatory restraints.

It is still our plan to discontinue carriage of the network on or about June 2, 1993. To reiterate a point that George made during his meeting with you, we want to keep the door open to any ideas you might share on how we can provide an effective package of quality inspirational programming to our customers.

Thanks again for visiting with us.

Sincerely,

/s/ W. Scott Westerman
W. SCOTT WESTERMAN
Vice President District Manager
Continental Cablevision of Jacksonville

[LOGO]

MULTIVISION

April 20, 1993

Mr. Tim Himmelwright
The New Inspirational Network
9700 Southern Pine Blvd
Charlotte, NC 28273

Dear Tim,

MultiVision Cable TV currently carries INSP part time on its Lanham, MD system and full time on its Leesburg, VA system. We are required to add two local broadcast stations in each system to comply with the must-carry provisions of the 1992 Cable Act. Channel 66 WTKK from Manassas, VA must be added in both systems. WTKK carries many of the same programs that INSP carries.

MultiVision will no longer carry INSP after June 1, 1993 on either system because of limited channel capacity and the duplication of programming with WTKK. I appreciate the support you have given to MultiVision and the cable industry, and I regret that we will no longer be an affiliate of INSP.

As you requested, I have enclosed a copy of INSP's May schedule. The hours within the blocks are when INSP is carried in Lanham. The highlighted programs are also carried on WTKK, WDCA, or WFTY. A copy of the program schedule for WTKK is also enclosed.

Sincerely,

MULTIVISION CABLE TV

/s/ David A. Wilson
DAVID A. WILSON
Vice President and Regional General Manager

Enclosure

MultiVision Cable TV
9609 Annapolis Road
Lanham, MD 20706
Tel: (301) 306-5700
FAX: (301) 731-7822

[Logo]

PARAGON
CABLE

2600 McCormick Drive, Suite 255
Clearwater, Florida 34619 813/791-7730

June 16, 1993

Bill McCall
The New Inspirational Network
9700 Southern Pine Blvd.
Charlotte, NC 28273

Dear Bill:

In order to satisfy our must-carry requirements on our Lakeland and Haines City cable systems, we need to remove a cable satellite service. The station being added will go on the system on 7/1/93.

After reviewing our line-up we have decided to remove the New Inspirational Network to make room for this must-carry station.

Rest assured, this was not an easy decision, but one that had to be made to comply with the new regulations. Feel free to call me with any questions or concerns.

Best Regards,

/s/ Anthony L. Marino
ANTHONY L. MARINO
Vice President
Marketing & Programming
TAMPA BAY DIVISION

ALM:dp

Comcast Cable
Communications, Inc.
1234 Market Street
Philadelphia, PA 19107-3723
215 665-1700

[Logo]

COMCAST

June 30, 1993

Mr. Jim Dickson
The New Inspirational Network
6860 S. Yosemite Court
Suite 200
Englewood, CO 80112

Dear Jim:

Please be advised that in order to comply with Federal "Must Carry" regulations, Comcast will cease transmission of the Inspirational Network in North Little Rock, Arkansas effective July 1, 1993.

Thank you in advance for your understanding in this matter. If you have any questions or concerns, please do not hesitate to contact me at (215) 981-7704.

Very truly yours,

/s Ellen M. Stone
Ellen M. Stone
Programming Manager

EMS pmh

cc: M. Young
G. Colvin
M. Wilson

[Logo]

LIBERTY
CABLE

Liberty Cable
3125 Firestone Boulevard
South Gate, California 90280

(213) 566-3991
(818) 443-4133

October 18, 1993

Fernando Gomez
Manager, Affiliate Relations
Inspirational Network
1888 Century Park East
19th Floor
Los Angeles, CA 90067

Dear Fernando:

This correspondence shall serve as official notice that due to retransmission and must carry responsibilities created by the 1992 Cable Act, effective 11 18 93, Consolidated Signal Corporation (d.b.a. Liberty Cable) will no longer carry the Inspirational Network.

As a cable network programmer you can appreciate the new awesome responsibilities caused by the 1992 Cable Act. We, as many of our industry counterparts, are doing our very best to meet these new challenges head on.

We appreciate the Inspirational Channel's past spirit of cooperating and support.

Sincerely,

s/ Michael A. Green
MICHAEL A. GREEN
President
Chief Operating Officer

cc: Matt Davis
Mike Beller
File

Supreme Court, U.S.
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No. 93-44

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,
v.
FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF CITIZENS FOR A SOUND ECONOMY FOUNDATION AS AMICUS CURIAE IN SUPPORT OF APPELLANTS TURNER BROADCASTING SYSTEM, INC., ET AL. IN CASE NO. 93-44

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Associated Press v. United States, 326 U.S. 1 (1945) 5
Buckley v. Valeo, 424 U.S. 1 (1976) 8
City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988) 5
City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488 (1986) 7, 10, 11
City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) 8
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Cohen v. Cowles Media Co., 111 S. Ct. 2513 (1991) 6
Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973) ..... *passim*
Community Communications Co. v. City of Boulder, 660 F.2d 1370 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982) 13
FCC v. League of Women Voters of California, 468 U.S. 364 (1984) 13
FCC v. Midwest Video Corp., 440 U.S. 689 (1979) 7
FCC v. Pacifica Foundation, 438 U.S. 726 (1978) 13
Freedman v. Maryland, 380 U.S. 51 (1965) 12
Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) 12
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Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984) 9
Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) ..... *passim*
Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983) 5
Mutual Film Corp. v. Industrial Commission of Ohio, 236 U.S. 230 (1915) 12
National Broadcasting Co. v. United States, 319 U.S. 190 (1943) 12
Omega Satellite Products Co. v. City of Indianapolis, 694 F.2d 119 (7th Cir. 1982) 13

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Pacific Gas & Elec. Co. v. Public Utilities Comm'n, 475 U.S. 1 (1986) 6, 7
Preferred Communications, Inc. v. City of Los Angeles, Calif., 754 F.2d 1396 (9th Cir. 1985), *aff'd sub nom. City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986) 14, 16, 17
PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980) 7
Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986) ..... *passim*
Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) ..... *passim*
Riley v. National Fed'n of the Blind of North Carolina, Inc., 487 U.S. 781 (1988) 6, 18, 19
Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board, 112 S. Ct. 501 (1991) 10
Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) 11
Telecommunications Research & Action Center v. FCC, 801 F.2d 501 (1986), *cert. denied*, 482 U.S. 919 (1987) 20
Telesat Cablevision, Inc. v. City of Riviera Beach, 773 F. Supp. 383 (S.D. Fla. 1991) 13
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Constitution and Statutes

U.S. Const. Amend. I ..... *passim*
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§ 4(b)(1)(B) (47 U.S.C. § 534(b)(1)(B))	2
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Miscellaneous	
J. Emord, FREEDOM, TECHNOLOGY, AND THE FIRST AMENDMENT (1993)	11
George Gilder, *What Spectrum Shortage?*, FORBES, May 27, 1991	19
Thomas W. Hazlett, *Private Monopoly and the Public Interest: An Economic Analysis of the Cable Television Franchise*, 134 Univ. Pa. L. Rev. 1335 (1986)	14
P. Huber, M. Kellogg & J. Thorne, THE GEODESIC NETWORK II: 1993 REPORT ON COMPETITION IN THE TELEPHONE INDUSTRY (1992)	21
Elizabeth Kastor, *It's a Wrap: Dallas Kills Film Board; To Save $60,000, City Stops Rating Movies*, Wash. Post, Aug. 13, 1993	12
William E. Lee, *Cable Franchising and the First Amendment*, 36 Vand. L. Rev. 867 (1983)	14
Licensing Broadcasters: Just What the Framers Feared?, CATO POLICY REPORT (Jan./Feb. 1988)	21
I. Pool, TECHNOLOGIES OF FREEDOM (1983)	10, 11
Glen O. Robinson, *Cable Television and the First Amendment*, 6 Comm. & the Law, 47 (1984)	18
A. Schlesinger, PRELUDE TO INDEPENDENCE (1958)	16
S. Rep. No. 102-92, 102d Cong., 1st Sess. (1991), *reprinted in* 1992 *U.S.C.C.A.N.* 1133	18
U.S. Congress, Office of Technology Assessment, *Science, Technology and the First Amendment*, OTA-CIT-369 (Washington, D.C.: U.S. Government Printing Office, January 1988)	20

IN THE

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OCTOBER TERM, 1993

No. 93-44

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v.

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On Appeal from the United States District Court for the District of Columbia

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BRIEF OF CITIZENS FOR A SOUND ECONOMY FOUNDATION AS AMICUS CURIAE IN SUPPORT OF APPELLANTS TURNER BROADCASTING SYSTEM, INC., ET AL. IN CASE NO. 93-44

INTEREST OF THE AMICUS CURIAE

Citizens for a Sound Economy Foundation ("CSE Foundation") submits this brief as amicus curiae in support of Appellants Turner Broadcasting System, Inc., et al.[1] Amicus CSE Foundation is a non-profit 501(c)(3) educational institution which promotes initiatives that foster economic growth and enhance the quality of life

[1] Consistent with Supreme Court Rule 37.3, all parties have given CSE Foundation their consent to the filing of this brief.

for its 250,00 members and all consumers. Amicus wishes to bring information to this Court's attention concerning why these must-carry regulations violate the First Amendment, and more importantly, why this Court should recognize full First Amendment protection for cable and all other electronic publishers. Lesser protection would inevitably burden the free speech of all and hinder technological advancements to the detriment of consumers and Amicus CSE Foundation's members.

BACKGROUND STATEMENT

Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 102 Stat. 1460 (47 U.S.C. §§ 534, 535) ("Cable Act of 1992") require cable operators to carry certain local broadcast stations on their cable systems.[2] Both sections prohibit cable operators from altering the content of or receiving compensation for carrying such stations. In the decision below, the majority upheld these "must-carry" regulations, rejecting appellants' First Amendment challenge. The majority found that the must-carry regulations are essentially economic regulations designed to create competition in the video industry and redress cable operators' anticompetitive practices. The court rejected a strict scrutiny level of review and upheld the regulations after applying the more lenient test established in *United States v. O'Brien*, 391 U.S. 367 (1968). The dissent viewed the must-carry regulations as content-based regulations, applied strict scrutiny review, and concluded that the regulations violated appellants' First Amendment rights.

---

[2] Section 4 concerns mandatory carriage with respect to local commercial television stations. 47 U.S.C. § 534. For example, cable operators with more than 12 usable activated channels must carry such stations up to 33% of its channel capacity. § 4(b)(1)(B), 47 U.S.C. § 534(b)(1)(B). Section 5 contains similar provisions with respect to local noncommercial educational television stations. 47 U.S.C. § 535.

SUMMARY OF ARGUMENT

The must-carry regulations are speaker-specific, content-based regulations on speech, and therefore, must be subject to strict scrutiny review. *O'Brien*'s deferential test is inappropriate and dangerously inadequate to review these regulations, which strike at the core of free speech: editorial discretion. These regulations would not survive strict scrutiny review.

This Court should also recognize that cable operators (and cable programmers) are entitled to enjoy the same level of First Amendment protection that this Court has recognized for the print press. *See, e.g., Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

This Court's jurisprudence has thus far provided that some speakers have less First Amendment protection based on their *medium* of communication. First Amendment protection should not be based on the nature of the medium. Rather, all speech should be fully protected by the First Amendment no matter how it is delivered. The Information Age we live in is marked by a continuous revolution in telecommunications technology. A First Amendment jurisprudence that seeks to define rights by reference to extant technology will be forever outmoded and, more importantly, will infringe upon the protected speech of new electronic speakers.

ARGUMENT

I. *O'BRIEN*'S DEFERENTIAL TEST IS INAPPROPRIATE TO REVIEW SPEAKER-SPECIFIC, CONTENT-BASED REGULATIONS

O'Brien's deferential review is applicable only to those general regulations directed at "noncommunicative conduct" and "not related to expression" that have an *incidental* impact on the exercise of free speech.[3] The statute at issue in *O'Brien*, which prohibited the destruction of a Selective Service draft card, was upheld because it "plainly [did] not abridge free speech on its face . . . and deal[t] with *conduct* having no connection with speech." *United States v. O'Brien*, 391 U.S. at 375 (emphasis added).[4] *O'Brien*'s less burdensome standard is inappropriate to review the speaker-specific, content-based must-carry regulations.

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[3] *Texas v. Johnson*, 491 U.S. 397, 403 (1989). Under *O'Brien*, a "government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restrictions on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States v. O'Brien*, 391 U.S. at 377.

[4] This Court recently emphasized *O'Brien*'s limited applicability: "In stating, moreover, that *O'Brien*'s test 'in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions,' we have highlighted the requirement that the governmental interest in question be unconnected to expression in order to come under *O'Brien*'s less demanding rule." *Texas v. Johnson*, 491 U.S. at 407 (1989), *quoting Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984) (internal citations omitted). Similarly, time, place, and manner restrictions must be "'*justified* without reference to the content of the regulated speech.'" *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), *quoting Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (emphasis added in *Ward*).

A. Must-Carry Regulations Are Directed At Speech

The must-carry regulations target "speech" and, therefore, *O'Brien*'s premise is never met. There is no "nonspeech" or "noncommunicative" element present.[5] Cable operators exist to deliver programming, speech protected under the First Amendment.[6] This Court's jurisprudence views laws that target the press as presumptively unconstitutional and subject to strict scrutiny review. *See, e.g., Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) (striking down a special use tax on ink and paper).

Because these regulations target a specific press medium, and are not generally applicable, the government is wrong in its suggestion that *Associated Press v. United States*, 326 U.S. 1 (1945) provides the proper framework for review. Government's Motion to Affirm ("Govt. Motion") at 10. That case upheld the application of a *generally* applicable law, the Sherman Antitrust Act, to anticompetitive activities of the press.

The government attempts to bring these speaker-specific regulations under *Associated Press* by equating a *specific* enforcement action against the press brought under the antitrust laws with a law that *targets* the press. Govt. Motion at 11 n.8. Obviously, all general laws must be applied against specific parties, including members of the

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[5] Any noncommunicative function of the cable industry, such as laying wire, is constitutionally indistinguishable from the noncommunicative functions of the print press, such as building a printing press or purchasing ink. Both are necessary functions to deliver the message and therefore this Court has always treated legislation targeting such functions as attacks on speech and therefore subject to strict scrutiny review. *See, e.g., Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988).

[6] *See, e.g., Leathers v. Medlock*, 111 S.Ct. 1438, 1442 (1991) (Cable television "is engaged in 'speech' under the First Amendment, and is, in much of its operation, part of the 'press.'").

press. As this Court has noted, "generally applicable laws do not offend the First Amendment simply because their *enforcement against the press* has incidental effects on its ability to gather and report the news." *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513, 2518 (1991) (emphasis added).

If the cable industry is engaging in anticompetitive practices, the government may prosecute under the antitrust laws. The regulations at issue here have nothing to do with the general "business" aspects of the cable industry. Rather, they target the press's "speech," and therefore, *O'Brien* is inapplicable. The nature of these regulations require strict scrutiny review.

B. Must-Carry Regulations Are Content-Based Intrusions On Editorial Discretion

The must-carry regulations are content-based intrusions because they require cable operators to carry another's message, regardless of the cable operator's preference. "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech . . . [T]herefore [such a law is a] content-based regulation of speech." *Riley v. National Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 795 (1988). This Court's rulings make it clear that it is impermissible to "identif[y] a favored speaker 'based on the identity of the interests that [the speaker] may represent' and force[] the speaker's opponent . . . to assist in disseminating the [favored] speaker's message." *Pacific Gas & Elec. Co. v. Public Utilities Comm'n*, 475 U.S. 1, 15 (1986), *quoting First National Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978).

The First Amendment protects "the decision of both what to say and what *not* to say." *Riley v. National Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. at 797 (emphasis in original). This infringement on the cable operator's "choice[] of what to say and what to leave unsaid . . . [is] impermissible." *Pacific Gas & Elec. Co.*

v. Public Utilities Comm'n, 475 U.S. at 11.[7] In the press context, these regulations are particularly offensive to the First Amendment because they strike at the heart of a free press—editorial discretion. *See, e.g., Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974).[8] As such, they must be subject to strict scrutiny review.

Because the must-carry regulations infringe on the editorial discretion of a member of the press, the lower court's reliance on *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) to uphold the regulations is misplaced. In *PruneYard*, a shopping center owner had denied certain individuals permission to distribute information on his property. The California Supreme Court ruled that the state constitution required access to the shopping center. This Court rejected the shopping center owner's First Amendment argument that this state-based access requirement impermissibly burdened his First

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[7] In *Pacific Gas & Elec. Co. v. Public Utilities Comm'n*, 475 U.S. 1 (1986), this Court struck down a commission's order which required a utility company to include a third party's newsletter in its customer billing envelopes. "'The essential thrust of the First Amendment [includes] . . . a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.'" *Id.* at 11, *quoting Estate of Hemingway v. Random House*, 23 N.Y.2d 341, 348, 296 N.Y.S.2d 771, 776, 244 N.E.2d 250, 255 (1968) (emphasis in original).

[8] This Court has recognized that cable operators exercise editorial discretion. *See, e.g., City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986); *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979). Cable operators follow a process similar to that of newspaper editors. They review potential programming sources, as a newspaper editor reviews wire copy. They select from among those sources particular kinds of programming to carry on their channels. That is a function akin to a newspaper editor's selection of copy. They choose channel placements for programming. That is a function akin to a newspaper editor's selection of column space to carry stories. With these basic commonalities, it cannot be seriously doubted that cable operators are editors.

Amendment rights, in part, because it concluded that such access did not intrude on any editorial discretion. Thus, *PruneYard* is inapposite to *federal* regulations targeting the press, particularly ones that infringe upon editorial discretion.

These regulations are also content-based because, as the dissent below noted, "Congress rested its decision to promote these [broadcast] stations in part, but quite explicitly, on a finding about their content—that they were 'an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate.'" J.S. App. 51a, *quoting* Cable Act of 1992, § 2(a)(11), 106 Stat. 1461.[9] Thus, Congress selected a favored class of speakers (local broadcasters) to the detriment of another class (cable programmers).

As Judge Williams noted below, "[g]iven the finite number of channels, replacement of the cablecaster's choice of programs with those of local broadcasters suppresses the alternative programs as completely as if Congress had ordered them shut down." J.S. App. 55a (footnote omitted).[10] But this Court has long recognized that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 48-9 (1976).

[9] This justification also makes the regulations content-based under *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). In *Renton*, the Court concluded that an ordinance regulating adult movie theaters (defined by the content of the movies) was content-neutral because it was targeted not at the *content* of such movies but at the noncommunicative *secondary effects* of the theaters. Here, Congress has offered *no* secondary effect rationale unrelated to speech.

[10] *See also Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1451 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986) ("In the case of systems saturated with mandatory signals, cable programmers are shut out entirely from the only forum capable of conveying their programming.").

The danger in applying *O'Brien's* lenient standard of review to speaker-specific, content-based regulations is that the test's deference presumes the constitutionality of the statute at issue. All general regulatory statutes necessarily will have some limiting effect on free expression. Because the test is properly applied to review only general regulatory statutes not directed at speech, *O'Brien*'s interest-balancing test is heavily weighted in the government's favor. It presumes a statute's *incidental* impact on free speech is constitutionally permissible.[11]

Thus, *O'Brien* is dangerously inadequate to review the must-carry regulations because those regulations target the press (and therefore speech) and are content-based.[12] However, the conclusion that *O'Brien*'s deferential standard is inappropriate to review these regulations does not end the constitutional inquiry.

II. FIRST AMENDMENT PROTECTION FOR SPEECH SHOULD NOT VARY BASED ON THE MEDIUM USED

This Court's First Amendment jurisprudence has indicated that some speakers have less First Amendment protection due to the nature of the medium of communication. Thus, content-based regulations, such as the Fairness

[11] *See, e.g., Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984); *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984); *United States v. Albertini*, 472 U.S. 675 (1985).

[12] Even under *O'Brien*'s less demanding standard, however, these must carry provisions must fail. As Appellant Turner notes in its Reply Brief, the "must carry provisions—divesting editorial discretion from *all* cable operators *as a class* for the benefit of *all* broadcasters *as a class* at the expense of *all* cable programmers *as a class*—are about the most blunt instruments imaginable for protecting against genuinely anticompetitive actions." Appellant Turner Broadcasting System, Inc.'s Reply Brief in Opposition to Motions to Affirm at 6. Thus, "a substantial portion of the burden on speech does not serve to advance its goals." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

Doctrine, have been upheld when applied to the broadcast medium, though found impermissible when applied to newspapers. *Compare Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), *with Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). Were cable afforded the same First Amendment protection as newspapers, these must-carry regulations would not survive constitutional review.[13] The fundamental question before this Court then is whether cable should be given full First Amendment protection, as articulated in *Tornillo*, or whether, because of its medium of delivery, it is only entitled to a lower level of protection, similar to *Red Lion*.

Thus far, this Court has indicated, in sometimes cryptic terms, that cable television "is engaged in 'speech' under the First Amendment, and is, in much of its operation, part of the 'press.'" *Leathers v. Medlock*, 111 S. Ct. at 1442.[14] Nevertheless, despite grappling with cable's status for over 20 years, this Court has been reluctant to define cable's First Amendment protection.[15] Unfortunately, this

[13] *See Turner Broadcasting Syst., Inc. v. FCC*, 113 S.Ct. 1806, 1807-08 (1993) (Rehnquist, C.J., in chambers) ("Under *Tornillo*, Congress plainly could not impose the must-carry provisions on privately owned newspapers."). In *Tornillo*, the Court struck down a right-of-reply statute without applying *any* balancing test. Other decisions have subjected content-based restrictions to strict scrutiny review and will only be upheld if the "regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 112 S.Ct. 501, 509 (1991), *quoting Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987). These must-carry regulations would not survive strict scrutiny review.

[14] This Court has recognized that cable operators exercise a significant amount of editorial discretion with respect to programming supplied to subscribers. *See, e.g., City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986).

[15] In *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986), this Court noted that "[c]able television

Court's reluctance to recognize full First Amendment protection with respect to cable puts cable in familiar company with other new media developed in this century, such as motion pictures and broadcasting.[16]

A. This Court Has Justified Lower First Amendment Protection By Distinguishing New Media From The Print Press

In confronting new media, this Court has been very hesitant to grant full First Amendment protection comparable to that enjoyed by the print press. Rather, this Court has sought to distinguish new media from print media, thereby justifying a different (always lower) level of First Amendment protection for the former.[17] Unfortunately, because the Court has focused on the medium, and not the message, the government has been allowed to infringe severely upon the First Amendment rights of electronic publishers. The result: With the advent of the electronic age, a great deal of speech is subject to regulation inconsistent with First Amendment principles.[18]

partakes of some of the aspects of speech and the communication of ideas as do the traditional [press]." *Id.* at 494. This view demonstrates the long-standing bias against recognizing cable as a fully protected First Amendment speaker. Of what "aspects of speech" does the traditional press partake that cable does not? There seem to be none.

[16] *See, e.g.*, J. Emord, FREEDOM, TECHNOLOGY, AND THE FIRST AMENDMENT (1991).

[17] *See, e.g., Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969) ("[D]ifferences in the characteristics of new media justify differences in the First Amendment standards applied to them."); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975) ("Each medium of expression . . . must be addressed for First Amendment purposes by standards suited to it, for each may present its own problems.").

[18] Ithiel de Sola Pool explained the effect of the Court's approach as follows: "A long series of precedents, each based on the last and treating clumsy new technologies in their early forms as specialized business machines, has led to a scholastic set of dis-

1. *Cinema*

As curious as it may seem now, in 1915 this Court ruled that motion pictures were not part of the press and therefore did not merit any First Amendment protection. *Mutual Film Corp. v. Industrial Commission of Ohio*, 236 U.S. 230 (1915). In upholding a censorship board to review motion pictures before distribution, this Court noted that motion pictures did not merit any First Amendment protection because "the exhibition of moving pictures is a business, pure and simple, originated and conducted for profit, like other spectacles, not to be regarded . . . as part of the press . . . ." *Id.* at 244.

In reasoning similar to that used to justify lower First Amendment protection for cable, the Court noted that motion pictures were mere conduits of another's information, "mere representations of events, of ideas and sentiments published and known." *Id.* at 244. It took *37* years before the Court specifically overruled *Mutual Film* in *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).[19]

2. *Broadcast*

In confronting First Amendment rights asserted by radio and television broadcasters, this Court justified greater governmental regulation, including content controls, based on the physical scarcity of the spectrum and physical interference. *See National Broadcasting Co. v. United States*, 319 U.S. 190, 226 (1943) ("Unlike other modes of expression, radio inherently is not available to all. That

tinctions that no longer correspond to reality. As new technologies have acquired the functions of the press, they have not acquired the rights of the press." I. Pool, TECHNOLOGIES OF FREEDOM 250 (1983).

[19] Nevertheless, this Court ruled in 1965 that motion pictures could still be subject to censorship boards pursuant to certain procedural safeguards. *See Freedman v. Maryland*, 380 U.S. 51, 58 (1965). The last local movie review board was open until this past summer. *See* Elizabeth Kastor, *It's a Wrap: Dallas Kills Film Board; To Save $60,000, City Stops Rating Movies*, Wash. Post, Aug. 13, 1993, at D1.

is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation."); *Red Lion Broadcasting Corp. v. FCC*, 395 U.S. 367, 390 (1969); *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984). In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), this Court ruled that regulation of indecent broadcasting was justified because broadcasting was "uniquely pervasive" and "uniquely accessible to children." *Id.* at 748-49. By finding unique characteristics with respect to the *medium* of communication, the Court has justified content regulation of protected speech, which, if delivered through the print medium, would be struck down.

3. *Cable*

Like its predecessors, cable has been distinguished from the print press because of its mode of delivery. The most common arguments are that cable must use public rights of way, is a natural monopoly, and exercises much less editorial discretion than newspapers.[20] In this case, appellees have also argued that cable has received government assistance in securing the right to retransmit the programs of broadcast channels, free of charge (through compulsory copyright access), and that cable can privately censor broadcasters (a variant of the natural monopoly argument).

The public rights of way argument is fatally flawed. Newspapers, too, must use public rights of way for delivery, through the placement of vending machines on public sidewalks and the use of public streets by newspaper trucks. Even if a cable system did impose a slightly different burden, the proposition that such use (and reg-

[20] *See, e.g., Omega Satellite Products Co. v. City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982); *Community Communications Co. v. City of Boulder*, 660 F.2d 1370 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982); *Telesat Cablevision, Inc. v. City of Riviera Beach*, 773 F. Supp. 383 (S.D. Fla. 1991).

ulation) justifies *content* control does not follow. As *Quincy* recognized: "No doubt a municipality has some power to control the placement of newspaper vending machines. But any effort to use that power as the basis for dictating what must be placed in such machines would surely be invalid." [21]

A useful analogy may help expose the bias against non-print media inherent in this argument. Suppose a law required newspaper vendors who operate only on public sidewalks to carry the local newspapers or books by local writers. A vendor could sell *USA Today* but only if the vendor also carried the *Washington Post*. Such a law would be struck down before the ink was dry on the legislation. In this sense, the position of a cable operator is no different than our hypothetical newspaper vendor.

The natural monopoly private censorship argument is equally flawed. It is arguable whether cable is a natural monopoly, rather its monopolistic characteristics may be caused deliberately by political choices.[22] Nevertheless,

[21] *Quincy Cable TV, Inc. v. FCC*, 768 F.2d at 1449; *see also Preferred Communications, Inc. v. City of Los Angeles, Calif.*, 754 F.2d 1396, 1406 (9th Cir. 1985), *aff'd sub nom. City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986); Lee, *Cable Franchising and the First Amendment*, 36 Vand. L. Rev. 867, 889-898 (1983) (arguing that this Court's decisions concerning regulation of public facilities, such as streets, provide constitutional protection against content-based intrusions).

[22] *Quincy* noted that "the 'economic scarcity' argument rests on the entirely unproven—and indeed doubtful—assumption that cable operators are in a position to exact monopolistic charges. . . Moreover, the tendency toward monopoly, if present at all, may well be attributable more to governmental action—particularly the municipal franchising process—than to any 'natural' economic phenomenon." *Quincy Cable TV, Inc. v. FCC*, 768 F.2d at 1450 (citations omitted); *see also* William E. Lee, *Cable Franchising and the First Amendment*, 36 Vand. L. Rev. 867, 880-887 (1983) (discussing lack of empirical proof and the need to define the relevant product market); Thomas W. Hazlett, *Private Monopoly and the Public Interest: An Economic Analysis of the Cable Television Franchise*, 134 Univ. Pa. L. Rev. 1335 (1986).

"whatever the outcome of the debate over the monopolistic characteristics of cable, the Supreme Court has categorically rejected the suggestion that purely economic constraints on the number of voices available in a given community justify otherwise unwarranted intrusions into First Amendment rights." [23] In *Tornillo*, the Court went to great lengths to illustrate the prevalence of one-newspaper cities, the growth of national newspaper chains, and the prohibitive costs of entering the newspaper business. Despite such findings, this Court struck down a right-of-reply statute. Thus, the natural monopoly argument is irrelevant because "there is no meaningful 'distinction between cable television and newspapers on this point.'" *Id., quoting Home Box Office, Inc. v. FCC*, 567 F.2d 9, 46 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977).[24]

The government argues that cable operators deserve less First Amendment protection because although they exercise editorial discretion, cable operators' "functions are quite distinct when they serve as passive conduits retransmitting the programming of others, rather than originating programming of their own." Govt. Motion at

[23] *Quincy Cable TV, Inc. v. FCC*, 768 F.2d at 1450, *citing Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241 (1973).

[24] In an otherwise superb opinion—which reaches the right result and applies the proper standard of review to these must-carry provisions—Judge Williams errs when he suggests that the mandatory access provisions in the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (47 U.S.C. § 532), as amended, would pass constitutional muster under *Tornillo*. He seeks to distinguish cable from print by noting its special character—"bottleneck control of access to an important medium." J.S. App. 71a. As discussed, *supra*, one-cable towns are often due to political factors. Moreover, *Tornillo* recognized the "bottleneck" features of the press industry and still rejected the right-of-reply statute. The gravamen of *Tornillo* was that all access provisions unconstitutionally intrude on editorial discretion.

27-28. The proposition that cable operators exercise less editorial discretion than newspapers because they transmit others programming is dubious at best. The content of many small town newspapers, for example, is generated not by the paper's staff writers but by national wire services. Similarly, most op ed pages of major newspapers carry syndicated writers, again merely transmitting a third party's message. But such "retransmissions" in newspapers are never used to classify newspapers as passive conduits.

Such a view also does not correspond with history. Arthur Schlesinger described the workings of the colonial newspaper editor: "Not until the rise of the troubles with Britain did the editor come to think of himself as a maker of opinion as well as a *transmitter* of news and literary offerings. Yet he unwittingly did something, however little, in that direction by the very act of deciding what to put in or leave out of his paper, and once in a great while he offered a terse comment of his own." [25]

Appel'ees argument that cable's prior receipt of governmental assistance justifies increased regulation is equally unavailing. As the dissent below noted, government largesse does not condemn one to second-class First Amendment protection. J.S. App. 70a. If that were the test, newspapers would surely be one of the most regulated industries. *See, e.g., Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 145 (1973) (Stewart, J., concurring) (noting that newspapers receive Government mail subsidies and a limited antitrust immunity).

Finally, the government's argument that cable is distinct from the print press because, unlike the print press, cable has been subject to a long history of regulation "merely begs the question." *Preferred Communications,*

[25] A. Schlesinger, PRELUDE TO INDEPENDENCE 61 (1958) (emphasis added).

Inc. v. City of Los Angeles, Calif., 754 F.2d 1396, 1405 n.8 (9th Cir. 1985), *aff'd sub nom. City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986). This argument is akin to saying in the Reconstruction Era that because former slaves had been subject to slavery for 200 years, they would only be entitled to lower constitutional guarantees of freedom. Obviously, if something is wrong, the fact that it has been wrong a long time does not make it right.

All of the arguments attempting to distinguish cable from the print press to justify lower First Amendment protections ring hollow and emphasize the point that "[t]here is never a paucity of arguments in favor of limiting the freedom of the press." *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. at 144 (Stewart, J., concurring).

B. First Amendment Values Do Not Justify Content-Based Regulation

Legislative intrusions on new electronic media are usually taken in pursuit of First Amendment "values"—thus the government steps in to ensure a vibrant marketplace of ideas. For example, in *Red Lion*, the Court cited the First Amendment's "ends and purposes" in sacrificing the editorial discretion of broadcasters and making the listener's interest paramount.[26]

In another decision, this Court noted "an unusual order of First Amendment values" present when considering the broadcast medium.[27] In justifying the must-carry regula-

[26] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 390. The Court added: "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount . . . [and] [i]t is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here." *Id.* at 390-91.

[27] *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 101 (1973).

tions, Congress cited the First Amendment values of promoting a diversity of views and ensuring that all viewers, not just cable subscribers, have access to local broadcast stations. Cable Act of 1992, § 2(a)(6)-(12), 106 Stat. 1461. Thus, the cable operator's editorial discretion would be sacrificed for a larger good.[28]

These actions (and justifications) run afoul of the basic principle that the First Amendment protects the press from governmental interference. "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press." *Riley v. National Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 791 (1988), *quoting Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).[29]

Red Lion's audience-rights approach to the First Amendment turns the purpose of the Amendment on its head—a bulwark that guaranteed that the government may not interfere with free speech becomes the very excuse to interfere.[30] It is a "frightening specter" to view

[28] According to the Senate committee report to the Cable Act of 1922, "[t]he First Amendment also supports government regulations intended to promote a diversity of voices, even if some incidental loss of editorial discretion results. Local signal carriage regulations ensure that cable subscribers receive a diversity of voices, not just the signals chosen by the cable operator." S. Rep. No. 102-92, 102d Cong., 1st Sess. (1991), *reprinted in* 1992 *U.S.C.C.A.N.* 1133, 1189.

[29] Thus, "[t]o this end, the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government." *Id.*; *see also Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. at 146 (Stewart, J., concurring) ("If we must choose whether editorial decisions are to be made in the free judgment of individual broadcasters, or imposed by bureaucratic fiat, the choice must be for freedom.").

[30] *See* Glen O. Robinson, *Cable Television and the First Amendment*, 6 Comm. & the Law 47, 53 (1984) (noting also that for constitutional adjudication, the audience-rights approach "seems mischievous; it undermines the very essence of the First Amendment, as a restraint on government interference, insofar as it subordinates the right of a speaker to speak what he wants to speak to the right of the listener to hear what he wants to hear.").

the First Amendment as "requir[ing] the government to impose controls upon private [speakers] in order to preserve First Amendment values." *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. at 133 (Stewart, J., concurring).[31]

III. THIS COURT SHOULD DISCARD MEDIUM-BASED RIGHTS APPROACH AND ADOPT A MESSAGE-BASED RIGHTS APPROACH

The inclination to distinguish all other electronic media from print media, including cable, may ultimately diminish the traditional First Amendment protection afforded the print press. The Court's current approach of assigning different levels of protection based on the medium of delivery is on a collision course with technology.[32] The walls that have historically separated the categories are disappearing with technological advances and the old legal theories strain under these new circumstances. As

[31] Under an audience-rights theory, governmental interventions are meant to "preserve an uninhibited marketplace of ideas." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 390. But such thinking is directly contrary to the Court's conclusion in *Tornillo* that a "[g]overnment-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate.'" *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. at 257, *quoting New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964); *accord Riley v. National Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 791 (1988). It is not surprising that despite nearly identical facts, *Tornillo* does not mention *Red Lion*.

[32] For example, the advent of new spectrum technologies, such as digital compression technologies, have expanded the use of the spectrum exponentially in the past five years. Rather than being a limited or scarce commodity, the space on spectrum now can be considered to be unlimited, constrained only by economic considerations. *See, e.g.*, George Gilder, *What Spectrum Shortage?*, FORBES, May 27, 1991, at 324.

the Congressional Office of Technology Assessment concluded, "[n]ew technologies, such as electronic publishing, may not fit easily into old models of regulation, and First Amendment distinctions between rights of print publishers, broadcasters, and common carriers will become increasingly difficult to justify." [33]

For example, if this Court concludes that cable should only receive *Red Lion*-like protection, could an electronic edition of the Wall Street Journal delivered by cable to a subscriber's desktop be subject to a right-of-reply statute or fairness doctrine, while its printed counterpart delivered to that subscriber's door step is protected from such intrusions?

This scenario would seem to be the implication of *Telecommunications Research & Action Center v. FCC*, 801 F.2d 501 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987) ("TRAC"). *TRAC* concerned whether *Red Lion* would govern teletext technology when it was sent through an otherwise unusuable portion of the spectrum.[34] Despite the similarities of teletext to the print medium, the D.C. Circuit concluded that when teletext used the spectrum, *Red Lion* governed.[35] In fact, Professor Robert

[33] U.S. Congress, Office of Technology Assessment, *Science, Technology and the First Amendment*, OTA-CIT-369 2 (Washington, D.C.: U.S. Government Printing Office, January 1988).

[34] Teletext is a form of electronic information services ("EIS"). Much of EIS is sent through telephone lines and cable. EIS is essentially an "electronic library" offering subscribers access to a wide array of topical databases, news, magazines, bulletin boards, and other information.

[35] In that opinion, the D.C. Circuit discussed at length the deficiencies in the scarcity rationale, noting that all economic goods, including newsprint and ink, are scarce. "The attempt to use a universal fact as a distinguishing principle necessarily leads to analytical confusion." *Telecommunications Research & Action Ctr. v. FCC*, 801 F.2d at 508. The government in this case implicitly acknowledges the bankruptcy of the spectrum scarcity rationale by trying to argue that the "critical factor" justifying broadcasting regulation has not been spectrum scarcity but the "resulting inability of the broadcast market to function successfully." Govt. Motion at 21.

Shanyon of the Annenberg School of Communications has argued that Congress constitutionally may be able to impose must-carry regulations on the *New York Times* and *Wall Street Journal* because they transport copy via satellite to printing plants across the country. "I think that the spectrum is limited, and if the big users shut out the small users, then the government should act to make fairness the ruling guideline." *See Licensing Broadcasters: Just What the Framers Feared?*, CATO POLICY REPORT, 6, 8-9 (Jan. Feb. 1988).

The future holds only more problems that defy categorization. Fiber optics will allow telephone companies or cable companies to deliver a multitude of services ranging from video to publishing to banking services. Today, technology has produced almost unlimited outlets of information. In the very near future, individuals can have instantaneous access to information from virtually unlimited sources.[36] Whether the fear of a too powerful press limiting the marketplace of ideas was ever legitimate for such regulation, today's technological advances certainly render such fear moot. Thus, the medium-based rights approach only hinders speakers—and continues to do injustice to the principles of the First Amendment.

This Court should discard that approach and apply full First Amendment protection to all messages without regard to the medium upon which they are delivered. The recognition of cable as a full-fledged member of the press is critical, not merely for the First Amendment rights of cable operators and cable programmers, but for the new press technologies which are on the horizon (indeed they are here).

[36] *See, e.g.*, P. Huber, M. Kellogg & J. Thorne, THE GEODESIC NETWORK II: 1993 REPORT ON COMPETITION IN THE TELEPHONE INDUSTRY (1992).

Cable and all electronic publishers should be given the same level of First Amendment protection that the print medium is given under *Tornillo*. The Framers of the First Amendment did not contemplate calibrating rights based on how the message is delivered. Such a diminution of First Amendment principles in this electronic age will inevitably lead to less protection for all speech. Rather than trying to create First Amendment categories for each new medium, the Court should focus on the message, and not the medium, and apply one level of First Amendment protection.

In striking down the first set of must-carry rules, *Quincy* noted that "traditional First Amendment doctrine [does not] fall[] by the wayside when evaluating the protection due novel modes of communication. For the core values of the First Amendment clearly transcend the particular details of the various vehicles through which messages are conveyed." *Quincy Cable TV, Inc. v. FCC*, 768 F.2d at 1448. Cable operators and programmers deliver messages no less than the print press. That should be the only relevant fact for First Amendment analysis. Cable television is entitled to the same level of First Amendment protection that the print press enjoys, as are all electronic publishers. Perhaps Justice Douglas presented the best defense for such an approach in his concurrence in the *CBS* decision:

> What kind of First Amendment would best serve our needs as we approach the 21st century may be an open question. But the old-fashioned First Amendment that we have is the Court's only guideline; and one hard and fast principle which it announces is that Government shall keep its hands off the press. That principle has served us through days of calm and eras of strife and I would abide by it until a new First Amendment is adopted. That means, as I view it, that TV and radio, as well as the more conventional methods for disseminating news, are all included in the concept of "press" as used in the First Amendment and therefore are entitled to live under

> the laissez-faire regime which the First Amendment sanctions.

Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. at 160-61 (Douglas, J., concurring).

CONCLUSION

For all the above reasons, this Court should strike the must-carry regulations of the Cable Act of 1992 as violative of the First Amendment.

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No. 93-44

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

TURNER BROADCASTING SYSTEM, INC., *et al.*,

Appellants,

—v.—

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF AMICUS CURIAE OF COURTROOM TELEVISION NETWORK IN SUPPORT OF APPELLANTS

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BRIEF AMICUS CURIAE OF COURTROOM TELEVISION NETWORK IN SUPPORT OF APPELLANTS

PRELIMINARY STATEMENT

Courtroom Television Network ("Court TV") submits this brief *amicus curiae* in support of the appellants in this case. Each party to this suit has given Courtroom Television Network written consent to the filing of this brief pursuant to Rule 37.3 of this Court, and copies of their consents have been filed with the Clerk of this Court.

INTEREST OF AMICUS CURIAE

Court TV is a 24-hour-a-day, 7-day-a-week cable legal news network and cable programmer dedicated to reporting on the U.S. legal and judicial systems. Court TV began operations on July 1, 1991. It is a joint venture of corporations from both the cable and broadcast television industries. Court TV creates all of its own programming and specializes in extended, "gavel-to-gavel" coverage of civil and criminal trials, both live and on tape, supplemented by attorney commentators who explain the proceedings to a lay audience. Court TV's programming, which covers the judicial process not with sound bites but with full, objective reports of the proceedings, has been widely praised as an innovative form of public service television.

Like commercial television networks, Court TV depends for its continued existence on its ability to secure viewers for its programming, both because cable systems pay on a per-subscriber basis for the programming they carry and because national advertising rates are strongly dependent on the number of viewers a program attracts. Like other cable programmers, Court TV is almost entirely dependent upon cable system operators to deliver its programming. It cannot gain access to any appreciable body of viewers without securing positions in the channel line-ups of a significant number of the thousands of cable systems throughout the country.[1]

The "must-carry" rules that are challenged in this case, 47 U.S.C.A. §§ 534 and 535, mandate that cable operators set aside a certain number of channels to carry local broadcast stations. Because every cable system has a finite number of channels, the must-carry rules reduce the number of channels available to cable programmers and thus make it more difficult for Court TV and other cable programmers to gain positions in

[1] Unless Court TV's programming is carried by cable system operators, the network can reach only the small percentage of viewers who have satellite dishes and can thereby obtain its signal without subscribing to a cable system.

cable system line-ups and, in consequence, more difficult to secure the viewers they need if they are to continue creating and distributing programs.

Court TV is deeply interested in the outcome of this case. The central issue before the Court is whether Congress, consistent with the First Amendment, may require the operators of cable television systems to devote channels to local broadcast stations regardless of the operators' programming preferences and regardless of the effects on other, congressionally disfavored programmers. When the Court decides this case it will determine whether cable operators that would otherwise choose to carry Court TV's innovative news programming will be required to forgo or curtail Court TV's channel access in order to provide channels to local broadcast stations, including shopping networks.

This brief is filed to set forth for the Court the practical impact on a relatively new cable network of the must-carry rules embodied in Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Act"), codified at 47 U.S.C.A. §§ 534 and 535 (West Supp. 1993), and to show that those must-carry provisions, entirely apart from their impact on the First Amendment rights of cable system operators, have a substantial negative impact on the First Amendment interests of cable programmers.

SUMMARY OF ARGUMENT

Court TV's day-to-day experience illustrates the impact that must-carry rules have on cable programmers in general and, in particular, on relative newcomers endeavoring to bring innovative or distinctive programming options to the public. That impact has been to make it significantly more difficult for national cable programmers, particularly new ones, to reach the public—and, of course, for the public to receive such programming. To demonstrate this, this brief summarizes four recent situations in which the 1992 Act's must-carry rules

adversely affected Court TV's ability to be shown at different locations in the country.

ARGUMENT

THE IMPACT OF MUST-CARRY LEGISLATION HAS BEEN TO SUPPRESS THE SPEECH OF CABLE PROGRAMMERS AND TO DEPRIVE THE PUBLIC OF THE OPPORTUNITY TO SEE PROGRAMS OF ITS CHOICE

A. Court TV's Programming And Access To Viewers

Since its creation in 1991, Court TV has specialized in "gavel-to-gavel" coverage of trials, both live and taped, commencing with opening statements and continuing through the jury verdict. Each trial is anchored by a team of experienced attorneys and legal journalists; in voice-overs and during breakaway interviews, commentators highlight significant substantive issues and explain procedural matters. A recent commentary in The New Yorker magazine noted "[t]he superb coverage of state trials by the two-year-old Court TV cable network." *Comment: Here's Justice*, The New Yorker, Oct. 11, 1993, at 8.

Court TV covers both civil and criminal trials, as well as parole hearings, death penalty hearings, and municipal and night courts across the United States. The network has televised proceedings in state, federal, and municipal courts throughout the United States, as well as trials from the former Soviet Union, from El Salvador and Serbia, and from the World Court at the Hague. By broadcasting extended, often live, coverage of a broad range of court proceedings, Court TV aims to enable its audience to understand how trials are actually conducted and to appreciate the broad impact of legal issues and the legal process on public and private life. Court TV's uniquely comprehensive trial coverage provides the public with

an opportunity to observe and understand the reality of the judicial system.

In addition to its comprehensive trial coverage, Court TV reports legal and judicial news several times each day and provides a daily wrap-up and analysis of trial highlights. Several regular weekly and quarterly series present in-depth analyses of aspects of the legal system, background reports on controversial high-profile cases, analysis and commentary on Washington-based legal news and judicial issues, and opportunities to call in to voice opinions or to obtain consumer law information.

Court TV also provides programs specifically designed for education. Each month Court TV selects and summarizes a trial for its "Cable in the Classroom" program, which aims to encourage junior high and high school students to discuss important legal and social issues and analyze the role of the judicial system in settling disputes in society. Each weekend Court TV's programming includes six hours of Continuing Legal Education (CLE) seminars from accredited CLE providers. The network also produces "town meeting" public affairs specials in selected cities several times each year.

As is true of any commercial television network, Court TV's financial success and, indeed, its continued existence depend on its ability to secure viewers for its programming. Court TV earns its revenue from two sources, and both depend on the number of viewers the network can attract. First, cable systems pay fees for programming based on the number of subscribers who have access to the programming. Second, advertisers pay for time, and national advertising rates are strongly dependent on the number of viewers a program attracts.

Court TV, a relatively new cable network at just over two years old, is currently available to 14 million viewers. Although Court TV reaches cable subscribers in 48 states, the District of Columbia, and Puerto Rico, it has access to fewer

than one-fourth of the more than 60 million cable sets in the United States.

Court TV gains access to viewers principally by securing positions in the channel line-ups of the thousands of cable systems throughout the country. Securing channel access for Court TV's programming involves in-person solicitation and negotiation with cable system operators. Where competition is intense because few channels are open to add new cable programmers, the process of seeking channel access typically becomes more expensive and more protracted, often requiring numerous meetings, detailed proposals, and intense negotiation of terms. At the same time the likelihood of success is diminished, since many of the cable channels launched in the last several years are competing for those few available channels.

B. The Must-Carry Provisions of the 1992 Cable Act

Congress passed the Cable Television Consumer Protection and Competition Act of 1992, now codified at 47 U.S.C.A. §§ 531 *et seq.*, on October 5, 1992. The 1992 Act authorizes extensive regulation of the cable industry by the Federal Communications Commission ("FCC"). Sections 4 and 5 of the 1992 Act, 47 U.S.C.A. §§ 534 and 535, require cable system operators, on request, to carry the signals of certain local broadcast stations.[2]

Section 4 requires cable system operators to carry, on request, the signals of licensed commercial broadcast television stations whose signals are received over the air in the same

[2] Must-carry rules were first formulated by the FCC in 1965. *See The D.C. Circuit Review—Federal Communications Commission: Must-Carry and the Continuing Search for a First Amendment Standard of Review for Cable Regulation*, 57 Geo. Wash. L. Rev. 1248, 1251 n.26 (1989). The FCC's must-carry rules were twice struck down by the D.C. Circuit. *See Quincy Cable TV, Inc.* v. *FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986), and *Century Communications Corp.* v. *FCC*, 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988).

television market as the cable system. A cable system operator with 12 channels or fewer but at least 300 subscribers must deliver the signals of at least three local broadcast stations. If the cable system operator has more than 12 channels, it may be required to set aside as many as one-third of its active, usable channels. If the number of local broadcast stations does not fill all of those channels, the operator must also carry one or two "qualified" low power broadcast stations.

Under Section 5 of the 1992 Act, a cable system operator with 12 channels or fewer must carry the signal of one local non-commercial educational broadcast station. Cable system operators with more than 12 but fewer than 36 channels must carry from one to three qualified non-commercial stations. A cable system operator with more than 36 channels must carry the signal of every local non-commercial educational broadcast station that requests carriage, unless a station's programming substantially duplicates that of another station the cable system already carries.

Both sections prohibit the cable system operator from accepting or requesting payment from local broadcasters; both require that the cable system operator carry the broadcaster's entire programming schedule; and both give the broadcaster the option of retaining its current channel position.

C. The Adverse Impact Of Must-Carry Rules On Court TV's Ability To Be Seen

1. Connecticut

Cablevision of Connecticut ("CVC") and Cablevision of Southern Connecticut ("CVSC") are charter Court TV affiliates—both launched the network on its first day on the air in 1991 and both have expressed to Court TV their high degree of satisfaction with subscribers' response to Court TV's programming. Together, the two systems serve approximately 183,300 subscribers in the area of Fairfield County, Connecticut.

Even before the 1992 "must-carry" rules were enacted, the systems' limited channel capacity often made it necessary for several satellite services to share one channel. Nonetheless, CVC carried Court TV 24 hours a day (except for minimal interruption for certain sports programs). CVSC carried Court TV from 6 a.m. until 6 p.m. on Mondays through Fridays.

The 1992 must-carry provisions have severely limited the viewable hours of Court TV on these cable systems. CVC has been required to carry three local broadcast stations. Two of these stations had previously shared one cable channel, but under the 1992 Act the cable system was forced to dedicate a full channel to each. It was also required to add a shopping channel that leases its 6:00 p.m. to 9:00 p.m. time to others. As a consequence, Court TV has gone from full-time carriage with minimal interruptions to sharing a channel with two sports programmers, with Court TV preempted for all live sports events.

CVSC was also forced to carry the shopping channel. As a result, Court TV has been moved from a daytime schedule that allowed subscribers to view more than 80 percent of Court TV's live trial coverage to the time slot from midnight to 11:30 a.m.

Since the first day of the new schedule viewers have complained about interruptions in Court TV's programming, about the reduction in its air time, and about the quality of programming on the must-carry channels. Nonetheless, even further reductions may soon be required to accommodate additional "local" broadcast stations that the systems will be required to carry.[3] Solely because of the must-carry rules, Court TV risks losing its carriage entirely on one of the largest cable systems in the country.

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[3] One of these "local" stations is in New Jersey; two others are in New York.

2. New Jersey

Approximately 230,000 subscribers in Northern New Jersey are served by Suburban Cablevision, the tenth largest cable system in the United States. In December 1991 Court TV submitted a formal proposal, the first step in attempting to sell its programming to Suburban Cablevision. Six months and several meetings later, Court TV submitted its second proposal.

After another three months had passed, Court TV was told that it could not secure a slot in the basic tier, but might win a position on a new tier the system was considering testing. Negotiations on pricing stretched over approximately two months, finally resulting in a deal letter. The test of the new tier began, with Court TV on Channel 53. After two months, plans for the new tier were put on hold, in large part because Suburban was not sure it would have enough channel capacity for all of the programming services in the test after "must-carry" absorbed several channels.

Court TV then submitted a third proposal, this time seeking a slot in the basic tier because at least two of the channels Suburban had planned to use for the new tier had been lost to must-carry. Court TV did not win a slot on Suburban's basic tier. Because of the must-carry requirements, the system had no room for Court TV.

The network then identified an opportunity for partial carriage and is now carried from 6 a.m. to 8 p.m. on a channel shared with another programmer. Subscribers cannot watch many of Court TV's popular evening programs, so its advertising revenues are reduced. Court TV's audience is further reduced by the fact that it is now carried on Channel 96, a position on the dial that is seldom reached by viewers browsing for a viewing choice. An executive of Suburban wrote to Court TV that he believed Suburban's customers "would prefer to have Court TV instead of the extremely marginal broadcast channels" the cable operator had been forced to add.

3. Illinois

Continental Cablevision provides cable programming services to approximately 110,000 subscribers in the suburban Chicago area. The Chicago area is a major television market and one that should play a significant part in Court TV's future growth. After more than a year of intensive marketing effort, and nearly three months after a corporate deal had been finalized, the system began expressing concerns about the impact of the must-carry rules. A few months later, Court TV was told that it still had a good chance if the system were not hit hard with loss of channel capacity. Ultimately, however, Court TV failed to secure a channel slot because the cable system had to award its last spaces to four local broadcasters that had demanded carriage.

4. California

For more than a year Court TV worked closely with executives of Crown Cable, a cable system serving approximately 150,000 subscribers in Riverside, Pasadena, and Alhambra, California. Court TV hosted and produced a televised town meeting with the cable system's owner. Ever since Crown Cable carried Court TV's programming of the Reginald Denny trial on its public access channels, subscribers have contacted both Court TV and Crown Cable to request continued carriage. Crown Cable said that it wanted to carry Court TV and would do so were it not for the 1992 Act's mandatory carriage provisions, but the 1992 must-carry rules forced Crown Cable to add three local broadcast channels, which filled all of its excess capacity.

5. Summary

The examples described above are just that. They are not special cases; nor do they involve unusual circumstances. They illustrate the pervasiveness of the influence of must-carry rules on Court TV's day-to-day relations with cable system operators. The subject of must-carry rules is raised almost immedi-

ately in every conversation with every cable operator. The must-carry rules consistently serve as an impediment to access for Court TV's programming, blocking access to a large percentage of the available slots on nearly all cable systems.

As a result, Court TV is seen less: viewers who prefer Court TV's programming over that provided by the local broadcast stations are disabled from making that choice; and cable system operators who would prefer to offer Court TV's programming are not permitted to make that editorial judgment.

The impact of all this is contrary to the most basic First Amendment notions. Court TV and other cable programmers are impermissibly deprived of their opportunity to be heard when they are denied channel access to accommodate the local broadcasters favored by Congress. Judge Williams's conclusion in his dissenting opinion below is unanswerable: "Given the finite number of cable channels, replacement of the cablecaster's choice of programs with those of local broadcasters suppresses the alternative programs as completely as if Congress had ordered them shut down . . . ." *Turner Broadcasting System, Inc.* v. *FCC*, 819 F. Supp. 32, 59 (D. D.C.), *prob. juris. noted*, 114 S. Ct. 38 (1993) (Williams, J., dissenting) (footnote omitted). Such a result cannot be reconciled with the First Amendment.

CONCLUSION

The decision of the United States District Court for the District of Columbia should be reversed.

Dated: November 9, 1993

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-44

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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BRIEF AMICUS CURIAE OF THE CALIFORNIA CABLE TELEVISION ASSOCIATION IN SUPPORT OF APPELLANTS

STATEMENT OF INTEREST OF AMICUS CURIAE

The California Cable Television Association ("CCTA") submits this brief as *amicus curiae* in support of appellants.[1]

CCTA is a trade association representing cable television system operators that provide cable television service to over five million California residents. CCTA brings information to the Court concerning the extent of First Amendment activities engaged in by cable television

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[1] Consistent with S. Ct. R. 37.3, all parties have given CCTA their consent to the filing of this brief.

operators and the impact of the must carry law on cable television systems in California. This *amicus* brief will illustrate that resolution of the issues before this Court in this case will affect the ability of California cable television operators and other cable television operators to engage in conduct protected by the First Amendment.

CCTA is a central clearinghouse for information on programming provided by its member cable television operators, much of it relating to the core concern of the First Amendment. This programming is threatened by the must carry provisions [2] of the Cable Television Consumer Protection and Competition Act of 1992 ("The 1992 Cable Act").[3] In addressing the issues before it, the Court should give substantial weight to the robust expressive activity that is undertaken by the cable television medium in California.

Since 1958, CCTA has participated in proceedings before a wide range of administrative, legislative, and judicial bodies on behalf of the cable television industry in California and its individual members. CCTA has a wide range of experience advocating the First Amendment rights of cable television operators before this Court [4] and before the Ninth Circuit Court of Appeals.[5] Most recently and most in point, CCTA filed *amicus* briefs when certain of its individual cable television system members sought to enjoin enforcement of the must carry

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[2] 47 U.S.C. § 534 and 535.

[3] Pub. L. No. 102-385, 106 Stat. 1460.

[4] See *amicus* brief filed by CCTA in *Leathers v. Medlock*, 499 U.S. ——, 111 S. Ct. 1438 (1991).

[5] CCTA filed *amicus* briefs in *Preferred Communications, Inc. v. City of Los Angeles California, and Department of Water and Power*, 754 F.2d 1396 (1985); and *Preferred Communications, Inc. v. City of Los Angeles, California, and Department of Water and Power*, Nos. 91-55625, 91-55665, argued on June 8, 1993.

provisions of the Cable Act in pending cases in the Northern [6] and Central [7] Districts of California.

SUMMARY OF ARGUMENT

This case presents the fundamental question of whether government can exercise control over, and restrain the rights of, cable television operators who are important sources of news, information and entertainment to their subscribers, to promote the relative power of the voices of a competing class of speakers—local broadcast television stations—based upon a congressional perception that the broadcast industry is in economic decline.

In this brief CCTA argues that, based upon the facts presented below as to the First Amendment protected activities of cable television operators, this Court should hold the mandates of the must carry restrictions unconstitutional. As active and robust First Amendment speakers, cable television operators are entitled to the highest degree of First Amendment protection.

ARGUMENT

I. THE MUST CARRY RULES IMPINGE UPON THE CURRENTLY ROBUST EXERCISE OF EDITORIAL DISCRETION BY CABLE TELEVISION OPERATORS

While the Supreme Court has not yet delineated the precise limits of the First Amendment protections extended to cable television, it has observed that cable television operators exercise "a significant amount of editorial discretion regarding what their programming will include." [8] In 1991 the Court stated:

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[6] *Viacom International, Inc. v. FCC*, No. C-93-1984 EFL (N.D. Cal.).

[7] *Community Cablevision Co. v. FCC*, No. CV 93-3104 R (C.D. Cal.).

[8] *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494, quoting *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979).

> Cable television provides to its subscribers news, information, and entertainment. It is engaged in "speech" under the First Amendment, and is, in much of its operation, part of the "press." [9]

For seven years, from the 1985 D.C. Circuit decision striking down the FCC's former local broadcast signal "must carry" rules until the enactment of the 1992 Cable Act, these editorial decisions were solely those of the cable television operator.[10]

The importance of the editorial discretion exercised by cable television operators is amply illustrated in this case by the deleterious results that implementation of those provisions have had in California, and the public outcry in response.

A. Specific First Amendment Harm Has Been Suffered By California Cable Television

The must carry obligations of cable television systems located in large television markets such as those in California are particularly onerous. Two cable television operators in such California markets have challenged the must carry rules as applied to them.

In the San Francisco Bay Area the must carry rules forced Viacom International, Inc. ("Viacom") to drop several cable television programming networks from a number of its cable television systems in favor of broadcast signals.[11] Viacom requested an injunction of the must

[9] *Leathers v. Medlock*, 499 U.S. at ——, 111 S. Ct. at 1442 (1991).

[10] *See Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986); *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988).

[11] Here, as in other contexts, a right may be valued by the consequence of its loss. The attached copy of a June 2, 1993 *San Francisco Examiner* article describes some of the public outcry over Viacom's planned channel changes as a result of must carry. *See* Appendix attached hereto.

carry provisions for its systems in the East Bay, Marin County, San Francisco, Petaluma, Pinole, and American Canyon.

At the time of implementation of the must carry rules, Viacom was forced to add four stations in the East Bay Area: Concord and San Jose stations with primarily religious formats, a San Francisco Asian language station, and a San Jose Spanish language station. To make room for those broadcast station additions, Viacom was forced to delete three non-broadcast channels it had been carrying: a channel that provided local religious programming, a channel that carried CNBC business news as well as the Comedy Central, and a channel called Sneak Preview, which promoted Viacom's pay-per-view programming.

In Marin County, Viacom was forced to add three stations: a San Francisco Asian language station, a San Jose Spanish language station, and a non-commercial San Mateo station mixing PBS and instructional programming. To make room for these additions, Viacom was forced to drop Bravo, which is a cultural arts cable television network, the evening programming of C-SPAN I, portions of a preview guide service, and a PBS station from San Jose that did not have must carry rights.

In San Francisco, Viacom had to add three stations: Concord and San Jose stations with primarily religious formats and a San Mateo non-commercial station offering a mix of PBS and instructional programming. To make room for these additions, Viacom was forced to limit C-SPAN I solely to live coverage of the U.S. House of Representatives, eliminating all its other public affairs programming, and pair it with the Playboy Channel, move the American Disabilities Channel and pair it with Bravo (which resulted in reduction of Bravo programming from full to part time), and delete portions of Sneak Preview programming and one-and-one-half pay-per-view channels.

This June, in granting the initial request by Viacom for a temporary restraining order and enjoining the FCC and the United States from implementing or enforcing the must carry provisions against Viacom, Federal District Judge Eugene Lynch recognized that the must carry rules interfere with cable television operators' editorial discretion and elevate the speech of local broadcast stations over cable television speakers. This statutory scheme implicates constitutional issues that rest at the heart of the First Amendment.[12]

The must carry rules have had an equally invasive effect on the First Amendment rights of Community Cablevision Company, doing business as Dimension Cable Services ("Dimension"), in Orange County in Southern California.[13] The Los Angeles Area of Dominant Influence ("ADI") contains 21 commercial broadcast stations and five non-commercial educational stations.[14] Systems such as Dimension, with 38 channels just barely over the 37-channel threshold that the 1992 Cable Act sets for requiring carriage of *all* nonduplicative noncommercial stations that request carriage,[15] have been particularly inhibited by the must carry rules. The rules required Dimension not only to carry *five* non-commercial television stations, but also to set aside 13 channels for the carriage of qualified commercial stations. The total number of

[12] *See* Temporary Restraining Order issued by Judge Lynch, dated June 1, 1993 in *Viacom International Inc. v. FCC*, No. C-93-1984 EFL (N.D. Cal.) at 4 ("[i]t is beyond all doubt [that Viacom's claims] raise serious First Amendment questions"); *see also* at 6 ("there is simply no denying that Viacom's suit raises serious First Amendment questions"). This case was eventually decided on *res judicata* grounds. *See* Order, August 26, 1993.

[13] *See Id.*, Memorandum of Points and Authorities in Support of Ex Parte Application for Temporary Restraining Order and Order to Show Cause Re: Preliminary Injunction, filed on May 28, 1993.

[14] 1992 *Broadcasting Yearbook*.

[15] 47 U.S.C. § 615(b)(1).

stations Dimension was thus required to carry is 18, or nearly 50 percent of its channel capacity, before Dimension had the opportunity to exercise any editorial discretion to decide how best to serve the needs and desires of its subscribers.

In its attempt to overthrow the must carry rules as applied to Dimension Cable, Dimension alleged that the must carry provisions required it to carry four additional commercial broadcast stations which it did not wish to carry. The must carry provisions also required that Dimension provide full-time carriage to one other commercial broadcaster that it currently carried on a part-time basis. Dimension's entire channel capacity was already being used for other programming services desired by its customers; thus, the must carry provision forced Dimension to reduce to a part-time basis its carriage of its own locally originated programming, C-SPAN, VH-1 and the Weather Channel and required it to displace The Movie Channel and Continuous Hits I, a pay-per-view service, from its channel lineup.[16]

Dimension, Viacom, and other similarly situated major market California cable television operators are deprived of even more than one-half of their capacity by governmental fiat when their leased access, public, educational, and governmental access and must carry requirements are aggregated. Far from being a precisely balanced legislative approach to a perceived problem, as applied to cable television operators in major California markets, the must carry rules sweep far too broadly. They inhibit cable television operators from exercising editorial discretion over their channel lineups consistent with their

[16] The Central District in the *Dimension Cable* case, like the Northern District in the *Viacom* case, never reached the First Amendment issues since the motion for preliminary injunction here was also denied on the basis of *res judicata*. *Community Cablevision Co. v. FCC*, No. CV 93-3104 R (C.D. Cal.), September 23, 1993.

own status as First Amendment-protected speakers. The must carry rules also shut out many other diverse speakers—cable television programming networks and local origination producers—who would otherwise gain access to these channels of communication.

B. Other California Cable Television Operators Make Editorial Programming Selections That Are Inhibited By the Must Carry Rules

Absent the must carry provisions challenged here, other California cable television system operators also make editorial choices among a wide variety of broadcast signals and satellite-delivered networks designed specifically for cable television system use. They select local broadcast signals, choosing among the three major network affiliates, Fox affiliates and other commercial independents, and public television stations in the local area, which in most California television markets comprise over a dozen broadcasters in total. California cable television operators also decide whether to import broadcast signals that cannot be received over the air with an ordinary home antenna. These signals, such as "superstations" WTBS, Atlanta, or WGN, Chicago, are brought into the cable television operator's service area either by microwave or by satellite.

California cable television operators also select from among more than 100 satellite program networks created specifically for the cable television industry. Nearly all of the over five million California cable television subscribers have access to twenty-four hour news from CNN and coverage of the United States Senate and House of Representatives from C-SPAN as part of their basic programming.

A cable television system operator's selection of programming involves a classic editorial function protected by the First Amendment. The fact that the expression may in some cases be originated by another party does

not remove the First Amendment protection that these editorial decisions usually enjoy. The *Los Angeles Times* or *San Francisco Chronicle* is not entitled to less First Amendment protection when it publishes an article as reported by the Associated Press or the opinion of a syndicated columnist. A broadcaster is not less protected when it selects network or syndicated programming.[17] Nor is a book or magazine seller entitled to any less protection in deciding what publications to stock and how to display them. Seldom do two cable television systems in California select precisely the same programs to offer to the public. And, even if they did, it would be irrelevant to a First Amendment analysis of their speech rights.

C. The Must Carry Rules Also Hamper Direct Communication Between Cable Television Operators And Their Subscribers

There are a number of state and regional networks unique to California. California cable television system operators also produce their own local programming. Much of this programming concerns public affairs. Indeed, sometimes cable television is the only source of such local information and opinion in California cities. The must carry rules thus not only create a chilling effect on highly valued programming, but also impermissively place the government in the position of handicapping competition in the marketplace of ideas.

Many California cable television operators, in conjunction with local broadcasters or newspapers, provide six minutes of local news and public affairs "Local Edition" inserts each half-hour to the national CNN Headline News cable television service. This "Local Edition" service reaches 1.4 million California cable television subscribers. In addition to these services, in some Cali-

[17] *Miller v. California*, 413 U.S. 15 (1973); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963).

fornia communities, local origination programs produced by cable television operators are highly developed, with daily newscasts that rival those of local broadcasters, and with depth of coverage that goes well beyond a "Metro" section of the local newspaper. Other cable television operators present weekly public affairs cablecasts that feature interviews with local officials, community leaders and candidates for local elections. Local programs also include live and tape delay cablecasts of city council meetings and local community events, such as sporting events and parades. As Orange County continues to develop a separate identity from Los Angeles, for example, cable television local origination has become the most logical way to serve the television news needs of the community.

In almost six years, Century Cable's Los Angeles system has produced almost 500 locally-originated public affairs programs distributed on a regular basis to thirty Los Angeles area cable television companies, with wider distribution when events warranted. Century's regular "Week in Review" program features politicians, press, and pundits discussing issues of community concern. Issue specials spotlight particular questions of public concern, including issues concerning the Cable Act and its implementation. Personality profiles highlight individuals in politics, business, and entertainment. Election specials have included candidate profiles, debates, press conferences, interviews, and critiques of political commercials. Century distributed statewide the only video debate between the candidates for state treasurer to all California cable television systems.

Viacom 6, the local origination channel of Viacom of San Francisco, employs twelve persons who produce local public affairs programming and facilitate public access programming. Viacom 6 has three regular weekly half-hour shows: "Viewpoint," an interview show that features public officials; "City Desk," a live round table discussion

that features journalists discussing San Francisco news and events; and "Helping Hands," a public health show that features a particular emphasis on AIDS. Monthly shows and specials on the arts, politics, neighborhood viewpoints, and earthquake safety are also produced.

California cable television operators also carry unique regional news networks. In September 1990, a regional cable television news network, Orange County NewsChannel, began 24-hour televised local news, sports, public affairs and cultural events coverage of Orange County, California, where most over-the-air news comes from the television stations that focus on neighboring Los Angeles County.[18] NewsChannel is being operated by Freedom Newspaper Corporation, which owns the *Orange County Register*, a local newspaper, and newspaper staff are helping to write and produce the programming for this channel.

Moreover, California cable television operators run the California Channel. The California Channel transmits live and taped coverage of the California Legislature, its committees and subcommittees almost three million California cable television subscribers. In many cases, the ability of cable television operators—including those serving on the California Channel's Board of Directors—to provide this service to subscribers depends upon having channel capacity, which is depleted as a result of the must carry rules.

Finally, California cable television operators gain the ability to communicate with their subscribers by retaining rights to local advertising time on cable television networks. Much of this time is dedicated to commercial speech. However, cable television operators also use this time to advocate with their subscribers on issues affecting operators before franchise authorities, the State, and Congress. Cable television operators have used their time to

[18] NewsChannel is currently distributed to almost all of the 500,000 cable television subscribers in Orange County.

urge subscribers to contact city council members to oppose local utility user taxes. They have used this time to urge subscribers to contact legislators and the Governor to oppose statewide cable television taxes. They have used this time to urge subscribers to petition Congress in opposition to the Cable Act.

This is the most highly protected form of political speech. By limiting the ability of cable television operators to control their channel lineups, the must carry provisions inhibit cable television operators from exercising their right to communicate directly with their subscribers.

II. CABLE TELEVISION SPEAKERS ARE ENTITLED TO THE HIGHEST FIRST AMENDMENT PROTECTION COEXTENSIVE WITH THAT ACCORDED THE PRINT PRESS

Thus, California cable television operators are full-fledged electronic publishers, possessed of all the editorial prerogatives of any of the newspaper publishers with whom they may co-produce channels, and are entitled to co-extensive First Amendment protections. Because the intrusive regulatory scheme in the must carry provisions could never be upheld in the context of the print press, they must be struck down.[19]

[19] *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974); *Turner Broadcasting System, Inc. v. FCC*, 113 S. Ct. 1806, 1807, 1808 (1993) (Rehnquist, J., in chambers) ("Congress plainly could not impose the must-carry provisions on privately owned newspapers"); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1453 (D.C. Cir. 1985); *cert. denied*, 476 U.S. 1169 (1986) (*"Quincy"*) ("if *Miami Herald* supplies the appropriate mode of First Amendment analysis, our inquiry would be at an end"); *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1401 n.1 (9th Cir. 1985), *aff'd on narrower grounds*, 476 U.S. 488 (1986) ("[i]mposing access requirements on the press would no doubt be invalid"); *Century Federal, Inc. v. City of Palo Alto*, 710 F. Supp. 1552, 1554 (N.D. Cal. 1987) (*"Century Federal II"*) ("Clearly, if . . . access requirements were applied to the traditional press, such as newspapers, they would violate the first amendment.").

CCTA believes that this Court must declare the must carry provisions to be invalid under the prevailing principles of First Amendment law applicable to the jurisdiction, notwithstanding the divided decision of the three-judge district court below in *Turner Broadcasting System, Inc. v. FCC*.[20]

The level of First Amendment protection to be accorded cable television is a critical legal issue with far reaching ramifications not only to cable, but also to the entire communications industry, especially as the technological revolution in that industry continues to unfold. Cable television has become the electronic embodiment of the print press: an important source of news, opinion, and other information to millions of people throughout this country.[21]

The development of the newspaper industry was due in part to a historical pattern of full and robust First Amendment protection—a protection that does not tolerate any interference with the exercise of editorial discretion.[22]

[20] 819 F. Supp. 32 (D.D.C. 1993).

[21] As stated by Judge Lynch in *Century Federal, Inc. v. City of Palo Alto*, 648 F. Supp. 1465, 1474 (N.D. Cal. 1986) (*Century Federal I*), "[i]n an age when most people receive their daily news via the television, that medium has established a role as critical to the free flow of ideas and information in this society as any of the more traditional media." *See also Leathers v. Medlock*, 111 S. Ct. at 1442 (1991) ("[c]able television provides to its subscribers news, information, and entertainment. It is engaged in 'speech' under the First Amendment, and is, in much of its operation, part of the 'press'"). *See also City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986) ("through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, respondent seeks to communicate messages on a wide variety of topics and in a wide variety of formats").

[22] *See Tornillo*, 118 U.S. at 258 (invalidating Florida statute requiring right of reply in newspapers because it impairs editorial functions).

Like the editorial functions of the print editors protected by the Supreme Court in *Tornillo*, cable television operators create, gather, package and distribute news, information and entertainment to their subscribers.[23] Given the similarities between functions exercised by the print editors and cable television operators, as well as the role of cable television as the electronic press of the modern era, cable television operators are entitled to the same First Amendment protection as that accorded the print media.

Rights of cable television operators to full First Amendment protection is not merely the product of analogizing its editorial functions with those of the print press. The starting point in any constitutional analysis of the regulation of any medium is that the particular medium at issue is entitled to the same protection as that afforded the print press. Some rationale must then justify reducing that medium's First Amendment protection. This is the analysis applied by California Federal District Judge Lynch in *Century Federal I*.[24] Confronted with the issue of whether cable television was more akin to broadcast television or the print press, Judge Lynch noted that protection less than that accorded the print press "was the exception to the rule that must be justified by a particular difference."[25] Judge Lynch went on to state: "Consequently, in developing the first amendment standard to be applied . . . the question becomes whether there are any differences in the characteristics of the CTV medium that justify a lesser standard of protection for it. . . ."[26] After considering a number of rationales submitted as justifying reduced protection for cable, Judge Lynch concluded, as a matter of law on the record before him, that

> [a]lthough the fact that cable television places a heavier burden on the public domain than more traditional forms of the media may justify some governmental regulations of that burden . . . there are [not] any other differences attributable to cable television that can justify a degree of first amendment protection similar to that applied to the broadcast medium.[27]

This case calls for an identical analysis. And, like the conclusion reached in *Century Federal I*, there is no rationale here that can justify relegating cable television to a reduced standard of First Amendment protection.

Because there is no rationale to justify reducing the First Amendment protection of cable television operators,[28] this Court must conclude that cable television is entitled to First Amendment protection coextensive with that of the print press. And, since the must carry provisions could not be applied to the print press, they must be struck down.

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[23] *See Century Federal II*, 710 F. Supp. at 1555 ("this Court believes [the function of newspaper editors] is closely analogous to the editorial functions of a CTV operator").

[24] Judge Lynch's opinion in *Century Federal I* remarked upon how the Supreme Court, in *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952), had faced the question as to whether a lesser First Amendment standard applied to films. There the Supreme Court held that "[t]here is no justification in this case for making an exception" to the rule that "the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary." *Century Federal I*, 648 F. Supp. at 1470 citing *Burstyn*, 343 U.S. at 503.

[25] *Century Federal I*, 648 F. Supp. at 1470.

[26] *Id.*; *see also Group W. Cable, Inc. v. City of Santa Cruz*, 669 F. Supp. 954, 961 (N.D. Cal. 1987) ("the starting point for the Court's analysis is that unless cable television differs in some material respect from the print media, the First Amendment standards that apply to newspapers apply with equal force to cable").

[27] *Century Federal I*, 648 F. Supp. at 1475.

[28] Because of the nature of the must carry provisions, CCTA cannot conceive of a manner in which any other possible justification for lower First Amendment scrutiny (*e.g.*, Economic or Physical Scarcity, Use of Public Rights of Way, Forum Analysis or Subsidy Law) might apply.

III. THE GOVERNMENT CANNOT REDRESS A PERCEPTION OF MARKET IMPERFECTION BY COMPELLING A CABLE TELEVISION OPERATOR TO ALTER ITS CABLE TELEVISION CHANNELS INCONSISTENT WITH THE MANNER IT WOULD OTHERWISE EXERCISE ITS EDITORIAL RIGHTS

The must carry provisions are not mere economic regulation subject to a deferential standard of judicial scrutiny like that applied in *Associated Press v. United States*.[29]

The majority's opinion in *Turner* turns on its finding that Congress intended "to restore competitive balance and assure a functional market in the distribution of video signals," and terming the must carry provisions as "essentially . . . economic regulation," the majority upheld the must carry provisions.[30] But *Tornillo* instructs that government cannot redress a perception of market imperfection by compelling speakers to alter the package of information that they would otherwise voluntarily disseminate.[31]

In addition, the majority's conclusion that the must carry provisions are mere "economic regulation" derives from its flawed signals with a commercial commodity

[29] 326 U.S. 1 (1945).

[30] *Turner*, 819 F. Supp. at 41.

[31] Taken to its ends, with this analysis, under the guise of redressing "monopoly" conditions, as determined solely at the exercise of its discretion, government could require newspapers to devote substantial portions of their publication to local columnists or movie theaters to run locally produced movies two days per week. The First Amendment cannot tolerate such behavior. It is a shield that protects against government, not a sword to be wielded at the government's whim. *Tornillo*, 418 U.S. at 254; *see also International Soc'y for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2701, 2716 (Kennedy, J. concurring).

market.[32] But the must carry provisions are not "commodity regulation" and do not regulate aspects of the video signal that cable television operators use (*e.g.*, by setting standards for signal strength or quality). Rather, these provisions force operators to carry local broadcast stations and provide that message to subscribers. Thus, these provisions are more akin to regulation that dictates to a theater owner whose movies to place inside its movie projector or that tells a newspaper owner whose columns to place inside its printing press. The *Turner* majority's effort to divorce cable's message from the medium fails, and, as the majority opinion itself acknowledges, "video signals have no other function than to convey information."[33]

In contrast to the *Turner* majority's analysis, there is a significant body of precedent that requires application of strict scrutiny to the must carry provisions.

First, the must carry provisions are content-based. They directly usurp a cable television operator's editorial discretion to select programming on a broadcaster versus broadcast and broadcasters' versus cable television programmer basis, and do so, as a result of Congress' judgment about the content of programming provided by "local" broadcast stations. As Circuit Judge Williams noted in his dissent in *Turner*, the must carry provisions provide mandatory access to a special class of speakers—local commercial and noncommercial television stations—

[32] According to the majority's opinion, the fact that cable speakers use video signals as their means of communicating "speech" is "of no particular significance" because similar arguments could be made for commodities like printing presses or movie projectors—commodities subject to regulation without impinging upon the First Amendment rights of those who use them. *Turner*, 819 F. Supp. at 40.

[33] *Id.*

chosen by Congress as a result of an explicitly content-related finding.[34]

Second, the must carry provisions compel speech by overriding a cable television operator's editorial discretion. That is constitutionally suspect under the First Amendment and requires strict scrutiny.[35]

Third, the must carry provisions subjugate the speech rights of cable television operators to their direct competitors—broadcast television—based on a perception that the speech of the latter requires governmental assistance. By so providing, Congress has contravened a core principle of the First Amendment.[36]

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[34] *Id.* at 58 (Williams, J., dissenting) (citing 47 U.S.C. § 532 (a)(11)).

[35] In dissent, Circuit Judge Williams agreed that strict scrutiny applied because the must carry provisions infringed upon cable operators' editorial discretion to select programming. *Id.* at 59. *See Riley v. National Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 795 (1988) ("[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech" and is "content-based"). In *Riley*, the Court expressly stated that "[t]he First Amendment mandates that we presume the speakers, not the government, know best what they want to say and how to say it," 487 U.S. at 790-91, and that any statute "regulating how a speaker may speak" directly affects that speech. *Id.* at 790 n.5. *Riley* thus stands for a salient principle: government "even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers." *Id.* at 791. *See also Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 9 (1986) (plurality opinion) ("compelled access . . . both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set"); *Tornillo*, 418 U.S. at 256, 258 (intrusion upon function of editors is constitutionally impermissible). *See also Wooley v. Maynard*, 430 U.S. 705 (1977).

[36] Although Congress may not intentionally have sought to suppress the speech of cable programmers because of any disagreement with their views, but rather have sought to advance the fortunes of broadcasters and what it believed were First Amendment values, Congress has accomplished its mission only at the expense of silencing the voices of cable programmers. As recognized by the dissent in *Turner*, "[g]iven the finite number of cable channels, replacement of the cablecaster's choice of programs with those of local broadcasters suppresses the alternative programs as completely as if Congress had ordered them shut down. . . ." *Turner*, 819 F. Supp. at 59. (footnote omitted). The result is constitutionally impermissible. *See Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) ("the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment"). The must carry provisions impose a burden "on one set of speakers for the direct and explicit advantage of a limited class of their competitors." *Turner*, 819 F. Supp. at 60. Legislation simply cannot establish a "pecking order" for speakers. *Id.*; *see also Pacific Gas & Elec. Co.*, 475 U.S. at 14 (speaker has First Amendment right "to be free from government restrictions that abridge its own rights in order to 'enhance the relative voice' of its opponents").

Fourth, the must carry provisions aim at a narrow group of First Amendment speakers—cable television operators—and impose burdens upon them that are not generally applicable, in fact, not even applicable to other multichannel video programming distributors, such as MMDS or DBS. That is constitutionally suspect and subject to strict scrutiny.[37]

IV. THE MUST CARRY PROVISIONS ARE NOT PRECISELY DRAWN TO FURTHER ANY GOVERNMENTAL INTEREST

Since the must carry provisions trigger strict scrutiny, the government bears the heavy burden of demonstrating that these provisions serve a compelling interest and are precisely drawn to further that interest.[38] The government cannot meet its burden.

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[37] *See Leathers v. Medlock*, 111 S. Ct. at 1443-44 (strict scrutiny appropriate when government "targets a small group of speakers"); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987) ("singling out the press as a whole or targeting individual members of the press—poses particular danger of abuse by the State").

Congress offers, and Government relies upon, a number of "findings" concerning a perceived threat to local broadcasting stations' competitive viability and the interest in maintaining their economic strength as justifications for a punitive regulatory regime. Several of Congress' "findings" are nothing more than wholesale adoptions of long-standing assertions by the broadcast industry.[39] In the context of the First Amendment, these "findings" must be carefully scrutinized.[40] Among the more dubious findings are:

- as a result of cable's deriving revenue from advertising, cable's purported "economic incentive to limit the voice of broadcast stations in the television market," despite the fact that the overwhelming source of cable television operators' revenue derives from subscriptions, not advertising;
- cable television subscribers' inability to receive over-the-air broadcast signals when common sense indicates such individuals could use antennae;

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[38] *See, e.g., Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 540 (1980).

[39] *See Turner*, 819 F. Supp. at 65 (Williams, J., dissenting) ("the legislative findings simply do not support the inferences needed to sustain must-carry" and "[i]f findings as scantily connected to the conclusion as these can justify must-carry, then the door is open, even in the area of First Amendment rights—to exercise of the most naked interest-group preferences").

[40] *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978) ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake."). *See also Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 129 (1989) ("it is our task in the end to decide whether Congress has violated the Constitution. This is particularly true where the Legislature has concluded that its product does not violate the First Amendment."); *Lamprecht v. FCC*, 958 F.2d 382, 392 n.2 (D.C. Cir. 1992) ("[I]f a legislature could make a statute constitutional simply by 'finding' that black is white or freedom, slavery, judicial review would be an elaborate farce.").

- cable's purported widespread dropping or repositioning of broadcast stations.[41]

While the legitimacy of any of these findings is certainly open to question, none rise to the level of a compelling governmental interest. Moreover, if any governmental interest is at stake here, Congress could easily have furthered that interest in a less intrusive manner.[42] In the area of the First Amendment, such overbreadth is fatal.

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[41] As to this, the House Report admits that "the [House] Committee has not found that cable systems are engaging in a widespread pattern of denying carriage of local television stations." (H.R. No. 628, 102 Cong., 2d Sess. 52 (1992)). Further, the FCC admits that its 1988 FCC study from which Congress "extrapolated" its "figures" (*see* S. Rep. No. 92, 102 Cong., 1st Sess. 43 (1991)), did not "focus on or attempt to explain the factors affecting cable systems' carriage decisions." *See* MM Docket No. 89-600, FCC 90-276 at ¶ 165.

[42] For example, if the protection of local broadcast stations was a compelling governmental interest, Congress could require television manufacturers, cable operators or broadcasters themselves to supply cable subscribers with antennae, or Congress can provide direct subsidies to local broadcast television. In either case, cable's First Amendment rights would not be impaired as with must carry.

CONCLUSION

California and other cable television operators exercise editorial discretion in programming their channel lineups and speaking directly to their subscribers. Often their speech involves the highest level of protected political speech. Imposition of the must carry statutory scheme upon the speech of these cable television operators is abhorrent to their free speech rights and cannot be supported under the principles of the First Amendment and the precedents of this Court.

Respectfully submitted,

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APPENDIX

APPENDIX

[from the *San Francisco Examiner*, June 2, 1993]

CABLE TV CAN KEEP POPULAR PROGRAMS

Court lets Viacom ignore
'must-carry' rules—for now

By Michael Dougan
Examiner Marin Bureau

SAN RAPHAEL—A federal judge has temporarily blocked new FCC rules that would force cable TV operators to drop popular channels in favor of local stations carrying religious instruction, foreign-language movies and classroom lectures.

Under a temporary restraining order issued Tuesday by U.S. District Judge Eugene Lynch, Viacom International systems in San Francisco, Marin, Sonoma, Napa and Contra Costa counties can ignore a Wednesday deadline to follow "must carry" rules Congress imposed on the Federal Communications Commission under the Cable Consumer Protection Act of 1992.

The so-called "must carry" rules would require cable operators to broadcast the signals of local TV stations.

Because many cable operators don't have empty channels to spare, that means more distant stations would be dropped from their systems.

Lynch's restraining order delaying the new rules for 30 days, which came in response to a lawsuit by Viacom, does not apply to other cable operators in Northern California but it could set precedence for future cases.

A three-judge panel will accept written and oral arguments on the case over the next few weeks, before ruling on the case.

In Marin County, Viacom planned to eliminate KTEH-TV (Channel 54), a San Jose public TV station noted for its unusual "theme nights" and its preponderance of British programming. Viacom isn't required to carry KTEH because the station is outside its "must-carry zone."

Angry anglophiles descended on Viacom's Marin County headquarters in San Rafael Tuesday morning to picket for unbroken access to such British programs as "East Enders," a cockney soap opera, and "Rumpole of the Bailey," a comedy series, carried on KTEH.

Marin's Viacom planned to replace KTEH with KCSM (Channel 60), a San Mateo-based PBS channel that features college classroom instruction.

'The most viewer-responsive'

"The programming on KTEH is unique," said Gage Taylor, 51, of Sausalito. "They carry some programs that are unique to the country, and they're the most viewer-responsive of any PBS station."

Elana Ellis of Larkspur said about half of the demonstrators like herself, hailed from Britain.

On hand to videotape their comments was Maura Daly Phinney, a Channel 54 producer. "We have about 6,000 members in Marin," she said, "and those are just the people who actually gave us money."

Viacom also planned to drop the Bravo cultural arts premium channel and cut drastically its coverage of C-Span, which airs U.S. congressional sessions.

In San Francisco, Tuesday's ruling means Viacom won't have to juggle several channels to accommodate KCSM and KLXV (Channel 65), a Christian channel out of San Jose.

"This really is a victory for our customers," said Sue Levitin, Viacom's San Francisco spokeswoman.

In Marin, where Spanish- and Asian-language channels would have been added under the new rules, Viacom's North Bay general manager Tim Rea said the "must-carry" policy was troublesome to Bay Area cable operators.

He noted that many cable systems had limited channel capacity and that there were an unusually high number of broadcast stations that could claim "must-carry" status.

By 1995, when Marin's Viacom customers will get 54 channels on an upgraded system, meeting the rules won't be a problem, Rae said.

In Fairfield, the 25,000 subscribers to MultiVision area cable system were to lose KPIX (Channel 5), San Francisco's CBS affiliate, on Wednesday.

"According to the FCC's new rules, KPIX is located out of our area of dominant interest," said Fran Parkey, MultiVision vice president and Northern California regional manager.

Under the new setup, MultiVision will begin carrying KSCH (Channel 58), a Sacramento independent station that airs movies, cartoons and syndicated reruns—but no newscasts.

Since MultiVision carries Sacramento's CBS affiliate, said Parkey, "our subscribers will get to see the network stuff, but they'll be cut off from KPIX's local productions, San Francisco-area news coverage and personalities they've come to identify with during the last decade."

At Cable Oakland, general manager Clay Owens planned to ignore the FCC's June 2 deadline for "must-carry" compliance.

"My dilemma is that KFCB (Channel 42) in Oakland and KLXV in San Jose both want to be on our system,"

said Owens. "Both are dedicated to Christian religious broadcasting and are owned by the same company. I don't believe the FCC wants duplication, so to prevent further chaos I will stand pat until July or until such time as I get further guidance from the FCC."

Despite the court ruling, Viacom's battle is far from won, said Rae. "Between now and the end of the year a number of other actions could create other disruptions for our customers."

They include rules that allow broadcasters to insist on payment from cable companies that carry them, unless they choose to declare themselves a "must-carry" station.

"The stronger channels might decide they want to make some money off this deal," Rae said. "But if negotiations don't go well, we'll literally drop these stations."

And if an agreement comes, he said, the costs could be reflected in customers' bills.

Al Morch of The Examiner staff contributed to this report.

[Picture Omitted in Printing]

No. 93-44

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

TURNER BROADCASTING SYSTEM, INC., *et al.*,

Appellants,

—v.—

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF NEITHER PARTY

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BEST AVAILABLE COPY

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IN THE
SUPREME COURT OF THE UNITED STATES
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TURNER BROADCASTING SYSTEM, INC.,
et al.,

Appellants,

-v.-

FEDERAL COMMUNICATIONS COMMISSION,
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ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

Pursuant to Rule 37.4, the American Civil Liberties Union (ACLU) respectfully moves for leave to file the attached brief *amicus curiae* in support of neither party.

We are filing this motion because, despite our best efforts, we have not yet received written consents from all of the parties to the proceeding listed in the jurisdictional statement submitted in this case on behalf of Turner Broadcasting System, Inc., *et al.* There are a total of forty parties listed in the jurisdictional statement. Thus far, twenty-seven have returned written consents, which are being lodged with the Clerk. So far as we can determine, the remaining thirteen parties listed in the jurisdictional statement have not yet responded to our request for consent. To date, no party has denied consent to the filing of an *amicus curiae* brief in this case by the ACLU.

The ACLU is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. Since its founding in 1920, the ACLU has participated in numerous free speech cases before this Court, both as direct counsel and as *amicus curiae*, including *Miami Herald v. Tornillo*, 418 U.S. 241 (1974), in which the ACLU argued that Florida's right-to-reply statute was unconstitutional because it interfered with the editorial discretion of newspapers, and *Metro Broadcasting Inc. v. FCC*, 497 U.S. 547 (1990), in which the ACLU supported congressional efforts to promote diversity within the broadcast industry.

The present case involves the application of these and other First Amendment principles to cable television, a rapidly evolving technology whose First Amendment status has never been definitively established by this Court. Accordingly, this case poses a series of important and unresolved doctrinal questions. The proper resolution of those questions is a matter of substantial

organizational concern to the ACLU because of its long-standing commitment to the First Amendment.

Respectfully submitted,

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Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557 (1980) 15

Chicago Cable Communications v. Chicago Cable Comm'n, 879 F.2d 1540 (7th Cir. 1989), *cert. denied*, 493 U.S. 1044 (1990) 8

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Miami Herald v. Tornillo, 418 U.S. 241 (1974) . . . . . *passim*

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Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986) 18

Police Dep't v. Mosley, 408 U.S. 92 (1972) 12

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) 4, 7, 9

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Sable Communications v. FCC, 492 U.S. 115 (1991) 5, 15, 16, 17

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) 12

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H.R. Rep.No. 934, 98th Cong., 2d Sess. 30-31 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News 4655 6

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S. Rep.No. 92, 102d Cong.,
1st Sess. 44-45 (1991) 2

Other Authorities

"Special Issue, Videotex,"
36 Fed.Comm.L.J. 119 (1984) 19

Bollinger, "Toward a Theory
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1988 Duke L.J. 329 18

INTEREST OF *AMICUS*

The interest of *amicus* is set forth in the motion attached to this brief.

STATEMENT OF THE CASE

This case challenges the constitutionality of sections 4 and 5 of the Cable Television Consumer Protection and Consumer Act of 1992, 47 U.S.C. §531, *et seq.* Section 4 of the Act, 47 U.S.C. §534, requires cable operators with more than 12 active channels to include all local commercial television stations as part of the basic cable package offered to cable subscribers.[1] Section 5 of the Act, 47 U.S.C. §535, requires cable operators with more than 36 active channels to set aside at least three of those channels for local noncommercial educational television stations.[2]

The legislative rationale for these so-called "must carry" rules is set forth at length in the Act's preamble. In particular, the "must carry" rules rest on five, principal congressional findings. First, most cable systems operate as monopolies due to "local franchising requirements and

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[1] There is an escape clause in §4 if the total number of local commercial television stations exceeds one-third of the cable system's activated capacity. Under these circumstances, the Act permits the cable operator to choose which local stations will be carried on its system.

In addition, the Cable Act stipulates that local commercial television stations carried pursuant to §4 are entitled to the same channel number on the cable system that they use for their over-the-air broadcasts. For example, if WCBS appears as Channel 2 on the broadcast dial in New York City, it must also appear as Channel 2 on any New York City cable system.

[2] Smaller cable systems have reduced requirements but, under §5, every cable system must provide at least one channel for noncommercial educational television.

the extraordinary expense of constructing more than one cable television system to serve a particular geographic area." 1992 Cable Act §2(a)(2).[3] Second, cable systems and broadcast systems "increasingly compete for television advertising revenues." 1992 Cable Act §2(a)(14). Third, this competition creates a natural incentive for cable systems to "delete, reposition, or not carry local broadcast systems." 1992 Cable Act §2(a)(16). Fourth, without access to cable, "the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized." *Id.* And fifth, "[t]here is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media." 1992 Cable Act §2(a)(6).

The constitutionality of the "must carry" rules was immediately challenged in a series of lawsuits. The appellants in this case include a consortium of cable operators and cable programmers.[4] Their essential claim is that the "must carry" rules violate the First Amendment for three related reasons. First, appellants contend, the "must carry" rules require a cable operator to say something (in the form of broadcast programming) it otherwise might not say. Second, they prevent a cable operator who is already operating at full capacity from saying something (in the form of displaced cable programming) it otherwise might say. Third, and derivatively, the "must carry" rules unfairly favor one category of speaker (broadcast television) at the expense of another (cable programmers).

Each of these contentions was rejected by the three-judge court that heard the case below. In an opinion by Judge Jackson, the majority concluded that the "must carry" rules had more in common with economic regulation than speech regulation, that strict scrutiny was therefore inappropriate and that, absent strict scrutiny, the congressional findings in support of the "must carry" rules were entitled to deference.[5] J.S.App. 2a-35a. Judge Williams dissented. In his view, the "must carry" rules are content-based and cannot survive strict scrutiny on this record. J.S.App. 50a-72a.

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[3] More specifically, Congress found that cable now supplies the signal to 60% of the nation's television receivers, 1992 Cable Act §2(a)(3); that more than 98% of American communities are served by a single cable system with a local monopoly franchise, J.S.App. 11a n.16; and that, while technically feasible, it is currently impractical for viewers to receive noncable broadcast signals once they have opted for cable, S. Rep.No. 92, 102d Cong., 1st Sess. 44-45 (1991). In their affidavits and other submissions, appellants have contested some of these findings and amplified others.

[4] Cable operators transmit broadcast signals through cables, generally laid under the streets or on telephone poles, to individual subscribers who pay to receive the cable transmission. Cable programmers produce material designed for transmission over a cable system. Several of the appellants are both cable operators and cable programmers.

[5] Pursuant to the jurisdictional scheme created by the Cable Act, the three-judge court only considered appellants' challenge to the "must carry" rules. Shortly after the three-judge court rendered its opinion, however, Judge Jackson, sitting as a single judge, also rejected appellants' challenge to the public and leased access provisions of the 1984 cable law, 47 U.S.C. §§531, 532. That decision is now on appeal to the D.C. Circuit. *Daniels Cablevision, Inc. v. U.S.*, No. 92-2292 (D.D.C. Sept. 16, 1993), *appeal docketed*, No. 53-5290 (D.C.Cir. Sept. 28, 1993).

It is worthwhile to note that "must carry" rules differ from public and leased access rules in at least three significant ways: (1) the "must carry" rules run in favor of a specific category of speaker -- local television broadcasters -- while public and leased access operates on a first-come, first-served basis; (2) "must carry" grants free access to cable systems, while "leased access" requires payment of a reasonable fee; and (3) the "must carry" rules guarantee favorable channel placement for broadcast television, while public and leased access channels can be placed anywhere on the dial by cable operators.

SUMMARY OF ARGUMENT

This case involves important and unresolved questions of First Amendment law, with potentially far-reaching applications, that unfortunately comes before this Court on a very incomplete record. Appellants discount the importance of a factual record because they believe that the "must carry" rules are facially inconsistent with the principles announced in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). The government, for its part, also discounts the importance of a factual record but on the very different theory that the congressional findings provide ample justification for the constitutionality of the "must carry" rules.

In our view, neither position is correct. Appellants' contention that this case is controlled by *Tornillo* necessarily rests on the premise that cable operators and newspaper publishers should be treated indistinguishably for First Amendment purposes. We disagree. While many cities in this country may have only a single newspaper, that result is not the product of a government franchising system. When government actively and directly participates in the creation of a media monopoly, as it does with cable television but could not do under traditional First Amendment jurisprudence, the First Amendment stakes change and government's interest in assuring the rights of diverse speakers correspondingly increases. Under these circumstances, this Court has recognized the right of government to adopt structural regulations in a variety of different settings designed to maximize diversity and assure access to the medium by less powerful voices (without engaging in content-based censorship). *See, e.g., Metro Broadcasting v. FCC*, 497 U.S. 547 (1990); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

The validity of such regulations, however, cannot be judged in the abstract, nor should they be judged based on undue deference to legislative factfinding. While government's participation in the creation of a media monopoly may justify its interest in diversity-enhancing regulations, such regulations still represent a significant intrusion into the affairs of a First Amendment enterprise and demand serious judicial review. In particular, the courts must make their own independent judgment about the necessity, efficacy, and likely impact of the proposed regulatory scheme. *See Sable Communications v. FCC*, 492 U.S. 115 (1991). Because that inquiry never took place below, this case should be remanded for further proceedings so that a final judgment about the constitutionality of the "must carry" rules can be made in an appropriate factual context.

ARGUMENT

I. THE "MUST CARRY" RULES ADOPTED BY CONGRESS SHOULD NOT BE STRUCK DOWN AS *PER SE* UNCONSTITUTIONAL UNDER *TORNILLO* BECAUSE OF THE GOVERNMENT'S UNIQUE ROLE IN CREATING AND MAINTAINING CABLE MONOPOLIES

The threshold legal issue to be decided in this case is whether cable operators enjoy the same First Amendment rights as newspaper publishers. If so, the "must carry" rules must fall because, under existing law, the government plainly may not compel access to a newspaper in the name of diversity. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241. For a variety of reasons, however, we do not believe that *Tornillo* provides the appropriate analogy or a suitable basis for resolving this dispute.

Indeed, we believe that a simplistic reliance on *Tornillo* would not only be wrong, but dangerous. Equating the First Amendment rights of newspaper publishers and cable operators would either weaken current First Amendment doctrine by diluting the existing rights of

purely private speakers or needlessly ossify First Amendment doctrine by undermining government's interest in regulating the operation of a critically important information monopoly that it created. Indeed, under *Tornillo*, viewing cable operators as equivalent to newspaper publishers for First Amendment purposes could well mean striking down leased and public access, as well as the "must carry" rules, and thus effectively doom a panoply of government efforts to regulate monopoly cable operators.[6]

In fact, the Court's cases reveal a more complex approach to the First Amendment. When the speaker and hearer communicate without the umbrella of a government granted monopoly, as in the case of newspapers and more traditional forms of speech, this Court has refused to permit even well-intentioned efforts to regulate the free marketplace of ideas to increase diversity or, conversely, to limit the power of a single speaker. *E.g.*, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241; *Buckley v. Valeo*, 424 U.S. 1 (1976); *First National Bank v. Bellotti*, 435 U.S. 765 (1978); *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981); *Pacific Gas & Electric Co. v. Public Utilities Comm'n*, 475 U.S. 1 (1986); *Meyer v. Grant*, 486 U.S. 414 (1988). *But see Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990).

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[6] As noted above, *see* n.5 *supra*, leased access and "must carry" raise different constitutional issues because, *inter alia*, "must carry" is designed to benefit one favored category of speaker at the expense of another. Insisting that cable operators are identical to newspaper publishers could, however, render such a potentially important distinction irrelevant, since even public and leased access would probably violate *Tornillo*. The ACLU has long supported the constitutionality of public and leased access at least in part because they create an electronic public forum. *See* H.R. Rep.No. 934, 98th Cong., 2d Sess. 30-31 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News 4655, 4667-68.

When, however, government grants a monopoly to a single speaker to carry out a significant communicative function, this Court has acknowledged a limited power to regulate the structure of the monopoly speech process in order to assure at least a minimum level of diversity with regard to both speech and speakers. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367; *Columbia Broadcasting System, Inc. v. FCC*, 453 U.S. 367 (1981); *Metro Broadcasting v. FCC*, 497 U.S. 547. *Cf. Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652. *See generally* Bollinger, "Toward a Theory of Partial Regulation of the Mass Media," 75 Mich.L.Rev. 1 (1976).

Television broadcasters, of course, face at least some competition from other broadcast licensees, although each broadcaster operates on the basis of an exclusive right to a designated portion of the electromagnetic spectrum. Cable operators, by contrast, typically face no competition from other cable systems in the same locality because of the nature of the franchising process. Thus, even more than television broadcasters, cable operators derive their monopoly status from the government and depend on the government to facilitate their speech by granting permission to dig up the streets.

As one court has noted:

> [A] cable operator must lay the means of his medium underground or string it across poles in order to deliver his message. Obviously, this manner of using the public domain entails significant disruption, especially to streets, alleys, and other public ways. Some form of permission from the government must, by necessity, precede such disruptive use of the public domain.

Community Communications v. Boulder, 660 F.2d 1370, 1377-78 (10th Cir. 1981). The FCC has similarly observed that "'local governments are inescapably involved

in the [franchising] process because cable makes use of streets and ways and because local authorities are able to bring a special expertness to such matters.'" *Id.* at 1378 n.8, *citing* 37 Fed.Reg. 3276 (1972).[7]

Reflecting this reality, the government has in fact established an elaborate system of government franchising for cable operators. *See* 47 U.S.C. §541. It also regulates cable franchise fees, *see* 47 U.S.C. §542, and other aspects of the cable industry's practices. *See, e.g.*, 47 U.S.C. §542 (capping fees that local franchising authorities can impose on cable operators).

A cable operator who is granted a government franchise generally "enjoys a virtual monopoly over its area, without the threat of an alternative provider." *Chicago Cable Communications v. Chicago Cable Comm'n*, 879 F. 2d 1540, 1550 (7th Cir. 1989), *cert. denied*, 493 U.S. 1044 (1990). In practical terms, therefore, the government-imposed franchising system makes real-market competition impossible and creates at least the danger that expressive diversity will be stifled as fewer and fewer entities dominate, with government assistance, the powerful cable communications medium.

The existence of government-imposed local monopolies sets cable television apart from print media. Subject to the substantial economic constraints that undoubtedly exist, anyone is free to publish a newspaper or magazine, or to hand out pamphlets, without seeking a government franchise. By contrast, individuals or entities that wish to communicate through the increasingly pervasive medium of cable television are at the whim of those operators to whom the government has granted a cable franchise -- or must rely on special access provisions like those at issue in this lawsuit.

This difference necessarily affects the First Amendment analysis and, in our view, justifies at least some regulation of cable that would not be permissible if we were dealing with newspapers. Strictly speaking, this is not a scarcity argument of the sort that has traditionally been used to justify government regulation of the broadcast industry. *See, e.g., FCC v. National Citizens Comm'n for Broadcasting*, 436 U.S. 775 (1978); *Red Lion Broadcasting v. FCC*, 395 U.S. 367. Unlike broadcast television, there is no technological limit to the number of available cable channels and thus no need for the government to allocate a limited number of available spaces on the electromagnetic spectrum among competing speakers. Like broadcast licensing, however, cable franchising thrusts the government right in the middle of the decision about who shall be allowed to speak.

It is somewhat disingenuous, therefore, to suggest that any government-mandated access rules violate the First Amendment rights of cable operators when the programming discretion that cable operators seek to protect from government regulation is also protected from market competition because of a government-awarded monopoly franchise. The contention that cable television should be regarded as equivalent to newspapers in all respects for First Amendment purposes simply ignores this crucial distinction.[8] Furthermore, if cable

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[7] *See also Carlson v. Village of Union City*, 601 F.Supp. 801, 810 (W.D. Mich. 1985)("Many courts have recognized that municipalities have substantial interests in controlling disruptive use of the public domain by cable television operations")(citing cases); *Berkshire Cablevision of Rhode Island v. Burke*, 571 F.Supp. 976, 985 (D.R.I. 1983).

[8] Recognizing that certain forms of monopoly speech are so intertwined with government assistance that the government is entitled to impose structural (as opposed to content) regulations in an effort to assure fair access and reasonably diverse content does not carry with it a general power to censor content in the name of decency, moral uplift or public policy. *FCC v. League of Women Voters*, 468 U.S. 364 (1984). Thus, whatever power Congress possesses to regulate monopoly cable operators and television broadcasters in the name of diversi-

(continued...)

television were to be treated as equivalent to newspapers for First Amendment purposes, then the government-created monopoly that cable operators now enjoy would itself violate the First Amendment.

There is, in addition, a second distinction between cable television and traditional newspaper publishing. This Court's decision in *Tornillo* upholding a First Amendment challenge to Florida's right-of-reply statute turned in large part on the Court's determination that the statute was an impermissible "intrusion into the function of editors." 418 U.S. at 258. At least for those cable systems with still unused channel capacity, or with current potential for increased capacity, that "intrusion" is less clear. Indeed, one way to think of cable operators is that they perform dual roles as both speaker and conduit, and that both roles are part and parcel of the monopoly granted by government franchise. Under this formulation, the access rules, including "must carry," are directed toward cable operators in their role as conduits and not in their role as speakers.[9]

Obviously, these labels cannot become a substitute for First Amendment analysis. Nor can First Amendment problems be ignored by the simple expedient of characterizing the target of government regulation as a conduit rather than a speaker. At the same time, it would be equally wrong to ignore the fact that the cable industry has a very different history than newspaper publishing, and that its original function was primarily to serve as a conduit for broadcast television rather than a speaker in its own right. *See Fortnightly v. United Artists Television*, 392 U.S. 390, 400-01 (1968).

History should not be destiny in this regard and the cable industry, like any other business, can change its focus over time. But the fact that the cable industry has historically played a conduit role along with its role as speaker, that the two roles can co-exist so long as there is unused channel capacity on the cable system, and that the access rules challenged in this lawsuit are not triggered by the content of the cable operator's own speech,[10] all further distinguish this case from *Tornillo* and suggest the need for a fresh look at the difficult constitutional issues presented.

II. BOTH THE MAJORITY AND DISSENT BELOW FAILED TO SUBJECT THE FACTUAL JUSTIFICATION FOR THE "MUST CARRY" RULES TO AN APPROPRIATE LEVEL OF JUDICIAL SCRUTINY

Just as appellants mistakenly argue that this case can be resolved on the basis of *Tornillo*, the government errs when it argues that no additional facts are necessary because the congressional record provides a conclusive resolution of the factual issues underlying the free speech controversy in this case. Once it is acknowledged that monopoly cable operators are subject to regulation, the government contends that the legislature's assessment of the need for such regulation and the efficacy of the means used to achieve the government's goal is conclu-

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[8] (...continued)
ty, we continue to believe that the power to censor content asserted in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) is profoundly dangerous and constitutionally unjustified.

[9] This Court has recognized in other contexts that media actors may play different roles with different First Amendment consequences. For example, in *Associated Press v. United States*, 326 U.S. 1 (1945), the Associated Press (AP) newspaper cooperative brought a First Amendment challenge to an antitrust decree that required AP to admit certain newspapers as members and share its news copy with them. In rejecting the First Amendment claim, the Court drew a distinction between AP's editorial and distributive roles. *Id.* at 20 n.18.

[10] *See Home Box Office, Inc. v. FCC*, 567 F.2d 9, 46 n.9 (D.C.Cir.), *cert. denied*, 434 U.S. 829 (1977).

sive in any later judicial proceeding. The government's contention, however, cannot be reconciled with First Amendment doctrine or this Court's prior cases.

While the existence of a government-sanctioned monopoly in an important communications medium may justify certain structural regulations designed to promote access to the medium and thereby a diversity of ideas and speakers that the government's award of a monopoly franchise might otherwise stifle, those regulations must still be subject to significant First Amendment scrutiny. Cable television is, obviously, an important medium for communication and cable programmers and operators are First Amendment speakers, in at least some of their roles. Indeed, this Court has already acknowledged that cable television provides its subscribers with "news, information, and entertainment," *Leathers v. Medlock*, 499 U.S. __, __, 111 S.Ct. 1438, 1442 (1991), and "communicates messages on a wide variety of topics and in a wide variety of formats." *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986).

Much of the battle in this case has inevitably revolved around the effort to define the appropriate standard of review in this unique and still evolving First Amendment context. More than anything else, however, this case demonstrates the wisdom of the Court's observation that First Amendment formulations developed to deal with one method of communication do not always apply with ease or precision to new and different media. *See, e.g., Metromedia, Inc. v. San Diego*, 453 U.S. 490, 501 (1981); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 547 (1975); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952).

Not surprisingly, appellants seek to characterize the "must carry" rules as a form of content-based regulation that requires the government to carry the highest burden of justification under the First Amendment. *Police Dep't v. Mosley*, 408 U.S. 92 (1972). There are, undoubtedly,

elements of the "must carry" rules that have content-based implications. In a cable system that is operating at full capacity, the "must carry" rules may in some circumstances force a cable operator to displace its own programming in order to create room for local broadcast television. In a cable system with excess capacity, the "must carry" rules still give the broadcast stations a preferred place in line over other speakers who are relegated to the public or leased access channels on a first-come, first-served basis.

However, even viewed in this light, the "must carry" rules do not appear to present the same potential for censorship that is traditionally associated with content-based regulation. They do not address or limit the subject matter of any programming. *Cf. Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530 (1980). And while they differentiate among speakers, they do not do so in a way that appears to be a proxy for viewpoint-based discrimination. *Cf. First National Bank v. Bellotti*, 435 U.S. 765.

Nevertheless, it is also difficult to characterize this case as having only an "incidental" impact on speech and thus to evaluate the "must carry" rules under the relaxed First Amendment standard announced in *United States v. O'Brien*, 391 U.S. 367 (1968). The *O'Brien* test was developed to review a statute that "on its face deal[t] with conduct having no connection with speech." *Id.* at 375. That is clearly not true of the "must carry" rules. Furthermore, to the extent that the "must carry" rules can be said to compel speech by cable operators, they do aim at the suppression of expression (at least in the negative sense that our expressive rights under the First Amendment include the right not to speak). *See, e.g., Pacific Gas & Electric Co. v. Public Utilities Comm'n*, 475 U.S. 1; *Wooley v. Maynard*, 430 U.S. 705 (1977).

Finally, the majority below characterized the "must carry" rules as a form of economic regulation having lit-

tle or no impact on the content of speech. This description also seems inaccurate or incomplete. For First Amendment purposes, there is a significant difference between general economic rules that are applied to a First Amendment enterprise like cable television and economic regulations that are expressly and uniquely targeted at First Amendment activity. If anything, this case fits within the latter category, where this Court has traditionally applied a heightened form of First Amendment scrutiny. *See, e.g., Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983).

In the end, the precise formulation selected by the Court is less critical than the recognition that the "must carry" rules represent a major government effort to regulate the expressive options available on an important medium of communication and that this fact alone calls for a demanding standard of review. Whatever formulation is ultimately adopted, therefore, we respectfully submit that the very essence of free speech protection in these circumstances requires independent judicial scrutiny of four issues: (1) the validity of the government's interest in regulation;[11] (2) the factual necessity for regulation;[12] (3) the efficacy of the regulation;[13] and (4) the existence of alternative, less intrusive means of regulation.[14]

In every First Amendment case, the legislature (or an administrative official) will have answered the four questions in favor of regulation. Congress has done so here. If that were the end of judicial review, as the government argues in this case, the legislature would be left free to define the limits of its own First Amendment authority. This Court has never adopted that view. To the contrary, the Court has consistently and properly recognized that the essence of free speech protection is the availability of a judicial "second opinion" on each of the crucial four questions of interest, necessity, efficacy and narrow tailoring.

Thus, in *Sable Communications v. FCC*, 492 U.S. 115, this Court invalidated a ban on so-called "dial-a-porn" because a factual basis for the congressional attempt at speech regulation was not present. In response to an assertion similar to the government's in this case that the Court was bound to defer to Congress' belief that a flat ban on dial-a-porn was necessary to protect children, Justice White, writing for the Court, held:

> To the extent that the federal parties suggest

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[11] Courts have rejected the government's asserted interest in regulation in two settings. First, this Court has firmly rejected any effort to regulate speech because of a disagreement with its content. *E.g., Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S 788 (1985); *Grosjean v. American Press Co.*, 297 U.S. 233 (1968). Second, this Court has required that the government interest be qualitatively significant. *Niemotko v. Maryland*, 340 U.S. 268, 273 (1951)(Frankfurter, J. concurring). In the context of this case, we believe that the two governmental interests asserted in support of the "must carry" rules -- the promotion of access and thereby presumably diversity, and the prevention of abuse by a government-franchised monopoly gatekeeper -- satisfy the criteria of neutrality and significance set forth in the Court's jurisprudence.

[12] The classic statement of the responsibility of the judiciary to exercise an independent review of the factual necessity for the regulation of speech is the "clear and present danger" test enunciated by Justices Holmes and Brandeis and accepted by this Court in *Brandenburg v. Ohio*, 395 U.S. 444 (1969). The movement from the "bad tendency" test to the "clear and present danger" test represents, in large part, the articulation of a judicial responsibility to assure that the factual justification for speech regulation actually exists.

[13] *See Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980).

[14] *See Sable Communications v. FCC*, 492 U.S. 115.

that we should defer to Congress' conclusion about an issue of constitutional law, our answer is that while we do not ignore it, it is our task in the end to decide whether Congress has violated the Constitution. *That is particularly true where the Legislature has concluded that its product does not violate First Amendment. 'Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake.' Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978). The federal parties, however, also urge us to defer to the factual findings by Congress relevant to resolving the constitutional issue . . . . *Beyond the fact that whatever deference is due legislative findings would not foreclose our independent judgment of the facts bearing on an issue of constitutional law*, our answer is that the congressional record contains no legislative findings that would justify us in concluding that there is no constitutionally acceptable less drastic means . . . to achieve the government's interest . . . .

492 U.S. at 129 (emphasis added).

Unfortunately, the majority below declined to apply a *Sable Communications* standard to the alleged factual justification for the "must carry" rules. Instead, the majority substituted labels for analysis, holding that the statute in question was merely an "economic" regulation subject to minimal review for rationality. Such minimal review did not, in the view of the majority, entitle the court to conduct an independent review of the factual basis for the regulation. *See FCC v. Beach Communications, Inc.*, 508 U.S. __, 113 S.Ct. 2096 (1993). Whatever label one appends to the "must carry" rules, though, they impose direct governmental interference with the programming decisions of a protected speaker. Accordingly, they cannot be approved based simply on legislative factfinding and statements of need but must be subjected to independent First Amendment judicial review, as in *Sable Communications*.[15]

Appellants have vigorously asserted that no real factual basis exists for Congress' assumption that cable operators will treat local broadcasters with special hostility, or that "must carry" rules are needed to protect the health of the television broadcast industry and its continued presence on cable systems. Appellees vigorously disagree, arguing that "must carry" rules are a necessary prophylaxis against abuse of monopoly power.

Congress resolved these difficult factual questions in favor of regulation but, as Justice White explicitly noted in *Sable Communications*, when First Amendment rights are at stake, the judiciary has an obligation to make an independent inquiry into the factual justification for government interference with free speech. Because the court below misunderstood its responsibility, it did not conduct such an independent factual inquiry. While it is possible for this Court to conduct the inquiry for the first time at the appellate level, it would be far more efficient to remand the matter to the trial court for the initial factual inquiry, especially since summary judgment appears impossible given the parties' vigorous disagreement about the facts.

On the other hand, the legislative findings are obviously relevant on remand. Accordingly, we believe the

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[15] The argument for deference to congressional factfinding was different and stronger in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547. First, in *Metro Broadcasting*, Congress was acting pursuant to its constitutional authority to enforce the provisions of the Fourteenth Amendment. Second, *Metro Broadcasting* did not involve the countervailing First Amendment concerns that are present in this case.

dissent below erred in failing even to acknowledge the importance of the congressional finding that prophylactic regulation is necessary to assure access and diversity in the cable industry. For example, despite Congress' finding that current technology makes it impractical for viewers to receive both cable and local broadcast signals through the use of a so-called A/B switch, *see* n.3, *supra*, the dissent ignored the congressional finding and premised its opinion, in part, on the existence of a ready technological alternative to "must carry." It may be that such a viable technological alternative exists but, if so, Congress' findings must be rebutted by something more than a mere assertion.

This is not to suggest that plaintiffs in a First Amendment case ever bear the burden of *disproving* government claims of necessity. To the contrary, "it has long been established that the government cannot limit speech protected by the First Amendment without bearing the burden of showing that its restriction is justified." *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986). At the same time, the law does not require that congressional findings be ignored. In the absence of record evidence to the contrary, congressional findings are generally entitled to respect. Once contrary evidence has been placed before a court, however, the First Amendment demands that the government establish all four parts of the factual justification for any restriction on speech. *See* p.14-15, *supra*. Thus, on remand, Congress' findings about the need for "must carry" should be given substantial, but not conclusive weight.

The precise First Amendment status of cable operators is a difficult issue of critical importance. *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488. *See also United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968); *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972). *See generally* Brenner, "Cable Television and the Freedom of Expression," 1988 Duke L.J.

329. The inherent difficulty of the issue is compounded by the shifting technological ground under the parties' feet. Assumptions about the technological capacity of cable, local broadcast, and other untried forms of transmission must necessarily play an important role in any judicial analysis. Yet, all agree that we stand on the threshold of vast technological change in the realm of mass communication -- change that may reshape our fundamental conception of the communications process. *See* "Special Issue, Videotex," 36 Fed.Comm.L.J. 119 (1984).

Accordingly, we urge the Court to refrain on this record from deciding the novel and difficult First Amendment issues presented by this case and to remand the matter for a more searching factual inquiry by the trial court. In the absence of a carefully developed factual record about necessity, efficacy and real-world impact of the "must carry" rules, it is impossible to do justice to the competing free speech claims that render this case so difficult. Among many other issues, the lower court should appropriately consider whether there is a demonstrated need for the "must carry" rules; whether the "must carry" rules are in fact designed to promote diversity rather than, as appellants contend, merely substituting one group of speakers for another; and whether there is a meaningful constitutional distinction between the application of "must carry" to otherwise unused portions of a cable system and the ousting of pre-existing speech from a fully utilized system.

Only when the full facts are known regarding the need for and impact of the "must carry" rules will this Court be in a position to assess the significant First Amendment interests on both sides of this case.

CONCLUSION

For the reasons stated above, this Court should reject the proposition that the "must carry" rules adopted by Congress in the 1992 Cable Act are *per se* unconstitutional under *Tornillo*, and then remand the case for further development of a factual record regarding the need for the rules and whether they are appropriately crafted to achieve their stated purpose of promoting diversity.

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No. 93-44

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,
v.
FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, NATIONAL LEAGUE OF CITIES, UNITED STATES CONFERENCE OF MAYORS, AND THE CITY OF NEW YORK AS AMICI CURIAE IN SUPPORT OF APPELLEES

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BRIEF OF THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, NATIONAL LEAGUE OF CITIES, UNITED STATES CONFERENCE OF MAYORS, AND THE CITY OF NEW YORK AS AMICI CURIAE IN SUPPORT OF APPELLEES

The National Association of Telecommunications Officers and Advisors, National League of Cities, United States Conference of Mayors, and The City of New York (collectively "the Local Governments") submit this brief *amici curiae* in support of the appellees. Each party to this suit has given the Local Governments written consent to the filing of this brief pursuant to Rule 37.3 of this

Court, and copies of their consents have been filed with the Clerk of this Court.

INTERESTS OF AMICI CURIAE

This appeal involves First Amendment facial challenges to Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, 1471-81 (to be codified at 47 U.S.C. §§ 534, 535) (the "1992 Cable Act"). Sections 4 and 5 set forth the conditions under which cable systems must carry the signals of local broadcast television stations. Among the issues before this Court is the proper First Amendment analysis for evaluating regulation of the cable industry. That issue directly concerns local governments, which have "primary" authority for cable regulation under the 1992 Cable Act. *See* H.R. Rep. No. 628, 102d Cong., 2d Sess. 29 (1992) ("1992 House Report").

Amici Curiae, who participated in the proceedings below, represent various governmental entities and officials involved in the regulation of cable television—

—The National Association of Telecommunications Officers and Advisors ("NATOA") is an unincorporated association composed primarily of local government employees and advisors responsible for the regulation of cable systems and other local telecommunications services. NATOA is affiliated with, and serves as an advisor to, the National League of Cities.

—The National League of Cities represents more than 17,000 cities and towns, the substantial majority of which franchise and regulate cable operators' use of public property.

—The United States Conference of Mayors represents the more than 950 mayors of cities with populations exceeding 30,000 residents. The majority of these mayors have cable television-related responsibilities.

—The City of New York has been involved in franchising and regulating cable systems since 1964. The City has in place ten franchises for cable television systems, which currently serve over one million households.

In exercising their responsibilities as trustees of public property, local governments have been negotiating franchise agreements with cable operators since the advent of cable television in the 1950's. Francise agreements specify certain of the conditions under which cable operators are allowed to utilize, and thereby commercially profit from, public property. Such agreements seek to ensure that cable operators use public resources for the purposes for which that use was authorized in the first instance—to make available a wide diversity of programming to the entire community. *See Chicago Cable Communications* v. *Chicago Cable Comm'n*, 879 F.2d 1540, 1550 (7th Cir. 1989) (as public's "representative," local government is "duty-bound" to ensure that cable operators who occupy public property "make optimum use" of it, and that public is "accorded a range of programming"), *cert. denied*, 493 U.S. 1044 (1990).

Increasingly, however, cable operators have raised First Amendment challenges to the public interest obligations reflected in franchise agreements. Moreover, operators have brought First Amendment challenges to a number of provisions of both the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 ("1984 Cable Act") and the 1992 Cable Act that directly affect local governments' regulatory responsibility over cable television. *See Daniels Cablevision, Inc.* v. *United States*, —— F. Supp. ——, Civ. A. No. 92-2292, 1993 WL 393000 (D.D.C. Sept. 16, 1993), *appeal docketed*, No. 93-5290 (D.C. Cir. Sept. 28, 1993). Among the 1984 Cable Act and 1992 Cable Act provisions currently being challenged are those that authorize franchising authorities to negotiate requirements for public, educational, and governmental access channels; establish national standards for the

local and federal regulation of cable rates; clarify that the 1992 Cable Act does not prohibit municipal ownership of cable systems; and immunize cable franchising authorities from certain damage awards.

In adjudicating First Amendment challenges to cable regulation, the lower courts have adopted varying (and often conflicting) standards of analysis. The purpose of this brief is to set forth the Local Governments' views concerning the proper First Amendment standard for evaluating economic regulation of the cable television industry, such as the must-carry provisions of the 1992 Cable Act.

SUMMARY OF ARGUMENT

In *City of Los Angeles* v. *Preferred Communications, Inc.*, 476 U.S. 488 (1986), this Court declined to articulate the appropriate First Amendment analysis for analyzing cable regulation. The Court explained that the appropriate analysis could not be determined without a fuller development of the factual record, noting that the particular characteristics of the cable medium—its "uses of the public utility poles and rights-of-way"—may distinguish it from other media for First Amendment purposes. *Id.* at 495.

As the Court has observed, "[E]ach medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems." *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 557 (1975); *accord Preferred Communications*, 476 U.S. at 496 (Blackmun, J., concurring) ("Different communications media are treated differently for First Amendment purposes."). Moreover, as the three-judge Court below correctly recognized in declining to exercise jurisdiction over appellants' non-must-carry claims, the different communications media are not "governed by a single First Amendment standard." *Turner Broadcasting Sys.* v. *FCC*, 810 F. Supp. 1308, 1314 (D.D.C. 1992). "In fact, standards vary within a single medium depending on the character of the disputed restriction." *Id.*

Any determination of the First Amendment standard to be applied to a particular cable regulation must take account of (1) the substantial benefits that local governments and the federal government confer upon the cable industry (including extensive, non-transient use of public rights-of-way) in order to facilitate the dissemination of a wide diversity of programming to the entire community; and (2) cable's "bottleneck" control over the programming that may be made available to that community. The First Amendment affords federal and local governments wide latitude in imposing conditions upon governmental benefits and in dealing with monopolistic conduct. *See Rust* v. *Sullivan*, 111 S. Ct. 1759 (1991); *Regan* v. *Taxation with Representation*, 461 U.S. 540 (1983); *Associated Press* v. *United States*, 326 U.S. 1 (1945).

As this Court's decisions make clear, viewpoint-neutral structural regulations of cable (including the must-carry provisions of the 1992 Cable Act) should be subjected to a rational basis, and not strict scrutiny, review. Requirements that further the purposes for which cable operators are permitted to make substantial use of valuable public resources easily satisfy a rational basis standard.

Under any standard, however, the must-carry provisions embodied in the 1992 Cable Act are consistent with the First Amendment. They reflect the type of reasonable public interest regulation that should be imposed upon cable operators who, as Congress found, have both the incentive and the ability to stifle potential competition from other media. *See* 1992 House Report at 60. Indeed, before the federal government preempted this area, local governments themselves could—and did—negotiate franchise agreements that required cable operators to carry local broadcast signals. The First Amendment does not preclude local governments from conditioning access to public property upon compliance with viewpoint-neutral requirements (including must-carry requirements) which help ensure that (1) the public receives a diversity of programming; and (2) the maximum possible beneficial

use is made of public resources. Nor does the First Amendment preclude the federal government from imposing what amounts to uniform national guidelines for such requirements.

ARGUMENT

I. RATIONAL BASIS IS THE APPROPRIATE STANDARD OF REVIEW

A. Rational Basis Review Is Appropriate Given the Substantial Governmental Benefits Which Facilitate Cable's Commercial Dissemination of Programming

1. Appellants argue at length that, for First Amendment purposes, cable operators should be treated the same as newspaper publishers. However, cable operators do not merely seek freedom from governmental regulation of their programming services. Instead, they seek to obtain the right of unrestricted *government facilitation* of their private speech and commercial interests. As such, their status is critically different from that of newspaper publishers.

Unlike newspapers, cable relies for dissemination of its programming services upon the permanent physical occupation of governmental resources held in trust for the public. In order to gain access to paying subscribers, cable operators must make extensive, non-transient use of valuable public property. Cable wires and associated equipment must be hung from poles, housed in underground ducts, or otherwise placed in or across a public right-of-way. Furthermore, cable operators necessarily depend upon state and local authorities to exercise their powers of eminent domain in order to ensure cable's access to private property. *See generally Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

The federal government also has adopted several laws and regulations that uniquely benefit the cable industry. Among other things, these provisions facilitate cable's access to the public right-of-way and to private property

owned by utilities and others. *See, e.g.*, 47 U.S.C. § 541 (a)(2) (rendering unenforceable private arrangements that seek to restrict cable system's use of public rights-of-way or easements); 47 U.S.C. § 224(b) (authorizing FCC to determine reasonable terms and conditions on which cable operator may require utility to provide access to that utility's poles and ducts).

Congress and the FCC also have benefited cable by imposing various limitations on the conditions that local governments may negotiate in cable franchise agreements. *See generally City of New York* v. *FCC*, 486 U.S. 57 (1988) (upholding FCC preemption of local cable technical standards); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984) (striking down state restrictions on cable advertising as inconsistent with FCC regulations and federal copyright law); *ACLU* v. *FCC*, 823 F.2d 1554 (D.C. Cir. 1987) (generally upholding FCC restrictions on state and local regulation of cable rates), *cert. denied*, 485 U.S. 959 (1988). The 1984 Cable Act itself places a cap on the amount of franchise fees that cable operators can be required to pay in exchange for utilizing public rights-of-way. *See* 47 U.S.C. § 542.

Similarly, to promote cable's growth and the wide availability of broadcast programming to cable subscribers, Congress has compelled copyright owners of programming broadcast over conventional television stations to license that programming to cable operators—on terms established solely by the federal government. *See* 17 U.S.C. § 111; *National Cable Television Ass'n* v. *Copyright Royalty Tribunal*, 724 F.2d 176 (D.C. Cir. 1983); 1992 House Report at 57. Neither broadcasters nor newspaper publishers enjoy any governmentally-mandated right to use and to profit from the copyrighted works they distribute.[1]

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[1] Appellants argue that the Court, in evaluating the constitutionality of the federal must-carry provisions, should disregard the substantial benefits that cable systems receive from local govern-

2. The First Amendment affords federal and local governments wide latitude in imposing conditions on the grant of benefits to private parties. For example, in *Regan*, this Court upheld against First Amendment challenges a statute that denied tax benefits to non-profit organizations engaged in lobbying. The Court in *Regan* ruled that restrictions on a federal subsidy are not "subject to strict scrutiny" where there is "no indication that the statute was intended to suppress any ideas or any demonstration that it has had that effect." 461 U.S. at 548-50. And, in *Rust*, 111 S. Ct. at 1776, this Court noted that "the existence of a Government 'subsidy,' in the form of Government-owned property," justifies government-imposed conditions on the subsidy, including restrictions on speech—unless those restrictions apply to speech within traditional public fora. As the Court in *Rust* also stated, "[W]ithin far broader limits than petitioners are willing to concede, when the government appropriates public funds to establish a program it is entitled to define the limits of that program." *Id.* at 1773.[2]

In *Federal Election Comm'n* v. *International Funding Inst., Inc.*, 969 F.2d 1110 (D.C. Cir.) (en banc), *cert. denied*, 113 S. Ct. 605 (1992), the U.S. Court of Appeals for the District of Columbia considered the con-

ments—such as use of public rights-of-way. That argument, however, rests upon a fundamental misconception of the must-carry provisions. Absent federal preemption of this area, a franchising authority could reasonably condition a cable operator's use of public property upon that operator's agreement not to deny local broadcast stations access to the cable system. The must-carry provisions of the 1992 Cable Act simply provide uniform, national standards for the carriage of local broadcast signals.

[2] The constitutionality of the statutory provisions at issue here presents a far easier case than did the constitutionality of the rule at issue in *Rust*. That rule prohibited recipients of federal family planning funds from advocating abortion as a method of family planning. In contrast, the cable regulations challenged by appellants constitute only structural economic regulations that are neither content- nor viewpoint-based.

stitutionality of a provision of the Federal Election Campaign Act ("FECA"). That provision granted persons access to public lists of the contributors of political committees, but prohibited persons from using those lists to solicit contributions or to advance a commercial purpose. The D.C. Circuit provided the following analysis of *Rust* and *Regan*:

> In those cases the Court apparently held that *so long as the purpose of a statute is not to "suppress*[] . . . *dangerous ideas," it is constitutional if it has a rational basis, see Rust v. Sullivan,* 111 S.Ct. at 1771-76 (no mention of an "important" or "substantial" government interest); [*Regan*], 461 U.S. at 544-46 (same).

969 F.2d at 1116 (citations omitted) (emphasis added). The FECA's restriction on speech constituted a reasonable viewpoint-neutral condition on a governmental grant; accordingly, the Court of Appeals found that restriction to be consistent with the First Amendment.[3]

As this authority demonstrates, the government may condition the benefits it bestows upon the cable industry (such as the use of public resources), as long as those conditions are viewpoint-neutral and have a rational basis. The must-carry provisions of the 1992 Cable Act plainly satisfy that standard. Those provisions are content-neutral economic regulation. As the three-judge Court correctly concluded, "[T]he must-carry provisions are, in intent as well as form, unrelated (in all but the most recondite sense) to the content of any message." *Turner Broadcasting Sys.* v. *FCC*, 819 F. Supp. 32, 40 (D.D.C.), *prob. juris. noted*, 114 S. Ct. 38 (1993). Moreover, the

[3] The Court of Appeals in *International Funding* noted that there may be a "conflict" between *Regan* and *Rust*, on the one hand, and *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20 (1984) (requiring intermediate scrutiny in a government benefits case), on the other hand. The Court of Appeals found no need to resolve that possible conflict. 969 F.2d at 1116.

provisions are rationally related to the legitimate governmental interests explicitly set forth in Section 2 of the 1992 Cable Act. *See* 1992 Cable Act, sec. 2, 106 Stat. at 1460-64.[4]

B. Rational Basis Review Is Also Appropriate Given Cable's Bottleneck Control over the Programming That May Be Disseminated to Community Residents

The decisions in *Associated Press* and its progeny also make clear that content-neutral structural regulation of a natural monopoly does not implicate the First Amendment. As the Court noted in *Associated Press,* "Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests." 326 U.S. at 20. The Court in *Associated Press* thus held that the government, without violating the First Amendment, could use its antitrust laws to regulate the Associated Press' monopolistic practices. *Id.*

Similarly, in *FCC* v. *National Citizens Comm. for Broadcasting,* 436 U.S. 775 (1978), this Court upheld against a First Amendment challenge the FCC's ban on the number of media outlets that newspapers may own. The Court found the FCC's cross-ownership rule to be a "reasonable means of promoting the public interest in

[4] Reliance on a rational basis test in the circumstances here is also consistent with traditional forum analysis. Where nonpublic fora are involved (such as in the case of cable's use of a public right-of-way or easement), the government may "reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n,* 460 U.S. 37, 46 (1983). The determination of what is reasonable in such a context is properly focused on the reasonableness of regulating an industry receiving the privilege of comprehensive use of special public property. *See Preferred Communications,* 476 U.S. at 494-95.

diversified mass communications." *Id.* at 802. And, in *Committee for an Indep. P-I* v. *Hearst Corp.,* 704 F.2d 467 (9th Cir.), *cert. denied,* 464 U.S. 892 (1983), the Ninth Circuit upheld against a First Amendment challenge the Newspaper Preservation Act as an "economic regulation which has the intent of promoting and aiding the press." 704 F.2d at 483. In each of these cases, the courts evaluated the challenged governmental regulation without any hint of heightened scrutiny—notwithstanding that the regulation involved the print media.

The *Associated Press* doctrine applies equally to the must-carry provisions embodied in the 1992 Cable Act. Although a cable system may offer a large number of channels, there is typically only one system in each market. A cable system rarely faces competition from a second cable system. *See* S. Rep. No. 92, 102d Cong., 1st Sess. 8, 51-52 (1991) ("1991 Senate Report"); 1992 Cable Act, sec. 2(a)(2), 106 Stat. at 1460; *Chicago Cable,* 879 F.2d at 1550 ("Unlike the traditional forms of print media, a cable programmer enjoys a virtual monopoly over its area, without the threat of an alternative provider."). A community served by only one cable system effectively has access only to the speech selected by that one editor. That one editor determines which of several voices will be heard by cable subscribers.[5]

[5] Appellants claim that cable is not characterized by any "physical scarcity" that would preclude multiple cable operators in a community. However, at least one federal court, upon the development of a full evidentiary record concerning a particular community, has found to the contrary. *See Telesat Cablevision, Inc.* v. *City of Riviera Beach,* 773 F. Supp. 383, 396 (S.D. Fla. 1991); *see also Omega Satellite Prods.* v. *City of Indianapolis,* 694 F.2d 119, 125 (7th Cir. 1982). As Congress noted,

> "Common sense dictates that the number of entities that can tear up the streets or use existing poles and ducts is very limited physically * * * If everyone sought to have a cable operation, the result would be a wall of wires creating chaos

Under *Associated Press*, structural regulations that prevent cable operators from exploiting their "gateway" or "bottleneck" facilities (1992 House Report at 57) to diminish the diversity of programming do not violate the First Amendment. The must-carry provisions of the 1992 Cable Act constitute "economic regulations designed to promote competition and a diversity of voices in communications services," *Associated Press*, 326 U.S. at 59. As such, they do not offend the First Amendment.

II. THERE IS NO PROPER BASIS FOR APPELLANTS' INVOCATION OF STRICT SCRUTINY

Appellants' strict scrutiny argument rests on two claims: (1) the must-carry provisions allegedly interfere with the

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or interference akin to that which existed in the early days of broadcasting."

1991 Senate Report at 51 (ellipsis in original) (footnote omitted) (quoting Testimony of Henry Geller, "Cable TV Consumer Protection Act of 1989," p. 9).

Appellants also claim that the must-carry provisions preclude cable operators from offering programming they wish to offer. This is simply incorrect. The must-carry rules do not prohibit carriage of any programming. A cable operator's decision not to carry certain services is in fact the product of a number of factors unrelated to must-carry. *See* Time Warner Complaint ¶¶ 29-30 (filed Nov. 5, 1992), *Turner Broadcasting Sys.* v. *FCC*, 819 F. Supp. 32 (D.D.C.) (No. 92-2494), *prob. juris. noted*, 114 S. Ct. 38 (1993).

Furthermore, any limitation on the number of channels offered by a cable operator results from that operator's own economic and marketing decisions, because the cable operator is technologically able to offer as many channels as it wishes. Structural regulation does not infringe First Amendment rights simply because it may impose some greater expense on a cable operator. *See Warner Cable Communications, Inc.* v. *City of Niceville*, 911 F.2d 634, 638 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 2839 (1991) (injury to cable operator's profit is not the same as injury to its First Amendment rights); *Home Box Office, Inc.* v. *FCC*, 567 F.2d 9, 49 n.97 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977) ("[I]n the absence of a showing of economic harm bordering on censorship, a diminution of profits does not itself present a First Amendment problem.").

"editorial discretion" of cable *operators* (not cable programmers) by compelling them to carry speech they would otherwise not carry; and (2) these provisions discriminate among media by placing restrictions only on cable television. Neither of these theories warrants strict scrutiny under the First Amendment.

This Court, in *Leathers* v. *Medlock*, 111 S. Ct. 1438 (1991), held that cable operators could be taxed differently than newspapers. *Id.* at 1447. The Court in *Leathers* thus made clear that discrimination among media or categories of speakers "does not implicate the First Amendment"—unless it "is directed at, or presents the danger of suppressing, particular ideas." *Id.*; *see also Regan*, 461 U.S. at 548-49. The Court in *Leathers* rejected the position of the dissent there, which is essentially the same position advocated by appellants in this case: that the state must offer an interest in the regulation that is "sufficiently compelling to overcome the presumption of unconstitutionality under the nondiscrimination principle." 111 S. Ct. at 1450 (Marshall, J., dissenting).

Furthermore, any alleged interference with "editorial discretion" does not warrant strict First Amendment scrutiny—unless the government is penalizing or deterring the expression of particular views, *see, e.g., Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974) (striking down statute granting political candidates right of reply in newspaper that expressed particular viewpoint (criticism) with respect to them), or forcing the speakers to publicly "affirm" views to which they object. *See generally PruneYard Shopping Ctr.* v. *Robins*, 447 U.S. 74 (1980). Because the must-carry provisions are not viewpoint-based and do not force affirmation of particular views, strict scrutiny is not triggered.

CONCLUSION

For the reasons stated above, the Court should make clear that viewpoint-neutral economic regulation of cable is subject to rational basis review; structural regulation that furthers the purposes for which cable is authorized to use public resources does not offend the First Amendment. The Local Governments urge the Court to affirm the order and judgment of the three-judge District Court upholding the constitutionality of the must-carry provisions of the 1992 Cable Act.

Respectfully submitted,

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OCTOBER TERM, 1993

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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BRIEF OF THE CITY OF LOS ANGELES, CALIFORNIA, AND THE ALLIANCE FOR COMMUNICATIONS DEMOCRACY AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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S. Rep. No. 92, 102d Cong., 1st Sess. (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133 ..... 9, 10, 13

PERIODICALS

Douglas Davis, *Public Access TV Is Heard In The Land*, N.Y. TIMES, June 11, 1989, at H31 19

Michael Kiernan, *To Watch Is OK, But To Air Is Divine*, U.S. NEWS AND WORLD REPORT, Oct. 16, 1989, at 112 19

Johnnie L. Roberts *et al.*, *Time Warner Plans Electronic 'Superhighway'*, WALL ST. J., Jan. 27, 1993, at B1 26

Sheinman, *TV Goes Gray At The Grass Roots*, 50/PLUS, Sept. 1987, at 24 19

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Quanda Stroud, *The Disabled Making Cable Access-able*, NEWS AND VIEWS, Cincinnati Cable Access Corporation, Summer 1988 19

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BRIEF OF
THE CITY OF LOS ANGELES, CALIFORNIA, AND THE ALLIANCE FOR COMMUNICATIONS DEMOCRACY AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

INTEREST OF THE *AMICI CURIAE*

Amicus curiae the City of Los Angeles, California, is a municipality that franchises and regulates cable television operators within the City. The Alliance for Communications Democracy ("Alliance") is a membership organization comprised of nonprofit access corporations throughout the country, which have helped thousands of individuals use public, educational, and governmental ("PEG") access channels on cable television systems.[1] *Amici* believe that Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. §§ 534, 535 ("1992 Cable Act") — the so-called must-carry provisions — are constitutional, and that the Court should affirm the district court's decision.

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[1]Written consent to the filing of this brief has been obtained from the parties to this case. Copies of the consent letters accompany this brief.

Los Angeles, which participated as an *amicus* below, is the defendant in another case raising First Amendment challenges to cable television regulation, which was before this Court earlier. *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986). That case is now pending before the United States Court of Appeals for the Ninth Circuit, where it has been briefed and argued. *Preferred Communications, Inc. v. City of Los Angeles*. Nos. 91-55625, 91-55665 (9th Cir. filed May 9, 1991 and May 20, 1991). In *Preferred*, the plaintiff attacks on First Amendment grounds virtually every aspect of Los Angeles' cable television franchising process, including the requirement that a cable operator set aside two channels for public use, two channels for use by educational institutions, and two for use by the city government.

This Court declined in *Preferred* to articulate "the proper standard for judging First Amendment challenges to a municipality's restriction of access to cable facilities," *id.* at 496, because of the lack of a thoroughly developed record. The Court cautioned that "[w]e think that we may know more than we know now about how the constitutional issues should be resolved when we know more about the present uses of the public utility poles and rights-of-way and how respondent proposes to install and maintain its facilities on them." *Id.* at 495. The record in *Preferred* now addresses these factual issues, while the record in the instant case does not.

The Alliance, which also participated as an *amicus* below, is a nonprofit organization dedicated to ensuring that the public has some opportunity, albeit limited, to make use of television, the most powerful and popular communications medium of our time. "Access" channels, as

the name implies, are channels set aside on a cable system for noncommercial use by the general public, as well as by educational and governmental institutions. 47 U.S.C. § 531. Without PEG access channels, the public, and public institutions, would be virtually locked out of the television medium, despite the fact that the operation and profitability of a cable television system is made feasible only by virtue of the fact that a cable system is constructed on rights-of-way belonging to the public.

Members of the Alliance have assisted thousands of citizens in using PEG access channels, and using the television medium for communication.[2] Thus, the Alliance has firsthand knowledge as to the manner in which PEG access channels function, and their value in assuring that members of the public have an opportunity to communicate over cable systems.

Amici believe that the three-judge district court was correct in holding that the must-carry rules are constitutional, and that the judgment of the district court should be affirmed. In addition, *amici* are concerned that the Court not resolve the constitutional issues posed by the must-carry rules in a way that would inadvertently impinge on the City's ability to franchise and regulate cable television systems within its jurisdiction in the public interest, as well as the rights of PEG access users and

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[2]The Board of Directors of the organization is composed of representatives of nonprofit access corporations in Montgomery County, Maryland; Grand Rapids, Michigan; Columbus, Ohio; Tucson, Arizona; Chicago, Illinois; Boston, Massachusetts; Honolulu, Hawaii; St. Paul, Minnesota; Multnomah County and Salem, Oregon; and Staten Island and New York City, New York.

viewers, when the justifications for such regulation are largely absent from the factual record now before the Court.

SUMMARY OF ARGUMENT

Municipal cable television franchising and regulatory authorities, such as Los Angeles, have significant interests in how cable television systems make use of scarce public rights-of-way. Unlike any private business other than the traditional public utilities such as telephone, gas, water, and electric power, cable television systems operate by virtue of placing hundreds of miles of distribution plant on public rights-of-way, public utility poles, and in underground facilities. This extensive and permanent use of public property distinguishes cable television from all other media, and underscores the wisdom of the Court's instruction in *Red Lion* that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969).

As the Court recognized in *Preferred*, 486 U.S. at 495, "First Amendment values must be balanced against competing societal interests." A wide range of such "competing societal interests" support and justify all aspects of cable television regulation, including municipal franchising requirements and PEG access requirements. Most of those interests, however, are largely unaddressed in the factual record submitted by the parties here. Therefore, in deciding this case, and in articulating the appropriate First Amendment standard by which to judge the constitutionality of the must-carry rules, the Court should recognize that this record is largely silent on the First Amendment rights of PEG access users and viewers, as well

as the rights of municipalities to ensure that cable operators using public rights-of-way and the utility infrastructure serve the public, rather than purely private, interests. Therefore, this case should be addressed in a manner that does not inadvertently curtail these other important societal interests, including the First Amendment rights of PEG access users and viewers.

In particular, cable's distinctive and unique use of public rights-of-way and the public utility infrastructure demonstrates that appellants are wrong in urging the Court to adopt for cable television the same First Amendment standards that traditionally have been applied to the print media. Rather, *amici* suggest that the Court should look to forum analysis to provide the appropriate standard by which to judge the constitutionality of cable television regulation, and should conclude that the public utility infrastructure used by cable operators is a nonpublic forum. Alternatively, the Court should fashion a First Amendment standard specifically for cable television that recognizes the unique attributes of cable as a distribution medium, including cable's comprehensive use of public property. Since the must-carry rules permit a cable operator to retain control over the vast majority of channels on a cable system — indeed, far more channels than any other user of the system — the must-carry provisions are constitutional.

ARGUMENT

The Supreme Court has made clear that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 386 (footnote omitted); *accord Preferred*, 476 U.S. at 496 (Blackmun, J.,

concurring). "Each method of communicating ideas is 'a law unto itself.'" *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981) (quoting *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) (Jackson, J., concurring)). After all, "[t]he moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers." *Kovacs*, 336 U.S. at 97 (Jackson, J., concurring). Similarly, the nature of cable television is unique, as are the "values, abuses and dangers" it presents.

In enacting both the Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521 *et seq.*, ("1984 Cable Act"), and the 1992 Act, Congress looked carefully at the nature of cable television, as well as the "values, abuses and dangers" that the medium and the technology bring. Although appellants urge the Court to disregard Congress' findings in evaluating their First Amendment claims,[3] the Court must indeed take the findings of Congress into account in reviewing the constitutionality of Sections 4 and 5. *See Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985). As the Court has explained:

> That is not to say we "defer" to the judgment of the Congress and the Commission on a constitutional question, or that we would hesitate to invoke the Constitution should we determine that the Commission has not fulfilled its task with appropriate sensitivity to the interests in free expression. The point is, rather, that when we face a complex problem with many hard questions and few easy answers we do well to pay careful attention to how the other branches of Government have addressed the same problem.

Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 103 (1973).

[3]Brief for Appellant National Cable Television Association, Inc., ("NCTA") at 38-39, Brief for Appellants Turner Broadcasting System, Inc., *et al.* ("Turner Brief") at 38 & n.63.

Congress concluded in 1984 and reaffirmed nearly a decade later that the unique characteristics of cable television not only allow, but indeed necessitate, three forms of access to this particular medium: The must-carry rules for local broadcasters, the PEG access rules for the general public, and for educational and governmental institutions, and commercial leased access for other users, 47 U.S.C. §§ 531, 532, 534 & 535. While PEG and leased access channels are supported by important societal interests that are distinct and additional to the interests justifying the must-carry rules at issue here, the fact remains that all three forms of access to the cable television medium stem from cable television's unique "nature" — a local broadband communications distribution network, located on public property, with bottleneck characteristics. Each form of access is thus specifically tailored to address the "values, abuses and dangers" that characterize the cable medium.

I. MUNICIPAL CABLE FRANCHISING AUTHORITIES SUCH AS LOS ANGELES HAVE SIGNIFICANT INTERESTS, NOT REPRESENTED ON THIS RECORD, IN ENSURING THAT THE PUBLIC RIGHTS-OF-WAY USED BY CABLE SYSTEMS SERVE THE PUBLIC INTEREST.

Although appellants readily concede that cable systems inherently use public rights-of-way, and that municipalities'

interests in how cable systems use their rights-of-way[4] accordingly give them authority to regulate that use, appellants ignore the magnitude and permanence of cable's comprehensive use of that scarce public property. But it is this extensive, permanent use of public property that distinguishes cable from other media, and that underlies the policy decisions Congress made in enacting the 1984 and 1992 Cable Acts, including the provisions for must-carry and PEG access channels.

The installation and operation of a cable television system inherently involves significant and long-term occupation of valuable public rights-of-way. Like an electric, telephone, water, or gas system, a cable television system consists of a permanent street-by-street, house-by-house distribution system of hundreds of miles of cable and equipment installed on utility poles and in underground utility conduits. The utility poles and underground conduits, as well as the property traversed by aerial cable wires, are located on or under public streets and in rights-of-way held by a city or other local government in fee or through permanent easements. In Los Angeles, for example, cable systems occupy approximately 6,500 plant miles of municipal rights-of-way and utility infrastructure. No other private business in the City even approaches this level of ongoing and preclusive use of City property, other than the traditional public utilities. Each of those utilities, of course, is comprehensively regulated in the public interest.

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[4] *See, e.g.*, NCTA Brief at 31; Brief for Appellant Time Warner Entertainment Company, L.P. ("Time Warner Brief") at 33, 37, & 38.

Plainly, cable systems' use of scarce public rights-of-way differs not only in scope, but in kind from that of other media, such as newspapers. In enacting the 1992 Cable Act, Congress recognized that, in contrast to the print media, "cable must be awarded a franchise in order to operate and, similar to the telephone system, it must use governmental property to string its wires, lay its cable in ducts, and obtain necessary rights of way." S. Rep. No. 92, 102d Cong., 1st Sess. 51 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1184 ("Senate Report"). As the Tenth Circuit similarly has noted:

> To disseminate information, a newspaper need not use public property in the same way that a cable operator does. A newspaper may reach its audience simply through the public streets or mails, with no more disruption to the public domain than would be caused by the typical pedestrian, motorist, or user of the mails.

Community Communications Co. v. City of Boulder, 660 F.2d 1370, 1377 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982). Likewise, the Seventh Circuit has specifically distinguished cable from other media on the ground that "cable television involves . . . interference with other users of telephone poles and underground ducts." *Omega Satellite Prods. Co. v. City of Indianapolis*, 694 F.2d 119, 127 (7th Cir. 1982).

Moreover, while there are no physical limitations to the number of newspapers that may be published in a community, the public rights-of-way and utility infrastructure cannot physically accommodate all who

might wish to use them.[5] Appellants are disingenuous in asserting that "the physical capacity to accommodate additional cable systems exists" (NCTA Brief at 31), and that "in virtually every community, it is physically possible to have multiple cable systems . . . ." (Time Warner Brief at 33). In fact, utility poles and underground conduit can no more accommodate an infinite number of cable systems than they can accommodate an infinite number of telephone, electric, water or gas distribution systems.

Indeed, the cable distribution medium is, if anything, far more scarce than the broadcasting medium. In the Los Angeles area, for instance, there are at least twenty television broadcast stations. The record in *Preferred*, in contrast, makes plain that the City's existing utility infrastructure could physically accommodate at most only two or a small, unspecified number of cable systems. Yet the law is clear that the scarcity of the spectrum used by broadcasters, which supports far more broadcast users than the utility infrastructure will support cable users, is sufficient constitutional justification to subject broadcasters to licensing and comprehensive regulation in "the public interest" under the Communications Act, 47 U.S.C. §§ 301 *et seq. See, e.g.*, *Red Lion*, 395 U.S. at 388-91; *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943).

Time Warner nevertheless asserts that "in any location where existing space on poles and ducts is limited, there is nothing that stops would-be cable operators from adding space by, for example, erecting higher or additional

[5] *See* Senate Report at 55, 1992 U.S.C.C.A.N. at 1188 (noting that "[c]ertainly, there are practical limits on the number of cable franchises which can operate in any community . . . .").

telephone poles or laying cables underground" (Time Warner Brief at 33 n.30). Perhaps Time Warner is correct that there are no technological obstacles that would bar a community from erecting utility poles reaching to the heavens or from condemning more and more private land on which to install new sets of utility poles or underground conduit. But aside from the economic and legal limitations that may exist, surely the First Amendment does not require a community to engage in such activity. To the contrary, as the Seventh Circuit held in a recent *en banc* decision, "no person has a constitutional right to erect or maintain a structure on the public way." *Graff v. City of Chicago*, No. 92-2352, 1993 WL 484167, at *4 (7th Cir. Nov. 24, 1993).

Moreover, as this Court recognized in *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 816-17 (1984), the aesthetic interest in avoiding visual clutter, standing alone, may permit a city to limit the use of public property as a vehicle for communication. Given *Vincent*, surely there is nothing in the First Amendment that would require a city and its residents to endure the visual and economic burdens caused by more and more, taller and taller utility poles so that an unlimited number of cable operators may hang their wires in the public rights-of-way.

Furthermore, any use of a city's utility infrastructure for additional cable television systems prevents the space from being used for other purposes. The same public property — utility poles, underground conduit, and other public rights-of-way and easements — houses not only cable, but also electric and telephone wires; water, gas, and sewage pipes; and wires and equipment for a host of other municipal services, such as traffic signals and police, fire, and emergency communications networks. Particularly in a time

and place of rapid growth and development such as Los Angeles has faced in recent years, a municipality has a vital interest in conserving and managing the existing space in its utility infrastructure for future needs. Thus, a city could well conclude that sound management of its utility infrastructure requires it to reserve space on its utility poles for the time being so that anticipated growth in electrical or telephone service can be accommodated in the future.

The installation of each additional cable system also substantially increases the safety hazards that necessarily occur with the installation and maintenance of each system that is added to the utility poles, whether for distribution of electricity, telephone, or cable television. Safety risks increase for all utility workers, but particularly for those working on the electric or telephone systems, which are typically installed above cable on the poles, thus requiring workers on the uppermost systems to climb through the wires and equipment of the lower systems to perform any installation or maintenance work. Managing the utility infrastructure to plan future uses and to ensure safety is, of course, "the 'business of government'," *Graff*, 1993 WL 484167, at *9 (quoting *Chicago Observer, Inc. v. City of Chicago*, 929 F.2d 325, 329 (7th Cir. 1991)), which courts are peculiarly ill-suited to second-guess. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 299 (1984).

Moreover, as Congress has recognized, cable television is also an economically scarce medium; that is, a medium in which demand can generally be satisfied at lowest cost by a

single provider.[6] Time Warner nevertheless contends that economic scarcity is irrelevant because alternatives to cable television exist and cable operators must be minimally responsive to their customers' programming interests to stay in business (Time Warner Brief at 33-34). But Time Warner ignores a critical characteristic unique to the cable medium: The convergence of economic and physical scarcity in a medium making comprehensive use of public property. Unlike a newspaper, a cable system derives economic power from a government grant of authority to place permanent physical plant in scarce public rights-of-way, a right that inherently cannot be granted to everyone. *Community Communications*, 660 F.2d at 1377-79 (finding that a cable television system, unlike a newspaper, derives its economic power from its use of public rights-of-way). As Congress found, cable systems have strong natural monopoly tendencies. Absent regulation, they are thus in a position to exercise the market power derived from their control of local distribution facilities on public property to abuse consumers and harm competitors.

This power is amplified by the significant additional economic advantages that the law specifically confers on cable operators but not on other media, such as newspapers. For example, federal law grants cable television companies the right to place equipment and wires on public and private

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[6] Senate Report at 12, 1992 U.S.C.C.A.N. at 1144 (noting that almost all cable operators possess significant market power); *id.* at 19, 1992 U.S.C.C.A.N. at 1151-52 (noting that cable operators use market power to charge higher than competitive rates); *id.* at 24, 1992 U.S.C.C.A.N. at 1156-57 (noting that cable operators use market power over conduit in streets to force programmers to give them exclusive contracts or sell interests in programming services).

property. 47 U.S.C. § 541(a)(2). Moreover, Congress has made clear that "[a]ny private arrangements which seek to restrict a cable system's use of such easements or rights-of-way which have been granted to other utilities" are "not enforceable." H.R. Rep. No. 934, 98th Cong., 2d Sess. 59 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4696 ("1984 House Report"). The 1984 Cable Act also benefits cable operators in other ways. For instance, the Act limits the franchise fees cities may charge and the services they may regulate, 47 U.S.C. §§ 541, 542 & 544, limits the circumstances under which a cable operator may be denied renewal of a franchise, 47 U.S.C. § 546, and entitles a cable operator to modification of its franchise obligations under certain circumstances, 47 U.S.C. § 545.

Because cable systems make such extensive use of local public rights-of-way and are economically scarce, municipalities like Los Angeles indisputably have significant interests — interests not presently before the Court on the record of this case — in ensuring that cable systems serve the public, as opposed to the operator's purely private, interest. Among those uniquely local interests are (1) conserving and managing the capacity of a scarce and vital resource, the city's utility infrastructure; (2) planning and coordinating for the efficient use of that infrastructure so that it will best meet the public's overall needs, now and in the future; (3) minimizing the disruption to public and private property resulting from the installation of a cable system; (4) minimizing the permanent visual blight caused by utility poles and wires; (5) ensuring that a cable system is constructed and operated in a safe and productive manner; (6) assuring that cable service is available to all city residents; (7) ensuring that a cable system makes use of

public property in an efficient and productive manner that maximizes the communicative potential of the system; (8) obtaining compensation for a franchisee's use of public property; (9) allowing public participation and input in granting franchises and in formulating economically feasible terms for franchises; (10) protecting the public from fraud and dishonesty by franchisees; (11) ensuring that a franchisee is responsive to the particular needs of the local community; (12) increasing information diversity; and (13) ensuring that the public and public institutions also have an opportunity to use the cable medium for communications.

In order to ensure that cable systems serve these significant interests, local franchising authorities such as Los Angeles impose or negotiate a variety of requirements for cable franchises. Most of these requirements, such as construction standards and insurance and bonding requirements, do not implicate First Amendment interests at all. Others arguably do, and could not be imposed on newspapers, which have entirely different "natures, values, abuses and dangers." *Kovacs*, 336 U.S. at 97 (Jackson, J., concurring). For example, a requirement that newspapers dedicate space for general public use, analogous to the PEG access requirements for cable television systems, would not be constitutionally permissible given the particular characteristics of the print medium. *Cf. Miami Herald v. Tornillo*, 418 U.S. 241 (1974).

Similarly, local franchising authorities typically require a cable franchisee to wire all areas of the community that have enough housing density to make a cable system economically viable. Universal service is required even though particular neighborhoods may be less affluent and less profitable for the cable operator, who might not choose

to serve the area if not required to do so. Such a universal service requirement — patterned on the requirement imposed on the traditional public utilities — would surely pose grave constitutional concerns if imposed on a newspaper.

In the cable context, however, these requirements are explicitly tied to the fact that cable operators, unlike newspaper publishers, build and operate their plants on property belonging to the public. Thus, it is one thing to suggest, as this Court did in *Miami Herald v. Tornillo*, 418 U.S. at 250-54, that the First Amendment prohibits the government from targeting the print medium for special regulation to ameliorate the perceived effects of a newspaper publisher's market power — power that the government had no role in creating. It is quite another, however, to suggest as appellants do here, that the First Amendment renders the government impotent to take regulatory steps to prevent a cable operator's private monopolization of a communications medium located on public property.

In fact, it is a cable system's extensive use of public property that gives rise to the requirement that a cable operator, like other similarly extensive users of public property, must obtain a franchise from the government to operate. And as this Court long ago recognized, a franchise is a right of "public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration . . . under such conditions and regulations as the government may impose in the public interest, and for the public security." *California v. Central Pac. R.R.*, 127 U.S. 1, 40 (1888).

In light of the public's substantial interests in the use of public property, it is clear that the First Amendment standards applicable to the print medium are not appropriate for cable television. As discussed further below, *amici* suggest that the proper constitutional standard for reviewing those forms of cable regulation that implicate the First Amendment is the forum standard, and that the utility infrastructure used by cable systems is a nonpublic forum. In the alternative, the Court should fashion a First Amendment standard that recognizes the inherent public property attributes of the cable medium, and the strong governmental interests in ameliorating the inherent market power enjoyed by cable operators, and ensuring that, in return for their extensive use of public property and the other benefits they receive, cable operators are required to serve the public, as well as their own purely private, interests.

II. USERS AND VIEWERS OF PEG ACCESS CHANNELS HAVE SIGNIFICANT FIRST AMENDMENT INTERESTS THAT MUST BE RECOGNIZED IN FASHIONING A CONSTITUTIONAL STANDARD FOR CABLE.

As the legislative history to the 1984 Cable Act states:

> Public access channels are often the video equivalent of the speaker's soapbox or the electronic parallel to the printed leaflet. They provide groups and individuals who generally have not had access to the electronic media with the opportunity to become sources of information in the electronic marketplace of ideas.

1984 House Report at 30, 1984 U.S.C.C.A.N. at 4667.

Absent PEG access channels, the public, as well as educational and governmental institutions, would be locked out of the television medium. Only the fortunate and affluent few with the very substantial resources required to be cable operators, programmers, or broadcasters would be able to use the television medium as a vehicle for communications. The vast majority of the American public, unable to own a cable system, a satellite cable programming service, or a broadcast station, would simply be frozen out of the most powerful and popular communications medium of our time. PEG channels thus serve as a small, but vital, window of opportunity for the American public to participate as speakers, and not just as listeners, over the television medium.

Congress noted that PEG access requirements are not content-related, for they work "automatically" and without extensive "government intervention"; PEG channels are "available to all." *Id.* at 35-36, 1984 U.S.C.C.A.N. at 4672-73. Use of PEG access channels does not depend on the views or the identity of the access speaker; any speaker may use a channel regardless of whether that speaker agrees or disagrees with the government, the cable operator, or anyone else. The operator is free to disassociate itself from any and all messages, or from the PEG channel altogether. Moreover, Congress narrowly tailored PEG access requirements by specifically permitting the cable operator to use PEG access channels when they are not being used for their intended purpose. 47 U.S.C. § 531(d).

PEG access channels are uniquely local in nature, and they help communities grow and flourish.[7] They serve as outlets through which people can learn about and express their views on important issues in their communities. Indeed, according to one report, PEG access producers create some "10,000 hours of amateur programs each week."[8] For example, hundreds of Vietnamese families tune into public access each week to see the only television program available in their native language.[9] The disabled and senior citizens use public access channels to raise issues of importance to them and to debunk stereotypes portrayed in other programming.[10] And educational and governmental access channels in particular contribute to "an informed citizenry by bringing local schools into the

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[7]In some communities, all PEG users share one or more channels. In other cities the channels are allocated to the various user groups. No matter how they are managed, the overall character of the channels does not change.

[8]More than one-third of all cable subscribers watch access arts and entertainment, educational, and public affairs programming. Michael Kiernan, *To Watch Is OK, But To Air Is Divine, U.S. News & World Report*, Oct. 16, 1989, at 112. As the *New York Times* reported, "the electronic soapbox is now a vital part of almost 2,000 CATV systems." Douglas Davis, *Public Access TV Is Heard in The Land, N.Y. Times*, June 11, 1989, at H31.

[9]Kiernan, *supra* note 8, at 112.

[10]Quanda Stroud, *The Disabled Making Cable Access-able, NEWS AND VIEWS*, Cincinnati Access Corporation, Summer 1988; Sheinman, *TV Goes Gray at the Grass Roots, 50/PLUS*, Sept. 1987, at 24.

home, and by showing the public local government at work."[11]

Moreover, PEG access channels ensure that the grant of a franchise does not result in the conversion of the public property used by a cable system into a monopoly forum for the sole benefit of one or a handful of private cable operators. After all, the very act of granting a franchise provides the franchisee special privileges, not available to all, and creates a likelihood that the franchisee will obtain sizable speech (and other) advantages. Since this advantage is "the fruit of a preferred position conferred by the Government," *Red Lion*, 395 U.S. at 400, the government should be free to counterbalance it by ensuring that all — not just a privileged few — are able to speak. As the Court long ago held, there is no right to convert public property to private profit-making use, and the placement of wires and cables on public rights-of-way amounts to just such a conversion. *See City of St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92 (1893). The Court has since made clear that government has a compelling interest in ensuring that scarce public resources are used to the

[11] 1984 House Report at 30, 1984 U.S.C.C.A.N. at 4667; *see also* H.R. Rep. No. 628, 102d Cong., 2d Sess. 85 (1992) (PEG access channels serve the compelling governmental interest in "an informed and well-educated citizenry").

maximum benefit of the many, rather than permitting them to fall within the exclusive control of a few.[12]

The must-carry provisions at issue in this case likewise serve the government's substantial interests in fostering local interests and achieving a diversity of programming. However, there are significant distinctions between the must-carry provisions and PEG access requirements. Indeed, in striking down earlier must-carry rules, the D.C. Circuit specifically noted some of those differences, observing that PEG access requirements "serve countervailing First Amendment values by providing a forum for public and governmental interests." *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1452 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

PEG access channels, of course, favor no particular class or group of speakers. Rather, they are available to all, and they provide an outlet for communication for everyone in the community, regardless of the access user's viewpoint or the content of the message. For that reason, even if the Court were inclined to rule that the must-carry requirements are unconstitutional, it should also counsel against any extension of such a ruling to PEG access requirements.

[12] *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984); *see also Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) (government may regulate to ensure that those who are given benefits that permit them to speak more effectively do not monopolize or control public debate).

III. ANY FIRST AMENDMENT STANDARD APPLIED TO CABLE TELEVISION MUST RECOGNIZE THE UNIQUE PUBLIC PROPERTY ATTRIBUTES OF THE MEDIUM, AND UNDER SUCH A STANDARD, THE MUST-CARRY PROVISIONS ARE CONSTITUTIONAL.

As discussed above, the cable medium has a unique "nature," and presents "values, abuses, and dangers" not characteristic of any other medium. In particular, cable systems inherently make ongoing and extensive use of vital public property — the utility infrastructure — and in doing so, they exclude other users from that same property. The Court "has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." *United States v. Kokinda*, 497 U.S. 720, 726 (1990). *See also International Society for Krishna Consciousness v. Lee*, 112 S. Ct. 2701, 2705 (1992) (recognizing that previous precedent "reflect[s], either implicitly or explicitly, a 'forum-based' approach for assessing restrictions that the government seeks to place on the use of its property"). *Amici* therefore submit that forum analysis provides the appropriate analytical vehicle for

assessing the constitutionality of cable television regulation.[13]

Under forum analysis, there can be little question that the utility infrastructure that cable operators use is a nonpublic forum. This Court's previous decision in *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, renders untenable any suggestion that the utility infrastructure used by cable operators is a traditional public forum. And it is equally clear that the utility infrastructure is not a designated public forum, for by neither policy nor practice has that infrastructure been opened "for indiscriminate use by the general public." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47 (1983). Rather, the utility infrastructure is physically "separat[ed] from acknowledged public areas" and is "a special enclave," subject to special restrictions and uses. *Krishna*, 112 S. Ct. at 2706. Indeed, access to the public utility infrastructure has historically been far more restricted than access to the interior areas of airport terminals, which this Court recently found to be a nonpublic forum in *Krishna*.

Under the nonpublic forum standard, cable regulations must be upheld as long as they are reasonable and "not an effort to suppress the speaker's activity due to disagreement with the speaker's view." *Id.* at 2705-06. The must-carry provisions at issue easily satisfy this test. As the court below

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[13]If the Court is not inclined to apply forum analysis here, it should leave open for future cases the applicability of such analysis to local franchising requirements, since the local public rights-of-way and utility infrastructure used by a cable system are under the control and responsibility of the local franchising authority empowered to grant franchises to cable operators.

noted, all parties — including appellants here — agreed that "the must-carry provisions are not viewpoint-based." *Turner Broadcasting Sys. v. FCC*, 819 F. Supp. 32, 42 (D.D.C. 1993) (emphasis omitted). And while appellants might disagree with the policy conclusions of Congress in enacting the must-carry provisions, the district court was certainly correct in concluding that those provisions represent a reasonable method of ameliorating the perceived adverse effects of cable operators' "position of dominance in the video signal distribution market." *Id.* at 46. The must-carry provisions are therefore constitutional under the nonpublic forum standard.

Should the Court choose not to apply forum analysis, it should nevertheless fashion a First Amendment standard for cable television that gives proper emphasis to the unique public property attributes of the cable medium. Above all else, a cable system is a local broadband communications distribution system situated on public property. Moreover, in most communities, it is a local bottleneck monopoly; that is, were it not for the Cable Act's provisions regarding PEG, commercial leased access, and must-carry channels, the cable operator would enjoy absolute dictatorial control over who may communicate on the cable system. To be sure, some of the activities in which a cable operator engages implicate the First Amendment. *See Preferred*, 476 U.S. at 494. It hardly follows, however, that the First Amendment entitles a cable operator to transform the public property it uses into its own private monopoly over an entire communications distribution medium.

Appellants' fundamental error arises from an inability or unwillingness to distinguish between, on the one hand, the conduit aspects of a cable system as a local monopoly

broadband distribution system placed on public property, and on the other hand, the First Amendment right of a cable operator (like the First Amendment right of everyone else) to communicate messages or programming of its own choosing. A cable operator's status as the owner of a local broadband delivery conduit on public property does not entitle it to preferential First Amendment status as the sole holder of First Amendment rights in the cable medium. Rather, given the unique characteristics of cable, the First Amendment requires only that cable regulation leaves a cable operator with a reasonable ability to communicate messages or programming of its own choosing over that conduit.

Government regulation could satisfy this requirement in several ways. One way would be to treat the cable system as a common carrier network, allowing the cable operator, like everyone else, to lease capacity on the system. In the 1984 and 1992 Cable Acts, however, Congress chose a different approach, and one far more solicitous of cable operators' First Amendment interests. In essence, Congress required a cable operator to set aside a limited portion of its capacity for PEG, leased access and must-carry use, but left the remainder of a cable system's capacity for the operator to program as it pleases.

Thus, when viewed in context, the must-carry provisions are constitutional. They require a cable operator to devote up to approximately one-third of its channel capacity to retransmitting the signals of qualified local broadcast stations. 47 U.S.C. §§ 534, 535. By definition, this leaves the cable operator with control of well over half the channels on its system. And since each broadcaster is entitled to only a single channel, the cable operator enjoys

many times the channel capacity of any other single user of the system. For instance, in a hypothetical fifty-four channel system with eighteen must-carry channels and six PEG access channels, the operator would still control thirty channels — in other words, *thirty times* the communicating capacity of any other user of the system. Surely this enormous advantage over all other users is sufficient to satisfy a cable operator's First Amendment right to communicate programming of its own choosing to the public.

This conclusion becomes all the more obvious when considered in light of the fact that cable operators possess the ability to expand this already built-in channel capacity advantage. Most major-market cable systems in the country already have a channel capacity of at least fifty-four channels, and cable operators are upgrading systems to provide one hundred or more channels. Indeed, the cable industry has boasted of its plans to use digital compression technology to carry hundreds, if not thousands, of channels on systems in the near future.[14]

The constitutional significance of these developments is twofold. First, to the extent that cable operators claim that must-carry rules constrain their ability to carry programming of their choosing in light of current channel capacity, that merely underscores the importance of setting aside channels for others, lest the cable operator convert the public property it uses into a private monopoly over an entire medium of communication. Second, by expanding channel capacity, cable operators have the unilateral ability

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[14] *See, e.g.*, Johnnie L. Roberts *et al.*, *Time Warner Plans Electronic 'Superhighway,'* WALL ST. J., Jan. 27, 1993, at B1.

and incentive to eliminate any constraint that must-carry rules or any other access requirements place on their ability to carry the programming they wish. Indeed, the must-carry (and other cable access) provisions are structured in a way that ensures that the operator will retain complete control over the majority of any new channel capacity it adds to the system. Moreover, the proportionate share of channels over which the operator exercises control will continue to grow as the operator increases channel capacity. To return to the previous example, if the cable operator increases channel capacity from fifty-four to 108 channels, and even in the highly unlikely event that the number of both must-carry and PEG channels also doubled to total forty-eight, the operator would enjoy complete control over sixty channels, or *sixty times* the capacity of any other system user.

The cable programmer appellants nonetheless claim that the must-carry provisions infringe on their First Amendment rights, as distinguished from those of cable operators. *E.g.*, Turner Brief at 20. But the distinction the programmers seek to draw is illusory, for several reasons. First, most of the programmers are themselves owned in large part by cable operators. *See* Appendix to Jurisdictional Statement at 111a-114a. Second, under the cable programmers' own First Amendment theory, their ability to disseminate programming remains at all times entirely subordinate to, and completely dependent on, the editorial discretion of the cable operator. *See, e.g.*, Turner Brief at 20. In other words, even if the must-carry requirements were eliminated, cable programmers' ability to engage in any First Amendment activity via cable would depend entirely on the discretion of cable operators. Finally, the cable programmers completely ignore the fact

that Congress, in crafting a comprehensive scheme of cable regulation, has afforded programmers access to cable channels under 47 U.S.C. § 532, the commercial leased access provisions. That the programmers before this Court have not chosen to avail themselves of this avenue stems from the presumably more favorable economic terms and conditions of carriage that cable operators (with whom most of those programmers happen to be affiliated) have chosen to give them. But cable programmers' desire to preserve the favored economic relationships they enjoy with cable operators, while perhaps understandable, does not present a cognizable First Amendment injury.

Accordingly, in light of the special characteristics of cable television, and because the must-carry provisions leave cable operators and programmers with ample channel capacity over which to communicate their views, the must-carry provisions are constitutional.

CONCLUSION

For the foregoing reasons, the judgment of the United States District Court for the District of Columbia should be affirmed.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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BRIEF AMICUS CURIAE OF TELEMUNDO GROUP, INC. IN SUPPORT OF APPELLEES

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BRIEF AMICUS CURIAE OF TELEMUNDO GROUP, INC. IN SUPPORT OF APPELLEES

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae Telemundo Group, Inc. ("Telemundo"),[1] the second largest Spanish-language television company in the United States, produces and broadcasts programming for the Nation's large and growing Hispanic population. Through its owned and operated broadcast stations and affiliates ("the stations"), Telemundo serves 53 television markets that include approximately 85 per cent of all Hispanic households in the United States. Tele-

[1] This brief is being filed with the consent of the parties, whose letters of consent have been filed with the Clerk of the Court.

mundo and its stations thus serve as a vital link to this community by providing Hispanic citizens with a wide variety of programming in their native language, including national and international news, talk shows, movies, novelas (Spanish-language soap operas), game and variety shows, music, and sporting events. Programming is provided by Telemundo through its network, and by the local stations. Without this programming, many Hispanic citizens would be deprived entirely of a principal source of information, news, and entertainment.

Telemundo and its viewers have been greatly affected both by the "must-carry" provisions of Section 4 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), Pub. L. No. 102-385, 106 Stat. 1471 (codified at 47 U.S.C. § 534), and by the specific harms that Section 4 was intended to rectify. Despite significant Hispanic populations in the areas served by Telemundo's stations, cable operators in those areas have historically excluded the signals of those stations from their cable systems, and many of those systems carried no Spanish-language programming whatsoever. Consequently, before implementation of the must-carry provisions, Spanish-speaking cable subscribers in much of the Nation received little or no programming in their native language.

Under Section 4, however, Telemundo's stations qualify as licensed local commercial broadcast television stations, and therefore have the right to request carriage of their signals on most cable systems in their market areas. *See* 47 U.S.C. § 534(a), (b), (h). Because Section 4 requires those systems to carry the signals of a certain number of qualified local broadcasters, many operators that previously refused to carry the signals of Telemundo's stations have begun carrying those signals to comply with the must-carry provisions. Telemundo's preliminary data shows that since the effective date of those provisions, the broadcasts of Telemundo's full power owned and operated and affiliated stations have been added to approximately 140 additional cable systems nationwide, thereby reaching an additional 400,000 Hispanic viewers. It has also been Telemundo's experience that the number of Hispanic subscribers to a cable system rises whenever Telemundo is added to that system, thereby increasing Telemundo's audience even more.

Telemundo and its viewers thus have a strong interest in this case, and Telemundo urges the Court to uphold Section 4 and effectuate Congress' intent to provide a "fair, efficient, and equitable distribution of broadcast services" that "promote[s] the availability to the public of a diversity of views and information * * *." 1992 Cable Act § 2(a)(9), (b)(1), 106 Stat. 1461, 1463. As set forth below, Telemundo believes its own experience demonstrates the importance of these goals and the legitimacy of the manner in which Congress has sought to achieve them.

SUMMARY OF ARGUMENT

Congress enacted Section 4 of the Cable Television Consumer Protection and Competition Act of 1992 to rectify specific monopolistic and anti-competitive practices that Congress found were inherent in the cable industry. Telemundo believes that the District Court correctly held that this remedial legislation is entirely consistent with the First Amendment, and supports the legal arguments made by appellees below. Rather than repeating those arguments here, Telemundo has filed this brief to apprise the Court of the particular harm that the cable industry's anti-competitive practices have inflicted upon its own stations and upon the Nation's Spanish-speaking television audience, and to stress the vital importance of Section 4 to that important but historically under-served population.

Telemundo believes its own experience will help underscore for the Court two important reasons why Section 4—far from violating the First Amendment—is in fact a

measured and appropriate response to a glaring market imbalance that severely restricted the public's access to a wide range of diverse information. First, Telemundo's stations—which necessarily serve a discrete minority of viewers within their market areas—have been particularly disadvantaged by the "bottleneck" nature of the cable delivery system and the absence of competition within the cable industry. In seeking to rectify these structural barriers to access, Congress in no way dictated the content of any cable programming, but merely sought to level a playing field that had long been skewed against local broadcasters. And second, Telemundo's experience demonstrates the importance of the must-carry provisions to viewers—like Telemundo's Spanish-speaking audience—whose informational needs have been historically underserved due to the cable industry's monopolistic and anti-competitive practices.

ARGUMENT

I. THE MUST-CARRY PROVISIONS ARE A NEEDED REMEDY FOR MARKET IMBALANCES AND ANTI-COMPETITIVE PRACTICES THAT HAVE LONG HARMED LOCAL BROADCAST STATIONS

The must-carry provisions are a content-neutral remedy for specific market imbalances and anti-competitive practices within the cable industry that Congress found resulted in the systematic exclusion of local broadcasters from cable systems. As the District Court correctly found, these provisions are "economic regulation designed to create competitive balance in the video industry as a whole, and to redress the effects of cable operators' anti-competitive practices." J.S. App. 13a. As explained below, this remedial legislation is of special importance to Telemundo, which has been particularly harmed by the competitive imbalance that Section 4 was intended to rectify.

Telemundo's own experience demonstrates the importance of the must-carry provisions to smaller broadcasters

that serve discrete local populations—like Telemundo's Spanish-speaking viewers—whose informational needs have long been ignored as the result of the monopolistic structure of the cable industry and the "bottleneck" nature of its delivery system. Because the programming on Telemundo's stations is necessarily directed at the minority of the Nation's population that understands Spanish, cable operators within those markets have strong incentives to exclude Telemundo's signals and instead carry English-language programming on the limited number of available cable channels. And as Congress expressly found, these operators also have strong incentives to carry programming in which they have a financial interest, and to deny carriage to local broadcasters—like Telemundo's stations—that compete with the cable industry for advertising revenues. *See* 1992 Cable Act § 2(a)(5), (15), 106 Stat. 1460, 1462.

Thus, as noted above, the Nation's cable operators largely excluded Telemundo's signals prior to the advent of the must-carry provisions, and this exclusion persisted even in areas with substantial Hispanic populations. For example, in two recent cases arising in California, cable operators filed suit—on the same grounds alleged here—in an attempt to continue excluding the signals of Telemundo's stations. One case, *Community Cablevision Co.* v. *FCC*, No. CV 93-3104 R (C.D. Cal.), involved a cable system serving Orange County, near Los Angeles.[2] Prior to the effective date of the must-carry provisions, that system excluded the signals of a Telemundo station (Station KVEA) notwithstanding that KVEA is viewed in an average month by 71 per cent of the Hispanic population in the Los Angeles area (which has the Nation's largest concentration of Hispanics), and notwithstanding that nearly 10 per cent of the system's subscribers are His-

[2] The factual information in this brief relating to the *Community Cablevision* case is set forth in the Declaration of Karen A. Harmon, filed in that case on June 10, 1993.

panic. In fact, the system at issue in *Community Cablevision* carried neither of the two most popular Spanish-language stations in the Los Angeles area. As a result of Section 4, however, this system has begun carrying KVEA.

Similarly, *Viacom International, Inc.* v. *FCC*, No. C-93-1984 EFL (N.D. Cal.), involved a cable operator in the San Francisco area, which has the Nation's fourth largest concentration of Hispanics.[5] The cable systems at issue in that case had historically excluded the signals of another Telemundo station (station KSTS), but began carrying those signals as a result of Section 4. And despite the fact that 15 per cent of the cable subscribers in the San Francisco area are Hispanic, this operator carried KSTS on only one of its eleven cable systems in the area prior to the advent of must-carry.

As Congress expressly found, the must-carry provisions are of considerable importance to the financial viability of smaller local broadcasters such as Telemundo, whose signals have long been unfairly excluded from cable systems. *See* 1992 Cable Act § 2(a)(16), 106 Stat. 1462 (Congress found that without must-carry "the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized"). Indeed, the advertising revenues of station KVEA will increase by an estimated $100,000 per year simply as the result of KVEA's addition to the system at issue in *Community Cablevision*; and the advertising revenues of station KSTS would increase by an estimated $350,000 per year as the result of its addition to Viacom's San Francisco area systems. Moreover, because of the cable medium's ever-growing dominance, it is becoming increasingly difficult for smaller broadcasters like Telemundo's stations to remain profitable without access to the cable market.

[5] The factual information in this brief relating to the *Viacom* case is set forth in the Declaration of Joe Cruz, filed in that case on June 11, 1993.

These increased advertising revenue figures demonstrate that cable operators have long ignored a substantial demand for Spanish-language programming, and underscore Congress' findings that these operators, if left unregulated, will fail to meet the informational needs of substantial segments of their local viewing audience. As the District Court explained, Section 4 was based on Congress' belief that the "unfavorable treatment of broadcasters is the result of the cable operators' attempts to obtain a competitive advantage, not a function of consumer demand." J.S. App. 25a. Telemundo's own experience strongly supports that finding.

The problems that Telemundo and other broadcasters have experienced in gaining access to cable systems show that Section 4 is a remedial provision that must be evaluated in the same light as other content-neutral forms of economic regulation that may incidentally affect speech.[6] Similarly, the systematic exclusion of broadcasters—like Telemundo's stations—that serve discrete minority populations demonstrates that the cable medium, like the over-the-air broadcast medium, suffers from a scarcity of outlets for available programming. As Judge Sporkin explained below, "while cable has virtually eliminated the problems caused by scarcity on the broadcast spectrum, it has created another scarcity—namely access to the channels on cable systems themselves." J.S. App. 40a. The must-carry provisions are plainly a legitimate legislative response to that problem. *Cf. Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969) (applying scarcity rationale to uphold content-based broadcast regulation). Regardless whether it might be physically possible for

[6] *See, e.g., FCC* v. *National Citizens Comm. for Broadcasting*, 436 U.S. 775, 802 (1978) (sustaining restrictions on newspapers' ownership of broadcast stations as "a reasonable means of promoting the public interest in diversified mass communications"); *Associated Press* v. *United States*, 326 U.S. 1, 19-20 (1945) (rational basis standard applied to uphold antitrust remedy directed at news organization).

competing cable systems to accommodate all available programming. Congress has found that cable systems are in fact natural "bottleneck" monopolies that systematically exclude local broadcasters. Telemundo therefore urges the Court to uphold the intent of Congress and allow broadcasters like Telemundo the access to cable systems that has been unfairly denied them.

II. THE MUST-CARRY PROVISIONS FURTHER THE FIRST AMENDMENT RIGHTS OF TELEMUNDO'S SPANISH-SPEAKING VIEWERS, WHOSE INFORMATIONAL NEEDS HAVE LONG BEEN UNMET BY THE CABLE INDUSTRY

As this Court has emphasized, "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Red Lion*, 395 U.S. at 390.[5] The must-carry provisions further this important interest by allowing viewers to receive the diversity of local programming—without regard to the content of that programming—that had long been denied them as a result of the cable industry's monopolistic structure. The importance of this goal is even more clear in the case of Telemundo's Spanish-speaking viewers, who have been adversely affected by the anti-competitive practices of cable operators in ways that other viewers have not.

As noted above, many cable systems—even those located in areas with substantial Hispanic populations—carried no Spanish-language programming prior to the effective date of the must-carry provisions. This exclusion has been especially harmful to Spanish-speaking viewers. Denying these viewers access to the broadcasts of Telemundo's stations does not merely exclude one choice among many viewing options, but rather denies them one

[5] *See also First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 783 (1978); *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 756 (1976); *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969).

of the very few outlets for television programming in their native language. Without this programming, which has now been ensured for many viewers through Section 4, an important link will be severed between the Nation's Hispanic citizens and society at large. And this harm would not be felt merely by cable subscribers. As Congress recognized, the increasing dominance of cable threatens the financial viability of those stations that are denied access; thus, even Hispanic viewers who do not subscribe to cable may find no programming in their native language if the must-carry provisions are not enforced.

Accordingly, far from establishing content-based distinctions warranting "strict scrutiny" under the First Amendment, the must-carry provisions help ensure that cable viewers receive a wide spectrum of programming that has been systematically denied them as a result of the anti-competitive nature of the cable industry. Section 4 in no way attempts to dictate the particular content of appellants' speech. Rather, in order to rectify a serious market imbalance, Congress created a right of access for an entire category of broadcasters that Congress specifically found were adversely affected by that imbalance. This category was defined without any reference to the content of those broadcasters' programming, and the local broadcasters who benefit from Section 4 are as diverse as the viewers they serve. In Telemundo's case, Section 4 has provided Hispanic viewers throughout the Nation with much-needed access to a variety of programming in their native language. Other broadcasters that benefit from Section 4 serve different audiences with different programming.

Without must-carry, Spanish-speaking viewers will be deprived of a vital source of information due solely to the anti-competitive practices and market imperfections of the cable industry. But with must-carry, these viewers will be able to access a wide range of information in their native language. It is precisely this type of diversity in

local programming—without regard to the content of that programming—that Congress intended to foster by redressing the structural impediments blocking local broadcasters' access to cable. *See* 1992 Cable Act § 2(b)(1), 106 Stat. 1463 (Act was intended to "promote the availability to the public of a diversity of views and information * * *"). That diversity should be encouraged, not stifled.

CONCLUSION

For the foregoing reasons and those in the appellees' briefs, the judgment of the District Court should be affirmed.

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In The
Supreme Court Of The United States
October Term, 1993

TURNER BROADCASTING SYSTEM, INC., ET AL.,
Petitioners

v.

FEDERAL COMMUNICATIONS COMMISSION ET AL.,
Respondents

On Writ of Certiorari from the United States
District Court for the District of Columbia

BRIEF OF THE STATE OF CONNECTICUT AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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IN THE
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OCTOBER TERM, 1993

TURNER BROADCASTING SYSTEM, INC., ET AL.
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Respondent

On Writ of Certiorari from the United States District Court for the District of Columbia

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BRIEF OF THE STATE OF CONNECTICUT AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

The State of Connecticut, sponsored by the Attorney General of the State of Connecticut, submits this brief in support of the Federal Communications Commission and the United States of America, seeking affirmation of the decision of the United States District Court for the District of Columbia in *Turner*

Broadcasting System v. FCC, 819 F.Supp. 32 (D.D.C. 1993). The State of Connecticut files this brief pursuant to Rule 37 of the Rules of this Court.

INTEREST OF AMICUS CURIAE, STATE OF CONNECTICUT

As the United States District Court below held, the "importance of broadcasting generally, and in particular local broadcasting, to the American public is now beyond dispute." *Turner*, 819 F.Supp. at 45. However, as the court also found, unrestrained, cable operators' market power and anticompetitive practices place local broadcast television in serious jeopardy (*Turner*, 819 F.Supp. at 46 (citing 1992 Cable Television Consumer Protection and Competition Act (the "1992 Cable Act") § 2(a)(16); S. Rep. No. 92, 102d Cong., 1st Sess. at 59 (1991)) ("1991 S. Rep. No. 92")) and thereby threaten the public's right to receive a diversity of viewpoints. *See Turner*, 819 F.Supp. at 45 n. 25.

Cable operators compete with local broadcast stations for advertising revenues. *See id.* at 44, 46 n. 28 (citing 1991 S. Rep. No. 92 at 44). Yet, the technology and evolution of the cable industry have allowed cable systems to become the primary means for transmission of all video signals, including those of local broadcasters, to America's television viewers. *See id.* at 44, 46. This market power has given cable operators the incentive and ability to block local broadcasters access "to the bulk of any prospective [television] viewing audience."

See Turner, 819 F.Supp. at 46. Indeed, as the court found, Congress has determined that cable operators "in significant numbers" denied carriage on their systems to local broadcasters, attached onerous conditions to their agreements to carry broadcasters, and exiled broadcasters to remote channel positions. *Id.* (citing 1991 S. Rep. No. 92 at 42-43; H.R. Rep. No. 628, 102d Cong., 2d Sess. (1992) at 51 (1992). This "unfavorable treatment of broadcasters is the result of the cable operators' attempt to obtain a competitive advantage [over local broadcasters], not ... consumer demand." *Id.* (citing 1992 Cable Act § 2(a)(12)-(15); 1991 S. Rep. No. 92 at 44.

Connecticut's experience with cable operators' anticompetitive practices against local broadcast stations, in the absence of the must carry provisions of the 1992 Cable Act, confirms the court's findings about the cable industry. Connecticut residents are served by 24 cable operators franchised by the State, each operating as an economic monopoly in their respective assigned geographical areas.[1/] These cable operators retransmit the signals of local broadcasters to their cable subscribers throughout the state. This year two of Connecticut's

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1/ At present four applications have been filed by the FiberVision Corporation with the Connecticut Department of Public Utility Control, the franchising authority in Connecticut, to provide competing cable service to several Connecticut communities. At present, no ruling has been issued in these applications.

cable operators announced to their almost 200,000 Connecticut cable subscribers in 16 Connecticut communities that they would no longer be carrying most or all of Connecticut's local broadcast stations. Virtually all of southwestern Connecticut faced the possibility of losing access to all of Connecticut's broadcast stations, which had served them for over a decade. Without the must carry provisions of the 1992 Cable Act, there is nothing to prevent such occurrences from becoming commonplace on cable systems throughout Connecticut.

The future of local broadcasting in Connecticut and the First Amendment rights of Connecticut's residents to receive a diversity of viewpoints will therefore be significantly affected by this Court's ruling on whether to affirm the court's decision below. As a state, Connecticut has a quasi-sovereign interest in protecting the well-being of its residents and ensuring that they receive the benefits of federal legislation aimed at protecting them from harm. *Alfred L. Snapp & Son v. Puerto Rico*, 102 S.Ct. 3260, 3268-69 (1982). The State of Connecticut therefore has a direct and substantial interest in this matter.

SUMMARY OF THE ARGUMENT

The rights of the viewing public should be the paramount consideration in this Court's analysis of whether to affirm the District Court's decision upholding the constitutionality of the must carry provisions of

the 1992 Cable Act. *See Red Lion Broadcasting Co. v. FCC*, *395 U.S. 367, 390 (1969); Quincy Cable TV v. FCC*, 768 F.2d 1434, 1453-54 (D.C. Cir. 1985). Under the First Amendment, the public has a right to the widest possible dissemination of information from diverse and antagonistic sources. *See Associated Press v. United States*, 326 U.S. 1, 20 (1945).

It is a well-established fact that local broadcasting is important to the American public. Yet Congress discovered that most television viewers rely on cable television to receive programming from local broadcast stations. *See* 1992 Cable Act, §§ 2(a)(3); 2(a)(17). However, as the court below found, Congress also determined, after protracted hearings, that cable operators' market power and anticompetitive carriage practices against broadcasters, if unconstrained, threaten the very existence of local over-the-air broadcast television. *See Turner*, 819 F.Supp. at 39-40. Many Connecticut residents have had firsthand experience with the outrage of the potential loss of their access to Connecticut's broadcast television stations because of similar practices by cable operators operating in Connecticut.

Congress was not obliged to sit idly by while the public interest was harmed in this manner. Instead, as the court below held, after considering the alternatives Congress justifiably enacted the must carry provisions of the 1992 Cable Act to restore fair competition among video speakers, in order to assure the survival of local

broadcasting for the benefit of the public. *See Turner*, 819 F.Supp. at 45.

As the court below found, it was based upon this evidence, for this purpose, and not toward any goal to regulate the content of what cable operators say, that Congress enacted the must carry provisions of the 1992 Cable Act. *See Turner*, 819 F.Supp. at 40. For these reasons the must carry provisions of the 1992 Cable Act (codified at 47 U.S.C. §§ 534 and 535) (the "must carry provisions") are entirely proper and do not violate the rights of cable operators. The public interest requires that the District Court's decision upholding the constitutionality of the must carry provisions of the 1992 Cable Act be affirmed.

ARGUMENT

I. THE MUST CARRY PROVISIONS OF THE CABLE ACT ARE NECESSARY TO PROTECT THE PUBLIC'S FIRST AMENDMENT RIGHT TO RECEIVE INFORMATION FROM A DIVERSITY OF SOURCES.

The court below did not conclude, nor does the State of Connecticut contend here, that cable operators as "speakers" have no First Amendment rights. However, the interests of the viewing public should be paramount in any "First Amendment calculus" used to judge the constitutionality of provisions requiring cable operators to carry the signals of local broadcasters. *See Quincy*, 768 F.2d at 1453-54 (citing *Red Lion*, 395 U.S. at 390). It is the purpose of the First Amendment to provide the "widest possible dissemination of information from diverse and antagonistic sources" (*Associated Press*, 326 U.S. at 20), and to "preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market" by private parties. *Red Lion*, 395 U.S. at 390.

Local broadcasting is of crucial importance to the American public. See, e.g., *United States v. Southwestern Cable Co.*, 88 S.Ct. 1994, 2003 nn. 38-39 (1968); *see* 1992 H.R. Rep. No. 628 at 50. As Congress found, "[l]ocal television stations ... are both the leading source of news and public affairs information for a majority of Americans and the most popular entertainment medium." 1992 H.R. Rep. No. 628 at 50.

Congress concluded that "healthy and fair competition between cable television and the over-the-air broadcast television serves the public interest by providing increased diversity and program choice to the public." *See id.* at 51. However, upon according proper deference to Congress' factual findings concerning the status of the cable industry prior to the enactment of the 1992 Cable Act (*see Metro Broadcasting v. FCC*, 111 L.Ed.2d 445, 466(1990)), the court below determined that "certain characteristics unique to the way the [cable] industry has evolved and is presently structured" have allowed cable to control the means for transmission of the video signals of local broadcasters to television viewers. *See Turner*, 819 F.Supp. at 44.

As the court below noted, cable television has achieved "market dominance." *Id.* Furthermore, the court determined, after reviewing the evidence, that this market power provides cable operators with both "incentive" and "ability" to block local broadcasters' access to most of television's viewers. *See id.* at 46. Thus, the court justifiably concluded that "unconstrained cable holds the future of local broadcasting at its mercy." *Id.* Indeed, the extensive record compiled by Congress, which the court repeatedly cited, showed cable operators in significant numbers are engaging in anticompetitive practices against local broadcasters. *See id.* at 46 (citing 1991 S. Rep. No. 92 at 42-43; 1992 H.R. Rep. No. 628 at 51). As Congress concluded, "these patterns of carriage abuses may ...

accelerate in the absence of must carry rules.... For the subscribers to those cable systems, these local television stations will effectively cease to exist, despite the decision of the FCC that the public interest would be served by the broadcast service." *See* 1992 H.R. Rep. No. 628 at 53-54.

Connecticut has had firsthand experience with the effects of cable's market power and anticompetitive practices in the absence of the must carry provisions of the 1992 Cable Act. That experience confirms the court's and Congress' findings. At present, Connecticut's cable operators are not subject to effective competition and operate as economic monopolies in their respective franchise areas.[2/] As a result, Connecticut residents respectively are served by one of 24 cable operators, each franchised by the Connecticut Department of Public Utility Control, to serve specific geographical areas in the state. According to data compiled by the Connecticut Department of Public Utility Control through April 1993, 1,336,094 Connecticut residential dwelling units are passed by cable (virtually 100% of the dwelling units in the state), and there are

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2/ *See* note 1, *supra* (although FiberVision Corporation has, pursuant to section 7 of the 1992 Cable Act, filed several applications to offer competing cable service in several Connecticut communities, no decisions have been issued and competitive cable service is not available to Connecticut residents).

963,770 cable subscribers in the state -- a 72.13% penetration rate.

Residents of the Connecticut towns of Greenwich, Stamford, New Canaan, Darien, Wilton, Norwalk, Weston, Westport, Redding, Easton, Bridgeport, Milford, Fairfield, Stratford, Orange, and Woodbridge are, respectively, served by one of two cable operators, Cablevision of Connecticut or Cablevision of Southern Connecticut. The two cable companies are owned by the same limited partnership.

Because of their close proximity to New York and because of over-the-air reception difficulties, many of these residents cannot obtain access to Connecticut's broadcast stations without cable. Also because of their close proximity to New York, the Connecticut communities served by Cablevision of Connecticut and Cablevision of Southern Connecticut are not within the television markets of Connecticut's five primary commercial broadcast stations, WFSB-3, WTNH-8, WVIT-30, WTXX-20, and WTIC-61.[3/] Instead, because of an anomaly arising from the way television markets are technically defined under the 1992 Cable Act, those communities are within the New York City television market. Consequently, these five stations are technically not "local commercial television stations" as

3/ Several communities in the franchise area of Cablevision of Southern Connecticut are within the television market of WTNH-8.

that term is defined in section 614(h)(1)(C) of the 1992 Cable Act (codified at 47 U.S.C. § 534(h)(1)(c)), and the "must carry provisions" of the 1992 Cable Act do not presently apply to their carriage on the two Connecticut Cablevision systems. However, for over a decade, Connecticut's broadcast stations have been carried on these two cable systems and have been crucial in providing these residents with local news, sports, opinion, and analysis of issues concerning Connecticut's state government, towns, businesses, and residents.

Earlier this year, in the absence of the protections afforded by the must carry provisions of the 1992 Cable Act, the two Connecticut Cablevision systems moved to exercise their market power against Connecticut's commercial broadcast stations and Connecticut's cable subscribers. Cablevision of Connecticut announced that as of April 1, 1993, it would no longer carry any of Connecticut's five local broadcast stations. Instead, Cablevision of Connecticut proposed to replace the five broadcast stations with a single channel, "The Connecticut Channel," which only would carry portions of the programming from the stations that Cablevision selected for viewers to see. Cablevision of Southern Connecticut similarly announced that after April 1, 1993, it would only carry one of Connecticut's local broadcast stations. As a result of these actions, almost 200,000 Connecticut cable subscribers served by these cable operators faced electronic isolation from their home state.

After the two companies notified customers of their plans, this office, however, was deluged with complaints in writing and by telephone from their subscribers. *See* Appendix (several letters representative of the complaints received are reprinted therein). At community meetings around the state, consumers vented their anger and their desire for continued carriage by the two cable operators of Connecticut's local broadcast stations. Because of the cable operators' action and the resulting local outrage, this office petitioned the FCC to include those 16 communities within the television markets of Connecticut's broadcast stations.[4/] The plans of the cable operators were stayed pending FCC review of the petitions for market determination filed by this office and other parties, and the Cablevision systems

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4/ In enacting the must carry rules, Congress took special note of the plight of cable subscribers and broadcasters in this type of situation. It recognized that, since television markets under the 1992 Cable Act are "drawn along county lines, they may, in some instances, inaccurately reflect the stations which are local to a particular community." 1992 H.R. Rep. No. 628 at 97. To provide must carry protection to broadcasters and thereby ensure that such cable subscribers do not lose access to local programming, Congress under the Cable Act allowed for petitions to be filed with the FCC to ensure that technical definitions of television markets actually reflect the communities served by local broadcast stations. *See id.* at 97-98; 1992 Cable Act § 4 (codified at 47 U.S.C. § 534(h)(1)(c)); Cable Act of 1992 -- Must Carry and Retransmission Consent Provisions, 58 Fed. Reg. No. 62 (1993) (to be codified at 47 C.F.R. §§ 76.59, 76.64(f)(5)).

have agreed, for now, to continue carriage of Connecticut's stations.

Connecticut's experience with cable's market power in the absence of the must carry provisions confirms Congress' findings concerning the need for legislation to protect local broadcast stations and the public interest. Without such statutory protection, there is little to prevent other local broadcast stations from being denied carriage by cable operators throughout the state. Thus, as the above discussion vividly illustrates and as the court below found, the must carry provisions of the 1992 Cable Act are necessary to protect the public's interest in having access to a diversity of broadcast voices.

II. IN ENACTING THE MUST CARRY PROVISIONS, CONGRESS SOUGHT NOT TO REGULATE THE CONTENT OF WHAT CABLE OPERATORS SAY BUT INSTEAD TO CORRECT THE CARRIAGE ABUSES THAT EXISTED. THE MUST CARRY PROVISIONS DO NOT VIOLATE THE FIRST AMENDMENT.

Congress has the power to enact economic regulations designed to promote competition and diversity of voices, even if the affected activity involves communications. *See Metro Broadcasting,* 111 L.Ed.2d at 465; *Associated Press*, 326 U.S. 1 (1945) (upholding the application of the Sherman Act to newspapers); *cf. FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978). As the court below properly concluded,

given the extensive record of the status of the cable industry, the must carry provisions of the 1992 Cable Act are in intent as well as form unrelated to the content of what cable operators or even broadcasters have to say. *See Turner*, 819 F.Supp. at 40. Instead, as the court found, Congress sought to remedy the carriage abuses it found to exist in the cable industry and thereby protect the public's right to receive a diversity of voices. *See id.*

The court thus properly concluded that the appropriate standard to apply to determine whether the must carry provisions violate the First Amendment was (a) whether they further a significant government interest and (b) whether they both remedy the condition in need of correction and do not burden more speech than necessary. *See id.* at 45 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 798-99 (1989); *United States v. O'Brien*, 391 U.S. 367, 377 (1968)). As the court noted, Congress, in carrying out its goal, considered alternatives to the must carry rules such as "A/B" switches and found them to be ineffective. *See Turner*, 819 F.Supp. at 47 (citing 1991 S. Rep. No. 92 at 44-45; 1992 H.R. Rep. No. 628 at 54; 1992 Cable Act, § 2(a)(17)). On the other hand, as the court found, "there is little doubt that the must carry provisions will be effective in sustaining local broadcasting for the present." *Turner*, 819 F.Supp. at 47. Congress was not required to settle for an ineffective means to protect the public interest such as A/B switches merely because they might be less burdensome

on cable operators' speech. *See Rock Against Racism*, 491 U.S. at 800 (citing *United States v. Albertini*, 472 U.S. 675, 689 (1985)).

Indeed, as the court also noted, the must carry rules do not unreasonably burden the speech of cable operators. In no event under the must carry provisions does a cable operator have to dedicate more than one-third of its channels to local broadcasting. *See* 1992 Cable Act, § 4(b)(1)(B) (codified at 47 U.S.C. § 534(b)(1)(B)). Thus, the rules provide ample opportunities for cable operators to speak.

CONCLUSION

The First Amendment was not meant to be used as an excuse by private parties, such as cable operators, to invalidate legislation aimed at preventing their monopolization of a form of media, to the detriment of the public's First Amendment rights to a diversity of sources of information. *See Associated Press*, 326 U.S. at 20; *see Red Lion*, 395 U.S. at 386-87, 390. For all the reasons cited herein and in the decision of the court below, the must carry provisions of the 1992 Cable Act are necessary to protect the public's rights under the First Amendment to a diversity of voices. The District Court's decision upholding the constitutionality of the

must carry provisions of the 1992 Cable Act should therefore be affirmed.

Respectfully submitted,

* RICHARD BLUMENTHAL
ATTORNEY GENERAL
FOR THE STATE OF
CONNECTICUT

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* Counsel of Record

No. 93-44

In The
Supreme Court Of The United States
October Term, 1993

TURNER BROADCASTING SYSTEM, INC., ET AL.,
Petitioners

v.

FEDERAL COMMUNICATIONS COMMISSION ET AL.,
Respondents

On Writ of Certiorari from the United States
District Court for the District of Columbia

APPENDIX TO THE BRIEF OF THE STATE OF CONNECTICUT AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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February 18, 1993

Cablevision of Southern Connecticut
28 Cross Street
Norwalk, CT 06851

Attetnion:[sic] Ms. Irene Tripodi

RE: Discontinuing Connecticut Affiliates

Dear Ms. Tripodi:

I am extremely upset with your company's decision to eliminate all Connecticut affiliates on your cable system. I live in Milford, which is located in New Haven County Connecticut, not New York. Your survey which was conducted a few months back, by my calculations, took into account less than 1% of your subscribers. This is obviously not a fair sampling. Your decision to replace these stations with a SciFi channel, shopping and cartoon channel is absolutely absurd. I have no need for these. Also, to dictate which state's news we are allowed to watch for a service I pay for is outrageous. I have no need to hear all New York news, advertising, etc. My residence, family, job, and business connections are in Connecticut. I feel television viewing should be personal choice, not a company choice. I pay you for a service, not to make decisions on my behalf on my viewing selections.

You are a monopoly and you know it, but this does not give you a right to make such a wide sweeping change. If I had my choice, I would pick up another company which supports the State of Connecticut and its businesses.

I am also sending a copy of this letter to the State's Attorney's Office and the Department of Public Utilities Commission.

Very truly yours,

/s/

Carla M. Burgess
41 Freedom Road
Milford, CT 06460

TOWN OF GREENWICH

Office of First Selectman (203) 622-7710
Town Hall 101 Field Point Road Greenwich, CT 06836-2540

John B. Margenot
First Selectman

February 19, 1993

Ms. Irene Tripodi
General Manager
Cablevision
28 Cross Street
Norwalk, CT 06851

Dear Ms. Tripodi:

At a regular meeting of the Board of Selectmen, the Board unanimously approved a resolution urging you to reconsider your decision to eliminate programming by certain Connecticut stations.

At this time, when communications are so important, it would be unfortunate to disconnect Greenwich from the rest of the State by eliminating Connecticut stations from your service.

On behalf of all the people of Greenwich we urge you to delay any action on this proposal to be certain that you are responsive to the customers you serve.

Sincerely,

/s/

John B. Margenot, Jr.
First Selectman

cc: Richard Blumenthal, Attorney General
Clifton A. Leonhardt, Chairman, DPUC
Board of Selectmen

An Affirmative Action/Equal Opportunity Employer, M/F/D

471 Washington Parkway
Stratford, CT 06497
18 February 1993

Cablevision
122 River Street
Bridgeport, CT 06604

Dear Sirs:

I am appalled and angered by your recent decision to eliminate 4 Connecticut television stations (WFSB, WTXX, WVIT, and WTIC) from your programming in favor of 2 new additional cable channels and the New York network affiliate stations. Cable television enjoys the privilege of a public monopoly; consequently, the individual consumer does not enjoy a choice of cable service providers. Such decisions to deny Connecticut viewers access to Connecticut broadcast stations violates the public trust and is not in the public interest. I choose to live in Connecticut, not New York. As a consumer, I deserve the right to watch Connecticut broadcast stations.

I request that you rescind this decision and not eliminate the 4 Connecticut broadcast stations.

Sincerely,

/s/

Michael Carius

cc: Representative Rosa DeLauro
Senator Christopher Dodd
Senator Joseph Lieberman
Attorney General Richard Blumenthal
CONNECTICUT POST

Sarah L. Judd
92 Kenwood Ave.
Fairfield, CT 05430
21 February 93

Ms. Tripodi
Cablevision
122 River St.
Bridgeport, CT 06604

Dear Ms. Tripodi:

I am writing to Cablevision to express my extreme disapproval of your company's plan to discontinue carrying four Connecticut stations: WVIT, WFSB, WTIC, WTXX, and in the Stamford area, WTNH. Cablevision is a CONNECTICUT company, and as such, it should serve the community in which it is located. I find it reprehensible that you would presume to cut off southwest Connecticut from the goings-on in the rest of the state. We deserve the right to retain those channels on our cable system. Because Cablevision is a monopoly in this area, you should not and cannot take this kind of action. We have no other cable company from which to choose. I feel outraged and slighted by the actions of Cablevision, and I strongly urge you to reconsider your

decision; please do not continue with this horrific action.

Sincerely,

/s/

Sarah L. Judd

cc: Attorney General, State of Connecticut

41 Deacon Abbott Road
West Redding, CT 06896

February 17, 1993

Mr. Richard Blumenthal
Attorney General, State of Connecticut
State Capital [sic]
210 Capitol Avenue
Hartford, CT 06106

Dear Mr. Blumenthal:

The unilateral decision by Cablevision of Connecticut to discontinue providing Connecticut-based commercial television stations to its subscribers in southwestern Fairfield County is unfair to viewers like ourselves who want to receive information on what's happening in our state from news, sports and public service programing produced by broadcasters located in it. Furthermore, our family viewing preferences include syndicated programs and movies shown at particular times on Connecticut stations.

All of the above will be lost to us when Cablevision "shuts off" five Connecticut stations effective April 1, 1993. Their alternative, a "Connecticut" channel presenting "selected" Connecticut programs, smacks of Big Brother-ism, whereby Cablevision will decide what Connecticut-based programming we may

watch and when it will appear. This is counter-productive to what cable TV is supposed to provide: choices.

Cablevision says it is making this change based on what its viewers want. Cablevision says its viewers want to watch New York and New Jersey stations over Connecticut stations. Where did their "data" come from? They did not ask us or any other Redding cable subscribers as far as we are aware.

We and our family live in Connecticut. We watch Connecticut stations because we are interested in what is happening in our state and local area, not New York or New Jersey. When we watch network programming, we tune them in on Connecticut stations so that the news, weather and emergency announcements we receive pertain to where we live, not to Manhattan or Newark.

The reason we signed up for cable in the first place was because we get poor TV reception of stations in New Haven, Hartford and Waterbury. Now, under Cablevision's new "offering," we'll be denied access to them.

We urge you to take appropriate action to stop Cablevision of Connecticut from denying Connecticut-based stations to its customers. Thank you for your attention to this request.

Sincerely yours,

/s/ /s/

Jack Ciak Deborah L. Ciak

Alison Clement
8 Oakwood Avenue, Unit A-11
Norwalk, CT 06850

February 17, 1993

Mr. Richard Blumenthal
CT Attorney General
179 Elm St
Hartford CT 06108-2209

Dear Attorney General Blumenthal:

Re: Decision by Cablevision of CT
to discontinue service of
WTNH(8), WFSB(3), WVIT(30),
WTXX(20), WTIC(61)

I have received a notice of the discontinuation of the above stations on our cable service and am extremely upset.

According to the notice, a survey was conducted on 1/8/93 to determine whether subscribers would prefer to watch the New York affiliates or the Connecticut affiliates. I was not included in this survey. I firmly believe that for such a drastic change, all Cablevision of CT subscribers who will be affected should have been contacted and given the chance to respond.

I have lived in Norwalk most of my life and prefer to watch the Connecticut stations whenever possible. To me, one of the advantages of receiving cable is that I am no longer forced to watch only New York stations because of the inability to receive the Connecticut stations. Also, with the state of the economy in Connecticut, I am sure the loss of viewers will hurt not only the stations themselves, but also all of their advertisers.

It is my understanding that one of the new federal regulations may require cable companies to offer all stations within the subscriber's state. If this is true, it would make no sense to put this change into effect now.

I hope that you will do all in your power to convince Cablevision of CT that they should continue the service of the Connecticut affiliates.

Yours truly,

/s/

Alison Clement

C: Mareyce Cunningham, Director of Programming, Cablevision of CT

164 Byram Road
Greenwich, CT 06830
February 17, 1993

Cablevision of Connecticut

Gentlemen:

I was appalled to receive your notification that you would be dropping the Connecticut channels from my cable package. I watch the Connecticut network channels exclusively. Living in Greenwich, we have always had the New York channels forced upon us. I have absolutely no desire to watch the nightly news programs on the New York channels ... I do not wish to be reminded who was murdered, robbed, raped, knifed, stabbed, etc. etc. etc. every night.

I watch only Connecticut news on the Connecticut channels. WTNH is my favorite channel for news and weather and programming. I feel I should get to decide what stations I watch, not you. I want to watch Dr. Mel's weather ... I really don't care what the weather in New York City will be today. Please don't say that the Connecticut news channel will provide that information ... obviously what will be shown on that will again be your discretion.

I watch all network stations on the Connecticut channels, not New York, and I do this because the reception on the Connecticut channels is better and I like the programming better. Let's be honest and admit that the programming on the New York and Connecticut stations is not always a duplication. Do the New York channels carry the Huskies for example?

It is insulting that you would offer your new $9.95 package under this plan to receive, what else, but the New York network channels! How stupid do you think your customers are? I can cancel cable and hook back up to the antenna on my roof and receive all of the New York network channels for free! If you cancel the Connecticut channels, I will hook up to my rabbit ears to receive WTNH news at night ... and you can bet that if I do that I will stay hooked up to rabbit ears and watch the New York network channels for free.

You say you polled your subscribers ... I'd like to know where and who ... I was never polled and if I had been I most certainly would not have been willing to give up the Connecticut channels to receive cartoons and Science Fiction programs. Come on cable, admit you made a mistake ... if you cancel anything you should cancel the New York network channels, or better yet give your subscribers a choice. We are the customer ... we should tell you what we want, not you telling us what we can have.

Your telling me that I can now get only the New York channels because that is what most subscribers prefer is like CL&P telling me that I can only get electricity now in my kitchen because after polling their customers they found that most customers would rather have electricity in their kitchen rather than their livingroom. Not much of a choice, is it. Just as your offer isn't much of a choice either. It was kind of like, we are eliminating channels ... pick either New York or Connecticut. Why would anyone who lives in Connecticut want New York channels and not Connecticut.

If you go ahead with this absurd proposal, I will be cancelling my cable service as of March 31. I have no intention of paying your $24.95 a month to receive channels I do not want.

/s/ Francine Burk

cc: CT Attorney General [handwritten]

von SCHMIDT & FRESHMAN, P.C.
ATTORNEYS AT LAW

GEORGIA von SCHMIDT
NANCY SEGORE-FRESHMAN

OFFICES
37 ARCH STREET
GREENWICH, CT 06830

ADMITTED TO NY AND CONN. BARS

(203) 622-5900
FAX (203) 622-8298

February 18, 1993

Richard Blumenthal, Esq.
Office of Attorney General
55 Elm Street
Hartford, CT 06106

Dear Dick:

How are you? I am writing to you about the proposal by Cablevision to eliminate Connecticut channels in their service offered to New Haven and Fairfield Counties. I am very strongly opposed to this for the following reasons:

(1) Before cable TV, the only news we received was from the New York City channels. When cable came along, the main beauty of the service was that we were finally reunited with our home state

for purposes of news broadcasts. The elimination of Connecticut news from our viewing is an outrage. To allow a cable company the incredible power to prohibit our viewing of local news (other than that fed to us on the company's own Cable 12 Network) is a frightening spector.

(2) I think it equally outrageous that Cablevision will eliminate all competitive channels for purposes of placing advertisements. The only place a local business will be able to reasonably advertise is on Cable 12 since all other Connecticut channels will be eliminated. Thus, not only will Cablevision have a monopoly on the provision of programming to our community but also a monopoly on advertising our wares and thus, to some extent, regulating what we buy and sell and completely regulating the content of the news made available to us.

I am nothing short of outraged by this proposal and I vigorously urge you to take whatever action is necessary to stop this unconscionable conduct.

Best regards to you and Cynthia.

Very truly yours,

/s/

Georgia von Schmidt
Attorney at Law

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Daniels Cablevision v. United States, No. 92-2292, 1993 U.S. Dist. LEXIS 12806 (D.D.C. Sept. 16, 1993) 2,6

Daniels Cablevision v. United States, No. 93-5290 (D.C. Cir. consolidated Dec. 2, 1993) 2

FCC v. League of Women Voters of California, 468 U.S. 364 (1984) 14

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Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) 4,7,14,16

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United States v. Midwest Video Corp., 406 U.S. 649 (1972)	13,17
United States v. O'Brien, 391 U.S. 367 (1968)	9
United States v. Southwestern Cable Co., 392 U.S. 157 (1968)	13
United States v. Storer Broadcasting Co., 351 U.S. 192 (1956)	14
Ward v. Rock Against Racism, 491 U.S. 781 (1989)	9,10
Warner Cable Communications v. City of Niceville, 911 F.2d 634 (11th Cir. 1990), *cert. denied*, — U.S. —, 111 S. Ct. 2839 (1991)	11

STATUTES & LEGISLATIVE MATERIALS:

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Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, §§ 2(a), 2(b)(1)-(2), 4, 5, 19, 106 Stat. 1460 (1992)	*passim*
Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (1934)	3
House Committee on Energy and Commerce, H.R. Rep. No. 628, 102d Cong., 2d Sess. (1992)	7
H.R. 3626, 103d Cong., 1st Sess. (1993)	18
H.R. 3636, 103d Cong., 1st Sess (1993)	18

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S. 1086, 103d Cong., 1st Sess., 139 Cong. Rec. S37023-28 (1993)	18
Senate Committee on Commerce, Science, and Transportation, S. Rep. No. 92, 102d Cong., 1st Sess. (1992)	7
U.S. Const. art. I, § 8, cl. 3	12

MISCELLANEOUS:

Boyle, *Satellite Ops Brace for Digital Compression*, Broadcasting & Cable, Feb. 22, 1993	15
Rosenthal, *Broadcast TV Networks Eyeing Compression Gear*, Electronic Media, Jan. 18, 1993	15
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Tribe, *American Constitutional Law*, § 16-1 (2d ed. 1988)	16

BRIEF *AMICI CURIAE* OF DIRECTV, INC. AND THE NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE, IN SUPPORT OF APPELLEES

INTEREST OF *AMICI CURIAE*[1]

Amicus DirecTv, Inc., a subsidiary of Hughes Communications, Inc., is on the verge of providing an alternative multichannel video programming distribution service to cable television. DirecTv's sister subsidiary, Hughes Communications Galaxy, Inc., ("HCG") has been licensed by the Federal Communications Commission ("FCC") to provide high-power Direct Broadcast Satellite ("DBS") service, enabling viewers throughout the nation to receive approximately 150 channels of video programming using an 18" receiving dish. The first American high-power DBS satellite is scheduled to be launched in December, 1993. DirecTv intends to commence programming service in the spring of 1994.

Amicus National Rural Telecommunications Cooperative ("NRTC") is a non-profit corporation, owned and controlled by 521 rural electric cooperatives and 231 rural telephone systems located throughout 49 states. Through the use of satellite distribution technology, NRTC is committed to extending the benefits of information, education and entertainment programming to rural America on an affordable basis. On April 10, 1992, NRTC signed a DBS Distribution Agreement with HCG to provide DBS services including 20 channels of popular cable programming to rural subscribers across the country.

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[1] Letters reflecting written consent of the parties to the submission of this brief have been filed with the Clerk of the Court.

Amici have a demonstrable stake in the outcome of this proceeding because of its potential precedential effect on litigation challenging the constitutionality of other provisions of the Cable Television Consumer Protection and Competition Act of 1992[2] ("1992 Cable Act"). Specifically, *Amici* have a direct interest in continuing to sustain the constitutionality of Section 19 of the 1992 Cable Act which was upheld by the United States District Court for the District of Columbia in *Daniels Cablevision v. United States*, No. 92-2292, 1993 U.S. Dist. LEXIS 12806 (D.D.C. Sept. 16, 1993). That decision is currently on appeal. *Daniels Cablevision v. United States*, No. 93-5290 (D.C. Cir. consolidated Dec. 2, 1993). All proceedings in that appeal are being held in abeyance, pending this Court's decision in this case.[3]

Amici believe that Section 19 is indispensable to the development of competition in the multichannel video programming distribution market and to the broad deployment of new technologies, such as DBS, which are capable of enhancing the nation's communications and information infrastructure. Section 19 is a purely economic, structural measure which prohibits vertically integrated cable companies from engaging in "unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or prevent any multichannel video programming distributor from providing satellite cable programming . . . to subscribers or customers." *See* 47 U.S.C. § 628 (1992). Congress

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[3] The court so ordered on December 2, 1993.

enacted this provision to address specific, documented anticompetitive practices.

Amici's interest is in ensuring that this Court's ruling does not prejudge the outcome of the pending challenge to Section 19 and does not create a constitutional regime which gives favored First Amendment treatment to cable, thereby discriminating against DBS, a competitive multichannel video programming distribution service. This interest is unique and not likely to be asserted by the parties.

SUMMARY OF ARGUMENT

Amici respectfully request that this Court, in adjudicating the constitutionality of the must carry provisions, §§ 4 and 5 of the 1992 Cable Act, refrain from issuing a broad ruling that might have the effect of prejudicing the defense of Section 19 of the 1992 Cable Act against pending constitutional challenge.

A decision announcing a technology-based analytical framework, particularly a print press model, for evaluating the constitutionality of all regulation affecting the cable industry would be particularly dangerous. A decision conferring preferred First Amendment status on cable at the expense of competing electronic media, such as broadcast, satellite or telephonic delivery of video programming, could skew radically the development of these different technologies to the detriment of competition, diversity and universal service, core values of the Communications Act of 1934[4]. Such a ruling could seriously limit the ability of Congress to regulate this extraordinarily critical area of

[4] Pub. L. No. 73-416, 48 Stat. 1064 (1934) (codified as amended principally in sections of 47 U.S.C.).

interstate commerce at a time of revolutionary technological change and commercial ferment in the communications industry. Finally, it could needlessly prejudice the adjudication of the constitutionality of other provisions of the 1992 Cable Act, such as Section 19, which differ historically, factually and remedially from the must carry provisions.

It is most important to avoid the creation of a hierarchy of First Amendment regimes applicable to different video programming distribution technologies. The First Amendment rights of electronic media providing information and entertainment to the American public should not turn upon the particular technology used to distribute that programming. The media of distribution are immaterial to the viewer. In light of the technological trend toward transmission and compression of digital data as the common denominator of all modes of delivery of video programming, there is no reasoned basis for according wired delivery systems, such as cable, superior First Amendment rights to alternative multichannel video programming distributors such as DBS. Instead, the Court should articulate a jurisprudential model of analysis which focuses upon the unique facts surrounding must carry, the precise extent to which it may or may not implicate the First Amendment and the import of must carry to vindicate the First Amendment rights of viewers which are paramount. *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

ARGUMENT

I. THIS COURT SHOULD CRAFT A NARROW RULING WHICH ADDRESSES THE PRECISE FACTS OF THE MUST CARRY PROVISIONS AND AVOIDS PREJUDGING CONSTITUTIONAL CHALLENGES TO OTHER PROVISIONS OF THE 1992 CABLE ACT.

One of the most fundamental tenets of constitutional adjudication is that the Court will not " 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' " *Kremens v. Bartley*, 431 U.S. 119, 137 (1977) (quoting *Liverpool, N.Y. & P.S.S. Co. v. Emigration Comm'rs*, 113 U.S. 33, 39 (1885)); *see also Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 149-55 (1951) (Frankfurter, J., concurring). The presence of First Amendment issues does not negate this jurisprudential principle. *See Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985) ("Nor does the First Amendment involvement in this case render inapplicable the rule that a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it.").

The reasons for applying this time-honored rule to the instant case are especially compelling. First, appellants have challenged virtually every significant provision of the 1992 Cable Act on constitutional grounds identical or similar to those asserted here. Yet, there are multitudinous critical differences among these provisions in terms of their intended effect on market structure, relationship to content of speech and substantial state interests to be furthered. The United States District Court for the District of Co-

lumbia recently upheld the constitutionality of much of the 1992 Cable Act, specifically including Section 19, the program access provisions.[5] That decision is currently on appeal and may ultimately come before this Court. Under these circumstances, the Court should strive to avoid prejudging these other provisions. It can best do so by framing its decision narrowly to encompass only the particular facts and law essential to disposition of the must carry question before the Court.[6]

Secondly, an unduly broad ruling regarding the First Amendment status of cable television could have significant adverse consequences for the American public and could effectively reconfigure the media landscape. A sweeping decision conferring preferential First Amendment status upon cable vis-a-vis DBS, broadcasting, telephone or other wireless media would mean that cable technology would be more immune from government regulation than competing electronic media. Such a result would weaken existing competition to cable and potentially thwart or retard the emergence of new sources of competition from developing technologies such as DBS. It would thereby

[5] *Daniels Cablevision v. United States*, No. 92-2292, 1993 U.S. Dist. LEXIS 12806 (D.D.C. Sept. 16, 1993) (Jackson). *Amici* strongly support the court's decision in that case upholding the program access provisions as "content neutral regulatory measures designed to correct a market to which access was controlled by those who own the technology." 1993 U.S. Dist. LEXIS 12806, at *15.

[6] As appellant Turner Broadcasting System, Inc. notes in its Brief at 35, ". . . the Court need *not* decide the question of whether the First Amendment protection afforded cable television is in every respect co-extensive with that of the print press. . . ." (emphasis added).

undermine the primary purposes of the 1992 Cable Act, to promote competition to cable and protect consumers.[7] We urge the Court to exercise great care not to turn the 1992 Cable Act on its head by an unnecessarily broad ruling in this case.

II. THE NATURE OF THE GOVERNMENTAL RESTRICTION RATHER THAN THE MEDIUM OF DISTRIBUTION SHOULD PROVIDE THE FRAMEWORK FOR THE APPROPRIATE LEVEL OF CONSTITUTIONAL REVIEW.

The appellants argue that the must carry rules should be analyzed under a strict scrutiny standard. The linchpin of that argument is that cable television generally is more akin to the print media than to broadcasting, which, they contend, is subject to lesser protection under the First Amendment. *See, e.g., Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). Therefore, they suggest that the appropriate standard of constitutional review should be analogous to this Court's First Amendment treatment of the print press

[7] *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(b)(1)-(b), 106 Stat. 1460, 1463 (1992) ("It is the policy of the Congress in this Act to - (1) promote the availability to the public of a diversity of views and information through cable television and other video distribution media; [and to] (2) rely on the marketplace, to the maximum extent feasible to achieve that availability."). *See also* S. Rep. No. 92, 102d Cong., 1st Sess. 1 (1991) ("The purpose of this legislation is to promote competition in the multichannel video marketplace and to provide protection for consumers against monopoly rates and poor customer service."); H.R. Rep. No. 628, 102d Cong., 2d Sess. 26 (1992) ("The legislation will protect consumers by preventing unreasonable rates, by improving the cable industry's customer service practices, and by sparking the development of a competitive marketplace.").

[hereinafter referred to as the *Tornillo* or print model].[8] The Court should reject appellants' syllogism.

A. Strict Scrutiny Analysis Predicated Upon The Print Press Model Is An Inapposite Framework For Must Carry Review.

The *Tornillo* model is inappropriate for the reasons articulated by the government in its Motion of the Federal Respondents to Affirm, filed with the Court.[9] Instead, *amici* support the framework of analysis articulated by the telephone companies in their *amici* brief to the extent that they urge this Court to apply a level of judicial scrutiny commensurate with the nature of the governmental restriction on speech involved. *See* Brief of *Amici* United States Telephone Assn. at 4-5, 18 (stating that this Court's usual ap-

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[8] *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), relied upon by appellants. *See, e.g.*, Brief for Appellant Time Warner Entertainment, L.P. ("TWE Brief") at 23; Brief for Appellant Turner Broadcasting System, Inc. ("Turner Brief") at 30, 34; Brief for Appellant National Cable Television Association ("NCTA Brief") at 14, 30-34; Brief for Appellant Discovery Communications, Inc. ("Discovery Brief") at 32; and Brief for Appellant Daniels Cablevision, Inc. ("Daniels Brief") at 20.

[9] The government asserts that although the cable industry is not characterized by the same kind of physical scarcity as broadcasting, there are features of the industry which have created a similar communications bottleneck to the detriment of programming diversity and that governmental conduct has contributed greatly to cable's market power. Motion of the Federal Respondents to Affirm at 13-16. The government concludes that the power of private entities to silence other speakers justifies government intervention to promote a diversity of programming and information, whether that market power derives from physical scarcity, economic monopoly, advantages secured through governmental action, or a combination of the three as in the case of the cable industry. *Id.* at 22.

proach to First Amendment cases is to focus primarily on the nature of the restriction). By rejecting the print model as an analytical framework, this Court will reduce substantially the risk of prejudging questions that may arise in adjudicating the constitutionality of other provisions of the 1992 Cable Act, such as Section 19's program access provisions.

B. *O'Brien* Provides An Appropriate Framework For Constitutional Review Of Government Regulations That Incidentally Restrict Expressive Content.

If this Court deems that must carry regulations are not purely structural, economic regulation, but instead implicate some element of expressive content, the appropriate framework of constitutional review is the intermediate level of scrutiny established by this Court in *United States v. O'Brien*, 391 U.S. 367 (1968) and interpreted in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).[10] The *Ward* Court held

> [l]est any confusion [on the *O'Brien* standard] remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so.

491 U.S. at 798.

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[10] Application of this intermediate standard of review to must carry is supported strongly by *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (upholding ordinance limiting the location of adult theatres because purpose was to prevent "secondary effect" such as crime unrelated to the suppression of free expression).

Thus, the analysis of the nature of the restriction on expression turns on whether it is a "content-neutral" restriction. The *Ward* Court further elaborated that

> [t]he principal inquiry in determining content neutrality. . . is whether the government has adopted a regulation of speech *because of disagreement with the message it conveys. . . . The Government's purpose is the controlling consideration.* A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.

491 U.S. at 791 (emphasis added).

By establishing *O'Brien* and its progeny as the appropriate framework of analysis of the 1992 Cable Act's constitutionality, this Court will enhance the ability of lower courts to differentiate between provisions such as Section 19, the sole purpose of which is to achieve economic competition utterly without regard to the content of the programming, and other provisions which may be less clear.

C. The Must Carry Provisions Are Not Unconstitutional Because They "Single Out" The Cable Industry.

Appellants seek to distinguish cases upholding structural, economic regulations on media industries[11] by citing a string of cases that they claim stand for the proposition that "singling out" a particular segment of the press triggers heightened scrutiny. *See, e.g.*, TWE Brief at 27; NCTA Brief at 16 (citing inter alia, *Leathers v. Medlock*, ___ U.S. ___ , 111 S. Ct. 1438, 1447 (1991)). The cases do not so hold. The Court should reject this argument.

[11] *See, e.g., Associated Press v. United States*, 326 U.S. 1 (1945); *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951).

The regulations involved in the cited cases all were challenged because they were content-based. According to this Court, a regulation which "singles out" members of the media is *not* constitutionally suspect *unless* "it threatens to *suppress the expression of particular ideas or viewpoints.*" *Leathers*, 111 S. Ct. at 1443 (emphasis added); *see also Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983); *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978) (FCC multiple ownership rules do not violate the First Amendment rights of broadcasters by singling them out).

Indeed, lower courts have upheld the constitutionality of regulations that specifically target the cable industry to remedy anticompetitive abuses. In *Warner Cable Communications v. City of Niceville*, 911 F.2d 634 (11th Cir. 1990), *cert. denied*, ___ U.S. ___ , 111 S. Ct. 2839 (1991), the Eleventh Circuit rejected a constitutional challenge to a municipal ordinance permitting the operation of municipally-owned cable systems, the purpose of which was to foster competition to cable. The court held that the challenge failed to "assert a protected first amendment interest even if the City-owned system will surely render Warner's continued operation in Niceville economically infeasible." *Id.* at 636.

Similarly, in *Storer Cable v. City of Montgomery, Ala.*, 806 F. Supp. 1518 (M.D. Ala. 1992), the district court upheld two ordinances against constitutional

challenge that contained virtually the same core prohibitions as embodied in Section 19's program access provisions. The *Storer* court unequivocally rejected plaintiff's argument that the regulation "singles out" the cable industry and "infringes" on freedom of speech, concluding that the ordinance

> . . .is a legitimate trade practice regulation which may change the manner in which the plaintiffs conduct some of their business dealings, but does not in any way impair expressive activity or unreasonably 'single out' the press for burdensome treatment.

Storer, 806 F. Supp. at 1557-58.

Finally, the cable appellants' argument, taken to its logical conclusion, would erroneously suggest that Congress cannot enact industry-specific regulation involving the communications industry, including content-neutral economic regulation, without running afoul of the First Amendment. This line of reasoning neglects the deference courts have traditionally given acts of Congress under the Commerce Clause's broad grant of authority to regulate interstate commerce[12], including radio, broadcasting, and cable television. *See*

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[12] U.S. Const. art. I, § 8, cl. 3. *See, e.g., Hodel v. Indiana*, 452 U.S. 314, 323-34 (1981) ("It is established beyond peradventure that 'legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality' . . . . A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between regulatory means selected and the asserted ends.") (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)) (other citations omitted).

United States v. Midwest Video Corp., 406 U.S. 649 (1972); *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943).

III. THE COURT SHOULD SCRUPULOUSLY AVOID CONFERRING SUPERIOR FIRST AMENDMENT STATUS UPON CABLE RELATIVE TO COMPETING ELECTRONIC MEDIA

This case comes before the Court at a time of enormous technological change and frenzied commercial activity in the multichannel video programming marketplace. The advent of fiber optic wire with its almost limitless broadband capacity and the scientific breakthrough enabling distributors to transmit, compress and receive video programming in digital form pave the way for new entrants, such as DBS operators like DirecTv, telephone companies and even electric utilities to provide competition to cable, the objective most sought by the Congress in the 1992 Cable Act. From the viewers' perspective, however, the images viewed through the "TV screen" are the same regardless of the distribution medium, (*e.g.* cable, broadcast, satellite, telephone) used to transmit them. In other words, the transmission medium for the video information is transparent to the viewer. To vindicate viewers' First Amendment rights and to ensure that viewers obtain the benefits of competition promised by the 1992 Cable Act and made possible by technological advances, the Court should refrain from establishing preferred First Amendment status for cable relative to other multichannel video programming distributors.

A. The Paramount First Amendment Rights of Viewers Militate Against Greater First Amendment Protection for Cable Than That Afforded Its Competitors.

The 1992 Cable Act sought to increase the diversity of voices and viewpoints available to the public through a series of structural economic measures, such as Section 19, intended to foster competition to cable. In so doing, Congress reaffirmed the overriding importance of the link between diversity and the constitutional principle that the First Amendment rights of listeners and viewers are "paramount," transcending the rights of service providers. *Red Lion*, 395 U.S. at 390.[13]

The strength of the diversity principle as the essential safeguard of viewers' First Amendment rights has been established by an unbroken line of cases. *See FCC v. League of Women Voters of California*, 468 U.S. 364 (1984) (rejecting ban on editorializing by noncommercial public radio stations while reaffirming the virtue of a diversity of viewpoints); *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978) (upholding ban on newspaper/broadcast station cross-ownership); *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956) (upholding multiple ownership rules); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943) (upholding chain broadcasting rules regulating relationship between networks and affiliates).

[13] The *Red Lion* Court made a further observation most pertinent to the 1992 Cable Act:

> [I]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, *rather than to countenance monopolization of that market*, whether it be by the Government itself or a private licensee.

Id. (citing *Associated Press v. United States*, 326 U.S. 1 (1945) (emphasis added)).

The diversity principle could be severely eroded were this Court to confer preferred First Amendment status on cable. From the viewer's perspective, technological differences between one multi-channel video programming provider and another are irrelevant. Where the video programming is indistinguishable to the viewer—whose rights are paramount—it would be anomalous to afford one service provider unencumbered discretion to restrict the diversity of voices available to that viewer while denying that authority to its counterpart simply because the former utilizes an optical fiber or coaxial cable to distribute its programming while the latter employs satellites or the airwaves.

In fact, critically important technological developments argue against adoption of stricter First Amendment standards for wired providers such as cable. For example, *amici* telephone companies observe that signal compression technologies have served to increase the transmission capacities of wireline broadband networks. Brief of *Amici* Telephone Companies at 11. The same process of digital compression has been adopted by DBS and will be used in digital television to increase the capacity, and therefore the efficiency, of their media.[14]

[14] *See* Rosenthal, *Broadcast TV Networks Eyeing Compression Gear*, Electronic Media, Jan. 18, 1993; *see also* Boyle, *Satellite Ops Brace for Digital Compression*, Broadcasting & Cable, Feb. 22, 1993.

Finally, cable remains subject to administrative or regulatory scarcity. The authority of each cable operator to operate its system in the first instance stems from a government-issued franchise that is not available indiscriminately to anyone who may desire it. Just as "it was essential for the Government to tell some applicants that they could not broadcast at all because there was room for only a few," *Red Lion*, 395 U.S. at 388, so also has it become necessary for Government to intervene to regulate the construction of cable television systems in communities throughout the country. Because, as in broadcasting, not every aspiring cable operator may undertake to construct and operate a system, "it is idle to posit an unabridgable First Amendment right . . . comparable to the right of every individual to speak, write, or publish." *Id.*

For these reasons, elevating the First Amendment rights of one technological mode of programming distribution, *i.e.*, cable, over the First Amendment rights of alternative distribution technologies, *e.g.*, broadcasting, DBS, etc., would do violence to the viewer's First Amendment rights which are paramount and would also raise serious equal protection concerns.[15]

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[15] To the extent that multichannel video programming distribution technologies are similarly situated, they should be similarly treated. Rooted in the equal protection guarantees of the Fifth and Fourteenth Amendments to the Constitution is the notion that governmental classifications must be based on some reasonable "ground of difference having a fair and substantial relation to the object of the legislation, *so that all persons similarly circumstanced shall be treated alike.*" *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (emphasis added); *see also* Tribe, *American Constitutional Law* § 16-1 (2d ed. 1988) ("[E]quality can be denied when government classifies so as to distinguish, in its rules or programs, between persons who should be regarded as similarly situated in terms of the relevant equal protection principles.").

B. The Court Should Rule Narrowly to Preserve Congress' Ability to Make the Factual Determinations that Will Be Required to Reconcile the Interests of Viewers and Service Providers in a Dynamic and Converging Communications Marketplace.

The foregoing discussion illustrates the incredibly dynamic nature of today's communications marketplace. This Court historically has recognized the virtue in preserving its ability to adapt to an uncertain and rapidly-changing factual landscape. Accordingly, while this Court does not and should not " ' 'defer' to the judgment of Congress . . . on a constitutional question,' " it must nonetheless "play close attention to the expertise of the Commission and the fact finding of Congress." *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 569 (1990). Moreover,where the circumstances present particularly complex policy questions the Court must afford Congress' findings and the Commission's expertise "great weight." *Id.* (quoting *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 103 (1973)); *Cf. United States v. Midwest Video Corp.*, 406 U.S. 649, 677 (1972) (Douglas, J., dissenting) ("The policies reflected in the plurality opinion may be wise ones. But whether [the policy should exist] is a decision that we certainly are not competent to make and in my judgment the Commission is not authorized to make. Congress is the agency to make the decision . . . .").

The widespread technological and structural changes underway in the communications industries are test-

ing the existing regulatory framework at every turn. Congress and the Executive Branch are poised to respond. A number of far-reaching bills have already been introduced by key members of the House and Senate in the 103rd Congress, and more are expected.[16] As the Court considers the constitutionality of the must carry provisions of the 1992 Cable Act, considerations of comity also caution against issuance of a broad ruling that might unnecessarily impair Congress' ability to respond effectively to this challenge.

CONCLUSION

Amici respectfully urge this Court to issue a narrow ruling tailored to the precise facts and questions of law essential to the adjudication of the constitutionality of the must carry provisions, thereby diminishing the possibility of prejudging challenges to other provisions of the 1992 Cable Act, such as Section 19. In reaching its decision, the Court should reject appellants' invitation to accord preferred First

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[16] S. 1086, 103d Cong., 1st Sess., 139 Cong. Rec. S7023-28 (1993) ("Telecommunications Infrastructure Act of 1993" cosponsored by Senators Daniel Inouye and John Danforth); H.R. 3636, 103d Cong., 1st Sess. (1993) ("National Communications and Information Infrastructure Act of 1993" cosponsored by Representative Edward Markey and Jack Fields); H.R. 3626, 103d Cong., 1st Sess. (1993) ("Antitrust Reform Act of 1993" cosponsored by Representatives John Dingell and Jack Brooks). *See also Administration Planning Complete Overhaul of Communications Act*, Communications Daily, Nov. 12, 1993 (reporting that the Director of the National Telecommunications and Information Administration ("NTIA"), Larry Irving, has stated that the Executive Branch is urging Congress to pass a complete revision of the Communications Act of 1934 during this Congress.).

Amendment status to cable relative to competing electronic media.

Respectfully submitted,

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NO. 93-44

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

TURNER BROADCASTING SYSTEM, INC., *ET AL.*,

APPELLANTS

V.

FEDERAL COMMUNICATIONS COMMISSION, *ET AL.*,

APPELLEES

Appeal from the United States District Court
for the District of Columbia

BRIEF OF THE MEDIA INSTITUTE AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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STATUTES AND AGENCY RULES

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INTEREST OF AMICUS CURIAE

The Media Institute is a nonprofit research foundation specializing in the study of communications policy. As an independent and principled advocate of a robust press and a dynamic communications industry, the Institute dedicates its work to protecting freedom of speech, encouraging excellence in journalism, and fostering competition within the communications industry. The First Amendment rights of all speakers are now at risk in this case that is testing the authority of government to compel cable television to carry certain broadcast television signals. Any diminishment of the speech rights of cable television operators inevitably threatens the constitutional rights of all speakers.

That is the case because cable television, by freeing electronic communication from the limitations of radiated electro-magnetic waves, has created, and is continuing to develop, a medium of communications that is more diverse, more pluralistic, and more open than the present broadcast system. In the view of The Media Institute, more like the print medium. In fact, technological change is galloping at so rapid a pace that cable television and newspaper publishing are on the verge of using the same electronic means of communicating.

The Media Institute subscribes to the proposition that the way our society handles the electronic media is the preeminent free speech problem of our time. Ithiel de Sola Pool puts it starkly in TECHNOLOGIES OF FREEDOM, 10 (1983):

> The onus is on us to determine whether free societies in the twenty-first century will conduct electronic communication under the conditions of freedom established for the domain of print through centuries of struggle, or whether

that great achievement will become lost in a confusion about new technologies.

Indisputably, this new medium of cable television engages in speech that is protected by the First Amendment. *Turner Broadcasting System, Inc. v. FCC*, 113 S. Ct. 1806 (1993) (Rehnquist, C.J., in chambers). The Media Institute submits that the Congress has violated the First Amendment rights of cable television system owners by compelling that a substantial part of system channel capacity be devoted to the carriage of local broadcast television stations, programmers that are favored by Congress, which has now set aside the preferences of the cable system owner who, in the absence of the must-carry constraint, might choose to carry other programmers who will now be losing out to local broadcasters.

STATEMENT OF THE CASE; OPINION BELOW

Appellants are contesting the requirements of those provisions, §§4, 5 (47 U.S.C. §§534. 535) of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, that compel cable television operators to carry the programming of local broadcast television stations. The requirement is not insubstantial, has the potential to remove from system owner control perhaps as much as 50% of channel capacity. Thus, a cable system with a capacity of more than 12 activated channels must devote up to one-third of those channels to the carriage of local commercial TV stations. 47 U.S.C. §534(b). In addition, cable operators must carry three noncommercial TV stations when system capacity is from 13 to 36 channels, and perhaps even more noncommercial stations when capacity is in excess of 36 channels. 47 U.S.C. §535(b). Beyond that, the holdover provisions of the Cable Communications Policy

Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779, require a cable operator to relinquish editorial and business control over (1) such channels as the local cable franchise extracts for public, educational, and government access channels, 47 U.S.C. §531, and (2) for high-capacity systems, as much as 15% of channel capacity for leased access by persons unaffiliated with the system operator, 47 U.S.C. §532.

The dispute is here on appeal from a decision of a three-judge district court. *Turner Broadcasting System, Inc. v. FCC*, 819 F. Supp. 32 (D.D.C. 1993). Appellants contend that the mandating by government of cable carriage of broadcast TV stations violates their rights to freedom of speech and of the press, rights guaranteed by the First Amendment to the United States Constitution. The District Court, by a 2-1 vote, rejected the contention and upheld the constitutionality of the must-carry requirements. Evidence was not adduced; the dispute was resolved below on motions for summary judgment.

The District Court majority decided that must-carry was economic regulation, not regulation of speech, that the standard of strict judicial scrutiny did not apply, that the applicable standard was that established in *United States v. O'Brien*, 391 U.S. 367 (1968), and that the must-carry provisions satisfied the *O'Brien* test. *Turner Broadcasting*, 819 F. Supp. at 41, 45-7.

The majority opinion by District Judge Jackson noted: "That the First Amendment is to some extent implicated whenever a government endeavors to regulate a cable component...is a proposition now too-well established to reconsider [footnote, omitted]." *Id.* at 41. A concurring opinion by District Judge Sporkin, the other vote making up the majority of two judges, lashed at the cable industry for its

"mischievous" attempt to invoke the First Amendment.[1] It was "inconceivable," according to the concurring opinion, "that our forefathers at any time contemplated that the First Amendment would be used to regulate an industry that came into existence over 150 years after the Bill of Rights was adopted." *Id.* at 56.

Both majority opinions found that a significant government interest had been established by the record made in Congressional committee hearings, sufficient to satisfy the *O'Brien* test. Both are seemingly content to accept without more the Congressional judgment on the adequacy of the showing. This is to a large extent, key to the government's support of the must-carry provisions in the 1992 Cable Act.

Earlier, on two occasions, must-carry rules produced by the FCC had been invalidated because of the insufficiency of proof that there is a problem, proof that cable systems are not carrying broadcast signals, and that there is, for that reason, a substantial government interest. *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986); *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988). In both cases, it was concluded that the FCC had failed to determine whether the problem that must-carry rules sought to correct "is a real or fanciful threat." *Quincy* at 1463; *Century* at 305. In both cases, too, certiorari was denied.

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[1] In *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979), the court at 709 n. 19 observed that a First Amendment claim against forced access "is not frivolous."

Despite the reliance of the majority below on the fact of a Congressional finding and on the sanctity of that finding, the opinions do go on to gesture in the direction of dealing with the basis for the Congressional judgment. But the exploration is principally given over to a recitation of the length of hearings and the number of witnesses, the bulk of which has to do with the entire 1992 Cable Act, not necessarily with the problem of cable's dropping or threatening to drop broadcast television stations. *Turner Broadcasting*, 819 F. Supp. at 39 n. 14.

The dissent of Judge Williams, on the other hand, does delve into the Congressional record. *Id.* at 63. It was the judgment of Judge Williams that there was some evidence that broadcast stations had been dropped but that 80% of cable systems had never discontinued carriage of a single local broadcaster. In his view, the facts behind the recitation of long hearings and numerous witnesses "...do not support an inference that over-the-air TV is at risk." *Id.*

SUMMARY OF ARGUMENT

Cable television's prominent experience with government regulation has been to try to break out of FCC rules that persistently restrained the industry's authority to carry broadcast TV signals. In short, cable has from the outset of its development been plagued by government limits on the amount of broadcast signal carriage that would be permitted. Thus, between 1966 and 1972, there was every two years a new FCC program that continued to shackle cable's carriage of broadcast stations. The majority below dwells extensively on the growing supremacy of cable as a delivery mechanism for video programming but offers only small (e.g., "They vie with broadcasters for 'local' advertisers," 819 F. Supp. at 44)

rationale for any possible interest of cable in wanting to discontinue the carriage of broadcast TV stations.

Assuming that *O'Brien* is the appropriate standard for assessing the constitutionality of must-carry, it is contended here that:

(1) As in the *Quincy* and *Century* cases, there has been a failure again to establish that there is a significant government interest to be protected. Or, stated graphically, that there is a problem that must be cured by government's compelling cable systems to carry broadcast TV stations. Only the dissent in the decision below bothered to examine the evidence before the Congress. The majority is content to rely on what it apparently believes is a large number of witnesses and hearing days, all without analysis of how much of the Congressional exploration was given over to must-carry, which ended up as only two sections in an omnibus cable bill of 28 sections.

(2) The decision below and the mandatory carriage rules must fail because must-carry is an overbroad solution and burdens the speech of cable television system owners more than is necessary to cure the perceived problem. By way of example, there are at hand or available other avenues for broadcast television to assure access to the larger cable audience, all without intruding on cable TV's First Amendment rights: Broadcast television ownership of co-located cable television is barred by Congressional statute and by FCC regulation. 47 U.S.C. §533(a); 47 C.F.R. §76.501. The original reasons for imposing the ban--to contribute to diversity and to avoid the possibility that broadcast TV might impede the development of cable--no longer obtain. Dropping of the ban would allow local broadcast stations, separately or in concert, to build their own cable television facilities for

carriage of their signals. Additionally, access to cable's audience may be leased from the cable system. Leased access is guaranteed by 47 U.S.C. §532.

Overridingly, however, amicus contends that the must-carry rules are content-based and subject to strict judicial scrutiny. *See, e.g., Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987). There is semantic dispute in the decision below as to when government conduct constitutes suppression of free expression or is merely an incidental burden on speech. The majority appears to accept the proposition that government can be said to be intruding on free speech only when it dictates the message or the subject matter to be carried. *Turner Broadcasting*, 819 F. Supp. at 42. The dissent of Judge Williams, on the other hand, finds that "In requiring cable systems to carry a special group of competing speakers, Congress directly, not incidentally, restricts the cable operators' exercise of editorial discretion." *Id.* at 67.

Clearer evidence that must-carry is not content-neutral is at hand in the language of §4 of the 1992 Cable Act, 47 U.S.C. §534, where in subsection (g)(1) the right to must-carry status is denied to television stations that are "...predominantly utilized for the transmission of sales presentations or program length commercials." But the same §4 in subsection (g)(2), directs the FCC to conduct a proceeding to ascertain whether such stations[2] are serving the public interest, convenience, and necessity. Standards are next provided for making

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[2] Labeled "home shopping stations" in FCC proceedings. Report and Order in MM Docket 93-8 (Home Shopping Station Issues), 58 Fed. Reg. 39156, 73 Rad. Reg. 2d (P&F) 355 (1993).

that assessment. If the FCC concludes favorably for such stations, must-carry status is conferred. Tellingly, finally, and in the event the FCC finds against home shopping stations, the Commission is directed to allow such stations to qualify for mandatory carriage by giving up the speech associated with sales presentations and program length commercials.[3] The preciseness of these instructions as to program content clearly demonstrates that the must-carry rules are inescapably involved with directing the message.

ARGUMENT

I. THE COURT BELOW RELIED ON THE WRONG TEST IN ASSESSING THE CONSTITUTIONALITY OF THE MANDATORY CARRIAGE RULES

(a) The Standard of Judicial Review in Speech Cases Turns on the Degree of Government Intrusion

The standard of review in First Amendment cases depends on whether the government regulation is content-based or content-neutral. If the intrusion mandates or suppresses particular speech, it is subject to strict scrutiny by the courts. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987); *Carey v. Brown*, 447 U.S. 455, 461-62 (1980). If, on the other hand, speech and nonspeech elements are combined in the same source of government conduct, a

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[3] 1992 Cable Act, §4(g)(2), 47 U.S.C. §534: "...the Commission shall allow the licensees of such stations a reasonable period within which to provide different programming...."

sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. In that case, a more lenient judicial review is indicated under the formula of *United States v. O'Brien*, 391 U.S. 367 (1968), as modified in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

A government regulation is sufficiently justified under *O'Brien*: "...if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction...[on speech] is no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377. The features of the *O'Brien* test that are in dispute in the subject challenge to mandatory carriage have to do with whether a substantial government interest--or the existence of a problem--is sufficiently demonstrated, and whether the cure is tailored--no greater than is essential--to curing the problem.

(b) Court Below Adopts *O'Brien*, but its Decision Favoring Validity of Must-Carry Fails to Satisfy *O'Brien* Standards

The majority in the 2-1 decision below concluded in favor of the government on both disputed features of the *O'Brien* test. With respect to the establishment of an important government interest, the opinion of Judge Jackson relies only on an inference that Congress had devoted substantial time to uncovering the problem of broadcast stations being dropped or not carried. Thus, *Turner Broadcasting*, 819 F. Supp. at 39 n. 14, has Judge Jackson relying on this quote from Sen. Inouye: ("[T]he bill before us is the result of 13 days of hearings and 113 different witnesses. We have had countless numbers of communications experts and lawyers

look over the measure. We have conferred with, in addition to the 113 witnesses, at least 500 knowledgeable citizens"). But 39 n. 14, where Judge Jackson spells out the details of the Congressional labor over a cable bill, appears to identify only one date, October 25, 1989, when inquiry was given over to must-carry. Neither in the statement of Senator Inouye nor in the majority opinions are details supplied having to do with numbers of stations dropped or not carried.

The must-carry provisions of the 1992 Cable Act, it is relevant to observe, involve only two sections, 4 and 5, in a statute that consists of 28 sections that deal with such prominent matters, in a bill that heralds "Consumer Protection and Competition," as Sec. 3. Regulation of Rates, Sec. 6. Retransmission Consent for Cable Systems, Sec. 7. Award of Franchises; Promotion of Competition, Sec. 8. Consumer Protection and Customer Service, Sec. 9. Leased Commercial Access, Sec. 10. Children's Protection from Indecent Programming on Leased Access Channels, Sec. 11. Limitations on Ownership, Control, and Utilization, Sec. 12. Regulation of Carriage Agreements, Sec. 13. Sales of Cable Systems, Sec. 14. Subscriber Bill Itemization, Sec. 15. Notice to Cable Subscribers on Unsolicited Sexually Explicit Programs, Sec. 16. Technical Standards; Emergency Announcements; Programming Changes; Home Wiring, Sec. 17. Consumer Electronics Equipment Compatibility, Sec. 18. Franchise Renewal, Sec. 19. Development of Competition and Diversity in Video Programming Distribution, Sec. 20. Customer Privacy Rights, Sec. 21. Theft of Cable Service, Sec. 22. Equal Employment Opportunity, Sec. 23. Judicial Review, Sec. 24. Limitations on Franchising Authority Liability, Sec. 25. Direct Broadcast Satellite Service Obligations, Sec. 26. Sports Programming Migration Study and Report, Sec. 27. Applicability of Antitrust Laws, and Sec. 28. Effective Date.

(1) Making Conclusive a Congressional Finding of Substantial Government Interest, as does the Majority Below, is Intolerable; would Undermine the First Amendment by Giving Congress Free Scope to Abridge the Freedom to Speak, all without Judicial Probing into the Correctness of the Rationale for Congressional Action. Writing separately,[4] Judge Sporkin, the other vote making up the 2-1 majority, is content to rely on Judge Jackson's vague findings as to the extent of the non-carriage problem that must-carry is designed to cure. *Turner Broadcasting*, at 53 n. 4. Moreover, and even though *O'Brien*, 391 U.S. at 385, does not require it, both judges fall back on their understanding that courts do not "ordinarily" review the adequacy of the record that the Congress acted on.[5]

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[4] The concurring opinion seems inordinately laden with reproach and incongruity. Plaintiffs are scolded for coming before the court "...not because their freedom of speech is seriously threatened, but because their profits are." Turner Broadcasting, at 54. "Programmers and broadcasters," it is asserted, "are not constitutionally protected groups." Id. at 56. And, "If the Cable Act compelled the cable programmers to carry the broadcasters' speech, or compelled the operators to relay a particular message, the Act undoubtedly would run afoul of the First Amendment." Id.

[5] Judge Jackson at 41: "The record in support of the 1992 Cable Act...was made by Congress. Federal courts do not ordinarily review the adequacy of the record before Congress to support the laws it enacts." Judge Sporkin at 51 (later at 53 n. 4, relying on Judge Jackson's recitation of number of days given over to large numbers of witnesses): "Congress' finding is based on an exhaustive Congressional record, and deserves the Court's deference."

That position is, however, intolerable where speech is at risk because it would render the First Amendment vulnerable to circumvention. The purpose of the First Amendment is, *inter alia*, to keep Congress from legislating to abridge the freedom of speech. The courts have tempered the seeming absoluteness of the ban by allowing intrusions when a sufficient government interest is established. But the First Amendment is diminished if Congressional action does not have to run the gauntlet of judicial review as to the correctness of a finding of government interest. Without judicial review of the record, for example, a venal legislature could declare that preserving full-service newspapers is a substantial government interest that justifies a rule that bans tabloids, shopping and real estate guides, etc. Without judicial review of the legislative finding, *O'Brien* would be no test at all and the safeguards of the First Amendment would be nullified. As if recognizing the weakness of the position, both majority opinions *do* make a pass at probing the record made before Congress, however imperceptibly their review touches on the problem of the extent of broadcast stations being dropped or not carried in the first instance.

(2) Dissent Below, Unlike Majority, does Measure and Evaluate the Record before Congress on Must-Carry, and Concludes that a Substantial Government Interest--or a Problem Demanding Correction--has not been Established. The dissenting opinion of Judge Williams, on the other hand, goes extensively into the details of the evidence available to the Congress. *Id.* at 63-4. There, the evidence before Congress of the numbers of stations dropped and carried is marshalled in specific support of the conclusion of Judge Williams that such activities "do not support an inference of peril to the broadcast industry or even any segment of that industry." *Id.* Thus, "80% of cable systems have never dropped a single local broadcaster." *Id.* at 63. "What

pertinent data there is on the record states that the average cable system in 1990 carried just over eight local broadcast signals (7% more than were carried in 1985)." *Id.*

(c) The Must-Carry Rules are, in Fact, Content-Specific and Demand Strict Judicial Scrutiny

It is clear, it is here contended, that the must-carry rules compel the speech of some and suppress the speech of others. Even the FCC concedes that. Thus: "These rules [must-carry]...are intended to compel carriage of broadcast signals in place of alternate programming that subscribers, if given their choice, might otherwise choose." *Rule Making to Delete Mandatory Signal Carriage*, 55 Rad. Reg. 2d (P&F) 1365, 1367 (1984).

(1) Majority Below would Invoke Strict Scrutiny only when Specific Speech or a Particular Message is Compelled. The majority opinions below are of the apparent view that, to invoke the strict scrutiny standard of review, the actual wording of the message, or something approaching that, must be government prescribed. Judge Jackson at 42: "A compulsory speech requirement...is to be strictly scrutinized only if it appears that the government has prescribed the content - either the message or the subject matter - of the speech to be spoken [footnote omitted]." Judge Sporkin at 56: "If the Cable Act compelled the cable programmers to carry the broadcasters' speech, or compelled the operators to relay a particular message, the Act undoubtedly would run afoul of the First Amendment."

At the same time, Judge Sporkin at 55 takes the position that: "The right-of-reply statute in Tornillo...plainly

[was] based on the content of the regulated speech."[6] That seems curiously at odds with his apparent view that the message must be "particular," perhaps as to wording or at least as to view. The particulars of the compelled speech or message in *Tornillo*, it may be observed, were not government-prescribed. All that was required was that a right of reply be accommodated, without regard to the content of that reply.

(2) Accepting Majority View of Strict Scrutiny, the 1992 Cable Act's Treatment of the Carriage Rights of Home Shopping Stations does Target, does Compel Specific Speech and Message, and Finally makes Clear that Must-Carry is Pure Content Control. But, even accepting the view that, to invoke strict scrutiny, the government intrusion must deal with and identify specific speech, it is the view here that that is precisely what the Congress has done, has identified specific speech. To demonstrate, the evidence as to how the Congress is treating the must-carry status of home shopping stations is impressive.

§4 of the 1992 Cable Act, 47 U.S.C. §534, in subsection (g), withholds the must-carry option from television stations that are "...predominantly utilized for the transmission of sales presentations or program length commercials." Stated otherwise, the target is home shopping stations.[7] At the outset, then, the must-carry entitlement is extended only to local broadcast stations that are not "...predominantly utilized

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[6] Miami Herald Publishing Company v. Tornillo, 418 U.S. 241 (1974).

[7] See n. 2, supra.

for the transmission of sales presentations or program length commercials." That language in §4 (g) of the 1992 Cable Act persuades that a feature of the must-carry requirement does identify and does separate out--withholds--particular speech from the entitlement otherwise extended to local broadcasters. But other aspects of shopping station carriage seem even more conclusive of the question of whether the government's insistence on mandatory carriage of broadcast television stations has to do with broadcast program content.

§4(g) also directs the FCC to conduct a proceeding to ascertain whether home shopping stations are serving the "public interest, convenience, and necessity." In making that appraisal, the Commission is required to consider: "...the viewing of such stations, the level of competing demands for the spectrum allocated to such stations, and the role of such stations in providing competition to nonbroadcast services offering similar programming." If the Commission finds that home shopping stations--and their program content--do serve the public interest, convenience and necessity, it must qualify those stations for must-carry status.

Almost certainly for the proposition that must-carry is content-driven, the Commission, if it finds against home shopping stations on the issue of service in the public interest, convenience, and necessity, is directed in §4(g) to allow such stations to qualify for mandatory carriage by giving up home shopping programming. Thus, at 47 U.S.C. §534(g)(2):

> In the event that the Commission concludes that one or more of such stations are not serving the public interest, convenience, and necessity, the Commission shall allow the licensees of such stations a reasonable period within which to provide different programming...."

To put it more vividly, a class of licensees is told that, in certain eventualities, they may have to suppress the speech associated with home shopping programming in order to qualify for the right to demand distribution by cable.

Further demonstrating the unmistakable import of the Congressional language of §4, that programming--or content--is a benchmark of the imposition of mandatory carriage, is the FCC's subsequent reaction to, and implementation of §4(g). Thus, to comply with the Congressional direction, the Commission undertook and completed a proceeding to measure whether home shopping stations may be said to serve the public interest, convenience, and necessity. *Report and Order in MM Docket 93-8* (Mandatory Carriage of Home Shopping Stations), 58 Fed. Reg. 39156, 73 Rad. Reg. 2d (P&F) 355 (1993). That *Report and Order* is replete with evidence of the Commission's understanding that it was required to, and did, consider content in estimating whether shopping stations deserve must-carry status.

For example, at ¶29, under "Public Interest Obligations," the Commission relies, *inter alia*, on evidence that:

> ...licensees of home shopping stations have addressed such issues as drug and alcohol abuse, AIDS, race relations, homelessness, basic legal knowledge for non-English-speaking viewers, and local political debates and election returns.

By way of further illustration, there is reliance in ¶30 on evidence that some shopping stations weekly devote 7.6% of total broadcast hours to local programming, 7.6% to news and public affairs, and 10.2% to nonentertainment programming.

Additional insight is provided in the Separate Statement of FCC Chairman James H. Quello and the Dissenting Statement of Commissioner Ervin S. Duggan, both statements appearing as attachments to the *Report and Order* on home shopping stations. Commissioner Duggan notes, 73 Rad. Reg. 2d (P&F) 355, 371, that Chairman Quello:

> "...has fought the must-carry battle valiantly throughout his career at the Commission; I know that he cares deeply about it, and I share his concern that we not damage must-carry's ultimate defense."

What Commissioner Duggan is referring to is the candid confession by Chairman Quello, *id.* at 365, that:

> ...I am concerned that a decision in this proceeding to exclude home shopping stations from must carry status solely because of their content would have jeopardized the legal defense of the must-carry rules [footnote omitted].

The omitted footnote spells out the Chairman's awareness that a content-based imposition on speech would involve a higher level of First Amendment scrutiny and undermine the constitutionality of the must-carry rules.

The Chairman's concern about not excluding shopping stations on the basis of content, lest the legal defense of must-carry be jeopardized, would seem to be conclusive of the point that the Congressional legislation is content-based. Thus, §4(g) clearly provides that home shopping stations cannot claim must-carry entitlement until the FCC completes a proceeding favorable to those stations on the question of their

programming or content. Therefore, what Chairman Quello felt would be a giveaway of a defense was in fact already surrendered by the Congress in this language from Sec. 4, 47 U.S.C. §534(g)(1):

> Pending the outcome of the proceeding under paragraph (2) [Commission proceeding to determine whether home shopping stations are serving the public interest, convenience, and necessity], nothing in this Act shall require a cable operator to carry on any tier...the signal of any commercial television station...that is predominantly utilized for the transmission of sales presentations or program length commercials.

(d) The Strict Scrutiny Test Applies to These Content-Driven Requirements and the Decision Below must be Reversed and the Must-Carry Rules Deemed Invalid

Since the must-carry rules are demonstrably content-based, they are a direct and not an incidental burden on speech. Government must, therefore, justify the requirements of forced carriage on the basis of a compelling government interest, and the requirements must be closely drawn to avoid unnecessary abridgement of speech. *See, e.g., Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 535, 540 (1980); *Buckley v. Valeo*, 424 U.S. 1, 25 (1976). As will be demonstrated *infra*, the rules are invalid for, at the very least, failing the test that they be closely drawn.

II. COURT BELOW REACHED WRONG RESULT EVEN UNDER THE MORE FORGIVING O'BRIEN TEST

(a) Substantial Government Interest Not Sufficiently Established

The purpose of the must-carry requirements of the 1992 Cable Act is to assure local broadcast television's access to cable television's audience. But the history of government's persistence in insisting on mandatory carriage is puzzling[8] because cable television, from the outset, has not only

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[8] The *Quincy* court, 768 F.2d at 1440, noted that the FCC considers broadcasting to be "society's chosen instrument for the provision of video services." In that connection, it is useful to reflect that broadcast networks pay their affiliated TV stations to carry network program lineups. In that context, it may be speculated that must-carry surfaced at an early stage to ward against TV stations having to pay for cable carriage. Pursuing that possibility leads to the new must-carry rules that were adopted after the *Quincy* decision invalidated an earlier program. There, the Commission justified "The Need for Regulation" on what it described as "evidence in the record" that some cable systems had ceased carrying, refused to carry, "*and/or requested payment for carriage of stations.*" (emphasis added). *Report and Order in MM Docket 85-349*, 61 Rad. Reg. 2d (P&F) 792, 830 (1986). The Commission's new must-carry rules that are here challenged now prohibit a cable operator "...from accepting or requesting monetary payment or other valuable consideration in exchange either for carriage or channel positioning of any broadcast television station carried in fulfillment of the must-carry requirements...." 47 C.F.R. §76.60.

not resisted carriage of broadcast television stations, but has in fact been consistently restrained by government from expanding its carriage of broadcast stations. Admittedly, the government's insistence on carriage was only for local broadcast stations, and the resistance to expanded carriage had to do with distant stations. History, however, demonstrates not a cable resistance to local carriage but an eagerness by the cable industry to carry broadcast stations.

(1) Readiness to Assume that Cable must be Compelled to Carry Broadcast Stations Defies History and Logic. The mandatory carriage concept goes back at least to 1962 when the Commission first sought to impose must-carry as a condition for granting an application to construct a microwave system to transmit distant broadcast signals to a rural cable system. *Carter Mountain Transmission Corp.*, 32 FCC 459 (1962), *aff'd*, 321 F.2d 359 (D.C. Cir.), *cert. denied*, 375 U.S. 951 (1963). In 1965, the requirement was applied to all microwave-fed systems. *See, e.g., Quincy Cable*, 768 F.2d at 1440 n. 11. In 1966, mandatory carriage obligations were imposed on all cable systems. *Id.* All of that government regulation was imposed at a time when there was no point to cable's not carrying local stations because cable was basically an antenna service that sold only improved reception of broadcast signals. *See, e.g., Home Box Office v. FCC*, 567 F.2d 9, 21 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1978).

At the same time that the Commission was insinuating an obligation on cable systems to carry all local stations, the industry was being restrained by the Commission from expanding its carriage of broadcast stations. In 1966, when must-carry was locked in, the *Second Report and Order in Dockets 14895, 15233, and 15971*, 2 FCC 2d 725, 6 Rad. Reg. 2d (P&F) 1717, also principally featured a restriction on

cable systems operating in the top-100 markets, permitting them to carry distant stations only after an evidentiary hearing. Actual experience with the procedure "...soon revealed it to be largely unworkable." *Report, Economic Inquiry*, 45 Rad. Reg. 2d (P&F) 853, 865 (1979). In 1968, then, the FCC launched its *Notice of Proposed Rule Making and Notice of Inquiry in Docket 18397*, 15 FCC 2d 417, suspending the authorizing procedure of the 1966 rules and proposing a requirement that out-of-market stations could not be carried unless written permission of the station--*i.e.*, retransmission consent--was first obtained. Retransmission consent, however, "...did not prove to be a workable alternative...." *Report, Economic Inquiry*, at 866 n. 49. In 1970, then, the Commission's *Notice of Proposed Rule Making in Docket 18894*, 25 FCC 2d 38, offered up a complex program to permit the carriage in major markets of up to four out-of-market stations, provided the commercials on those stations were deleted and the advertising of local UHF stations substituted. The program was subsequently abandoned, but the result was to hold off for another two years cable's ability to increase the number of broadcast television stations that could be carried. In 1972, the *Cable Television Report and Order*, 36 FCC 2d 143, 24 Rad. Reg. 2d (P&F) 1501 finally broke the impasse by permitting the carriage of a limited number of distant stations, the number depending on the size of the television market, but in no case more than three commercial stations.

Invalidating the must-carry rules in *Quincy Cable*, the court observed[9] 768 F.2d at 1457 that:

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[9] The Quincy court, at 1439, noted that the regulatory result of the FCC's posture was "to protect an established industry [broadcast TV] from the encroachment of an upstart young competitor [cable]...." At Quincy, 1439 n. 10, it was

> In the two decades since the rules' original promulgation, the Commission has never seriously examined any of the admittedly speculative links in the chain of reasoning advanced in support of the rules. In particular, it has never sought support for the assumptions that are the linchpins of its analysis: (1) that without protective regulations cable subscribers would cease to view locally available off-the-air television...and (2) that even if some cable subscribers did abandon local television, they would do so in sufficient numbers to affect the economic vitality of local broadcasting.

History, it is believed, does not demonstrate an inclination by cable to cut back on its carriage of broadcast television stations. Nor is the record compiled by the

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observed that:

> Some analysts have taken a harsher view of the FCC's early regulatory posture. *See, e.g.*, H.R.Rep. No. 98-934, 98th Cong., 2d Sess. 22 (1984) ("FCC policies in [the] 1960s and early 1970s unfairly inhibited the growth and development of cable."); Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH.L.REV. 1, 40 (1976) ("There is considerable evidence that the Commission has been more concerned with protecting the economic interests of conventional broadcasters than with fully exploiting the resources of cable technology.").

Congress sufficient to establish new or any urgency attributable to cable's dropping or refusing to carry broadcast stations. Thus, the only evidence that the court below uncovered from the record before Congress in support of must-carry in the 1992 Cable Act is contained in the dissent of Judge Williams who culled the numbers and specifics from the record and found that the extent of non-carriage does "...not support an inference of peril to the broadcast industry or even any segment of that industry." *Turner Broadcasting*, 819 F. Supp. at 63-4. It was the view of Judge Williams that "...cable television appears to continue to be dependent on local broadcasters as critical suppliers of programming" and that "...cable simply cannot afford to drop broadcast channels to any significant degree." *Id.* at 64.

(2) Failure or Refusal to Carry is not Established as a Significant Problem and a Substantial Government Interest is not Demonstrated. It has not been established, it is submitted, that non-carriage is a problem. In that circumstance, a finding of the existence of a significant government interest cannot be sustained. The evidence on which the Congress acted, as uncovered by Judge Williams, is not up to disturbing the *Quincy* and *Century* precedents.

(b) Assured Access to Cable Television's Audience is Available to Broadcast Television without Burdening the Speech of the Cable Industry

The feature of the *O'Brien* test that insists that the remedy not be overbroad seeks a fit between the governmental interest and the regulation. If there are other cures available that do not intrude on speech, the must-carry requirement would inevitably be deemed overbroad. There are such availabilities.

(1) The Congress and the FCC, by Abandoning the No Longer Sustainable Ban on Broadcast Ownership of Cable, can Make Available to Broadcast Television Access to the Cable Audience. The Congress, 47 U.S.C. §533(a), and the FCC, 47 C.F.R. §76.501, have ruled out, and continue to prohibit, the cross-ownership of cable television by broadcast television station owners when the cable system and the television station are approximately co-located.[10] The original impetus for such a ban has been outdistanced by developments, and retention of the prohibition is now adverse to the government interest in curing the problem of assuring broadcast television's access to the audience that views television over wires. The FCC exclusion, first adopted in 1970, was premised on the assumption that separation of the media would contribute to diversity, *Second Report and Order in Docket 18397*, 19 Rad. Reg. 2d (P&F) 1775, and that, otherwise, broadcast television might retard the growth and development of cable television, *Memorandum Opinion and Order in Docket 18397*, 26 Rad. Reg. 2d (P&F) 739, 754 (1973).

The Congress has found that cable "...has become a dominant nationwide video medium." 1992 Cable Act, §2(a)(3). The stunting or impeding of cable's growth is now

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[10] The Congress provided that: "It shall be unlawful...." The FCC has enacted the ban as: "No cable television system...shall carry the signal of any television broadcast station..." if they are approximately co-located (emphasis in quotation added), thereby presumably recognizing that it is impossible to operate a cable system without TV station carriage and perhaps emphasizing the point that the cable industry is not likely to drop broadcast signals whose carriage is vital to cable system operation.

beyond the broadcast industry. And diversity would be enhanced if the cross-ownership ban were lifted and TV broadcasters permitted to launch their own competing cable facilities.

(2) The Leased Access Provisions of the 1984 and 1992 Cable Acts also Guarantee Broadcast Television's Access to the Cable Audience. Moreover--and short of building its own cable facilities--broadcast television now has guaranteed access to cable's audience via the leased access route. The cable industry has been legislatively required since 1984 to designate, for systems with 55 or more channels, up to 15% of channel capacity for commercial use by "persons unaffiliated with the operator [of the cable system]." 47 U.S.C. §532(b)(1)(B). A broadcast television station, now barred from ownership of local cable systems, surely qualifies as such an "unaffiliated" person. With the enactment of the 1992 Cable Act, loopholes in the original requirement have been closed by requiring the FCC to establish maximum reasonable terms, rates, and conditions for the use of leased channels, thereby reducing the opportunity for cable to outmaneuver the access obligation and making access a more meaningful avenue to cable's audience. 1992 Cable Act, §9.

III. CONCLUSION

Even under the more lenient *O'Brien* test, the mandatory carriage rules are unconstitutional. For all the foregoing, amicus curiae The Media Institute respectfully requests that the decision below, upholding the validity of mandatory carriage, be reversed.

Respectfully submitted,

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No. 93-44

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

TURNER BROADCASTING SYSTEM, INC., *ET AL.*,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *ET AL.*,
Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF UNITED STATES TELEPHONE ASSN., AMERITECH CORP., BELL ATLANTIC CORP., BELLSOUTH CORP., GTE SERVICE CORP., NYNEX CORP., PACIFIC TELESIS GROUP, ROCHESTER TELEPHONE CORP., AND SOUTHWESTERN BELL CORP., AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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QUESTIONS PRESENTED

Amici will address the following questions implicated by this Court's review of the constitutionality of the must-carry rules contained in 47 U.S.C. §§ 534 and 535:

1. Whether this Court should create an industry- or medium-specific First Amendment hierarchy, relegating video programming to a status of less than-full constitutional protection.

2. Whether, instead of relying on the identity of the medium used to transmit information, this Court should assess the constitutionality of a government restriction on expression on the basis of the nature of the restriction, recognizing the critical difference among direct bans on speech, speaker- or content-specific preferences, and nondiscriminatory access rules.

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Ameritech Corp. v. United States, No. 93-642 (N.D. Ill.) . . . 2
Ameritech Corp. v. United States, No. 93-CV-74617-CT (E.D. Mich.) 2
Associated Press v. NLRB, 301 U.S. 103 (1937) 22
Associated Press v. United States, 326 U.S. 1 (1945) 22
Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983) 15
Branzburg v. Hayes, 408 U.S. 665 (1972) 22
Buckley v. Valeo, 424 U.S. 1 (1976) 15
Cohen v. Cowles Media Co., 111 S. Ct. 2513 (1991) 22
Chesapeake & Potomac Telephone Co. of Virginia v. United States, No. 92-1751-A, (E.D. Va. Aug. 24, 1993), *appeal pending*, Nos. 93-2340 (4th Cir.) 1, 7, 25
Citizens Publishing Co. v. United States, 394 U.S. 131 (1969) 23
Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973) 14, 16, 19
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Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) . . . 19
Daniels Cablevision, Inc. v. United States, No. 92-2292 (D.D.C. Sept. 16, 1993) 21
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FCC v. Midwest Video Corp., 440 U.S. 689 (1979) 24
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Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) 8
Leathers v. Medlock, 111 S. Ct. 1438 (1991) 13
Lorain Journal Co. v. United States, 342 U.S. 143 (1951) . 23

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Cases: **Pages**

Los Angeles v. Preferred Communications, Inc., 476 U.S. 488 (1986) 13
Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984) 13
Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) 14, 15, 19
Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) 15
Minneapolis Star & Tribune Co. v. Minneapolis Comm'r of Revenue, 460 U.S. 575 (1983) 22
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Mutual Film Corp. v. Industrial Comm'n of Ohio, 236 U.S. 230 (1915) 11
National Ass'n of Regulatory Utility Comm'rs v. FCC, 533 F.2d 601 (D.C. Cir. 1976) 24
Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) 19
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Pacific Gas & Electric Co. v. Public Utilities Comm'n of California, 475 U.S. 1 (1986) 21
PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980) 21
Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986) . . 17
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Sable Communications, Inc. v. FCC, 492 U.S. 115 (1989) 5, 19
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Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 112 S. Ct. 501 (1991) 22
Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) 3, 8

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Cases: **Pages**

Telecommunications Research & Action Center v. FCC, 801 F.2d 501 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987) 12
Turner Broadcasting System, Inc. v. FCC, 819 F. Supp. 32 (D.D.C. 1993) . . . . . *passim*
United States v. O'Brien, 391 U.S. 367 (1968) 3, 6-7
U S WEST, Inc. v. United States, (W.D. Wash.) 2
Ward v. Rock Against Racism, Inc., 491 U.S. 781 (1989) 3, 6-7
Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977) 22

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47 U.S.C. §§ 534 and 535 . . . . . *passim*
47 U.S.C. § 541(a)(1) 17
47 U.S.C. § 541(f) 17
47 U.S.C. § 543(a) 18
H.R. Rep. No. 628, 102d Cong., 2d Sess. 46 (1992) 17

Miscellaneous:

Ameritech to Offer "Solutions" for Wireless Data Providers, Wireless Messaging Report, Oct. 26, 1993, at 5 10
Click! On-Line Newspaper Is a Mixed Read, Wash. Post., Oct. 23, 1993, at A-1 10
Digest, Wash. Post, Oct. 12, 1993, at D-1 10
C. Fink, *Strategic Newspaper Management* (1988) 13
FCC, Office of Plans and Policies, *Broadcast Television In a Multichannel Marketplace*, OPP Working Paper No. 26 (June 1990) 12
FRC Second Annual Report at 160, quoted in Caldwell, *Censorship of Radio Programs*, 1 J. Radio L. 441 (1931) 12

TABLE OF AUTHORITIES (cont.)

Miscellaneous: **Pages**

Hazlett, *The Policy of Exclusive Franchising in Cable Television*, 31 J. Broadcasting & Electronic Media 1 (1987) 17
Into Media's Future, Digitally, N.Y. Times, Oct. 17, 1993, at F-9 11
Newspaper Ass'n of America, *Facts About Newspapers '92* (1992) 12, 16
NTIA Reply Comments, *Teleport*, File No. 13135-CF-TC(3)-92 (May 27, 1992) 16
I. de Sola Pool, *Technologies of Freedom* (1983) 11
Reply Comments of the United States Department of Justice, *Telephone Company-Cable Television Cross-Ownership Rules*, CC Dkt 87-266 (Mar. 13, 1992) 16
Report of the Federal Communications Commission Regarding the President's Regulatory Reform Program (April 28, 1992) 16
U.S. Dept. of Commerce, Bureau of the Census, *Statistical Abstract of the United States 1992* (112th ed. 1992) 12
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BRIEF *AMICI CURIAE* OF UNITED STATES TELEPHONE ASSOCIATION, AMERITECH CORPORATION, BELL ATLANTIC CORPORATION, BELLSOUTH CORPORATION, GTE SERVICE CORPORATION, NYNEX CORPORATION, PACIFIC TELESIS GROUP, ROCHESTER TELEPHONE CORPORATION, AND SOUTHWESTERN BELL CORPORATION, IN SUPPORT OF APPELLANTS

INTEREST OF *AMICI CURIAE*[*]

Amici are communications companies in the business of providing telecommunications services and products to the general public, including local telephone service regulated as common carriage under state laws and the federal Communications Act of 1934.[1] *Amici* file this brief to support the appellants' position that the must-carry rules of 47 U.S.C. §§ 534 and 535 are unconstitutional, and also to urge this Court to adopt a framework of analysis of this case based on the nature of the governmental restrictions on speech rather than to relegate an entire category of expression — video programming — to less-protected status. *Amici's* interest in this case is twofold:

First, telephone companies are prohibited by federal statute from providing "video programming" directly to subscribers within their telephone service area. 47 U.S.C. § 533(b). "Video programming" is defined as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station." *Id.* at § 522(16).

On August 24, 1993, the United States District Court for the Eastern District of Virginia held § 533(b) unconstitutional under the First Amendment, both on its face and as applied. *Chesapeake & Potomac Telephone Co. of Virginia v. United States*, No. 92-1751-A, Mem. Op. (E.D. Va. Aug. 24, 1993), *appeal pending*, Nos. 93-2340 (4th Cir.) (filed Oct. 15, 1993). Additional First Amendment challenges to § 533(b) are currently pending in other

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[*] Letters reflecting written consent of the parties to the submission of this brief have been filed with the Clerk of the Court.

[1] Also included as an *amicus* is the primary trade association of the local telephone industry, the United States Telephone Association.

federal district courts. *See Ameritech Corp. v. United States*, No. 93-642 (N.D. Ill.) (filed Nov. 1, 1993); *Ameritech Corp. v. United States*, No. 93-CV-74617-CT (E.D. Mich.) (filed Nov. 1, 1993); *U S WEST v. United States* (W.D. Wash.) (filed Nov. 3, 1993).

Amici believe that, in adjudicating the constitutionality of 47 U.S.C. §§ 534 and 535, this Court would be aided by a fuller picture of the relevant statutory framework — especially the immediately adjacent provision, 47 U.S.C. § 533(b), containing the ban on video programming by telephone companies. In particular, *amici* respectfully suggest that this Court should not issue a broad edict resolving the constitutionality of the must-carry access rules that would prejudge constitutional questions raised by § 533(b)'s direct ban on speech — questions that may well be before the Court within a year. *Amici* believe that they can be of assistance to the Court in identifying the features of the instant case that would permit an appropriately narrow resolution.

Second, and more generally, *amici* have an interest in this case because print, television, telephone, computer, and cable technologies are already converging in a single information services market. *Amici* have a strong interest in ensuring that no artificial legal distinctions are drawn among different media whose means of delivering information — however distinct they may have been in the past — are now merging.

Telephone companies are deploying fiber optic cable with the capacity for video as well as voice transmission. Newly developed signal compression technologies allow video programming to be transmitted over copper telephone wires as well. As a result, *amici* have become *communications* companies rather than simply *telephone* companies. In addition, telephone and cable companies have formed alliances to deliver telecommunications services more efficiently to American consumers.[2] *Amici* therefore have a direct

[2] On May 16, 1993, U S WEST announced that it had bought a 25 percent stake in Time Warner Entertainment, the nation's second-largest cable company, in a move to create interactive cable networks. On Oct. 12, 1993, BellSouth announced plans to acquire a 22.5 percent stake in Prime Management Co., which operates cable systems. On Oct. 4, 1993, NYNEX announced that it was investing $1.2 billion in Viacom, a cable company; NYNEX is also the largest cable provider in the United Kingdom. On Feb. 10, 1993, Southwestern Bell announced plans to buy two Washington, D.C. area cable systems from Hauser Communications. Pacific Telesis is awaiting federal approval to purchase 75 percent of Prime Cable of Chicago. And on October 13, 1993, Bell Atlantic announced a planned merger with Tele-Communications, Inc. (TCI) and Liberty Cable.

These transactions have not implicated the ban on video programming by telephone companies embodied in 47 U.S.C. § 533(b). Southwestern Bell's acquisition, for example, occurred outside its telephone service area and thus was not covered by the statute. Even Bell Atlantic, against whom enforcement of § 533(b) has been enjoined, has committed not to retain any cable systems owned by TCI or Liberty Cable in the Bell Atlantic telephone service area.

and legitimate interest in the regulatory regime governing the provision of video programming.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici believe that the must-carry rules contained in 47 U.S.C. §§ 534 and 535 violate the First Amendment, primarily for the reasons stated in Judge Williams' opinion below: they require cable operators to carry the speech of a special class of government-preferred speakers — local commercial and noncommercial television stations. *Amici* agree with Judge Williams that "Congress cannot advance specific content by requiring a competing class of First Amendment speakers to carry the favored speech." *Turner Broadcasting System, Inc. v. FCC*, 819 F. Supp. 32, 62 (D.D.C. 1993) (dissenting opinion). In addition, *amici* believe that the must-carry rules could not survive scrutiny under the test of *United States v. O'Brien*, 391 U.S. 367, 377 (1968), and *Ward v. Rock Against Racism, Inc.*, 491 U.S. 781, 798 (1989).

Amici submit, however, that even if this Court were to uphold the must-carry rules, it should decide this case in a way that does not prejudge the telephone companies' pending constitutional challenge to 47 U.S.C. § 533(b), which prohibits telephone companies from providing "video programming" directly to subscribers within their telephone service areas. A federal district court has invalidated § 533(b) under the First Amendment; the decision is on appeal to the Fourth Circuit and may well be before

this Court within a year. Additional challenges to § 533(b) are pending in other federal district courts.

I. The Court should not attempt to create a pigeonholed First Amendment hierarchy with different levels of constitutional protection for different technologies. The question before the Court is not whether cable television is more like newspapers or more like broadcasting. This Court has indicated that "[e]ach medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975). But that does not mean that this Court should constitutionalize a First Amendment pecking order in which certain members of the press receive preferential treatment and others are relegated to disfavored status depending solely upon how the products of their creativity and editorial judgment are delivered to the public.

Amici urge this Court to bear in mind several developments militating strongly against an industry-specific hierarchical approach:

A. The Nation and the world are in the midst of a telecommunications revolution, which would overwhelm any attempt to draw constitutional lines on the basis of changing technological characteristics. Even newspapers and magazines, the most traditional members of the press, are no longer simply print media. They are now available electronically to millions of computer users, who can read the publications in electronic form or print them out in the familiar paper format. The difference between print journalism and electronic forms of communication is now simply a matter of whether the printing occurs at a central plant or instead at each reader's home or office.

As the computer, telephone, and television combine with cable technology to usher in a new era of interactive, multimedia communications services, it is becoming impossible to define the traditional media in technological terms. The carriage capacities of the new broadband networks will be vast, and companies like *amici* will make them available to independent programmers of all affiliations and views. In the new information age, even the soapbox orator will have the power to be seen as well as heard.

B. In any event, this Court should not relegate video programming to the low end of a First Amendment hierarchy.

1. More people rely on video programming than on any other source of news and entertainment. Moreover, video programmers exercise the same kind of editorial discretion as do newspaper and magazine publishers. If anything, the Government's power to regulate entry into video programming should be subject to heightened, not reduced, First Amendment scrutiny.

2. The Government's narrow justification for the must-carry rules provides no warrant for broadly decreeing a particular level of First Amendment protection for cable television, or any other variety of communications technology. The Solicitor General claims that the must-carry rules are a remedy for problems of concentration and anticompetitive abuse in the cable industry. The Court should not endorse different laws that cannot be justified by that rationale, or issue a ruling that would give the Government greater power to exclude new entrants from video programming.

II. The nature of the governmental restriction on speech is the critical determinant of the level of scrutiny to which a restriction should be subjected, regardless of the technology used to transmit the information at issue. Thus, this Court applied strict scrutiny in *Sable Communications, Inc. v. FCC*, 492 U.S. 115 (1989), notwithstanding the fact that the case involved wireline communications, and this Court took note of the direct, content-based nature of the restrictions on speech at issue in *FCC v. League of Women Voters*, 468 U.S. 364 (1984), even though that case involved broadcasting.

There is a fundamental difference among (1) direct prohibitions on speech like 47 U.S.C. § 533(b), (2) preferential speaker- or content-specific access rules, and (3) neutral, nondiscriminatory access rules. *Amici* believe that the must-carry rules contained in §§ 534 and 535, which fall into the second rather than the third category, are unconstitutional. In any event, however, it is critical to recognize that access rules, whatever their constitutionality, lend no support to direct bans on speech — and particularly to laws that use the content of expression to identify what information a speaker is forbidden to provide to that speaker's chosen audience. Access rules affect speech merely incidentally, by burdening expression

only insofar as distribution capacity cannot be expanded to accommodate additional speakers.

The difference between access requirements like the must-carry rules and direct prohibitions on speech is particularly salient with respect to *amici*. Telephone companies are currently subject to nondiscriminatory access obligations as common carriers that are far more extensive than the must-carry rules at issue here, and that also avoid the constitutional infirmity identified by Judge Williams. Telephone companies that delivered their own video programming over their common-carrier networks would retain these nondiscrimination obligations. Hence, the permissibility of an access rule could not be used to justify a restriction like § 533(b).

In short, if the Court does sustain the decision below, we respectfully urge the Court to avoid a broad ruling that sweeps beyond the key factors of this case and the special nature of the must-carry rules, in view of the related, but nonetheless very different, questions that may soon be presented to the Court in litigation regarding § 533(b).

ARGUMENT

Amici believe that the must-carry rules of the 1992 Cable Act are invalid under the First Amendment, and we urge this Court to reverse the judgment of the district court. As Judge Williams noted, those rules do not extend access on the basis of "neutral criteria for service." 819 F. Supp. at 57 (dissenting opinion). Rather, they "extend the privilege of access only to a special class of unaffiliated programmers" — local broadcast television stations — because of a legislative judgment that the programming content provided by those speakers is especially worthy. *Id.* at 58.

While Judge Williams applied strict scrutiny, *see id.* at 60, *amici* believe that the must-carry rules are also invalid under the test of *United States v. O'Brien*, 391 U.S. 367, 377 (1968), and *Ward v. Rock Against Racism, Inc.*, 491 U.S. 781, 798 (1989). Congress' factfinding with respect to §§ 534 and 535 is noteworthy, both because it was unusually extensive and because it was embodied in formal legislative findings adopted as part of the 1992 Cable Act. This type of factfinding is completely absent in the case of many laws, such as 47 U.S.C. § 533(b).

Nevertheless, Congress' factfinding is woefully inadequate for the reasons elucidated by Judge Williams, *see* 819 F. Supp. at 61-64 (dissenting opinion), and *amici* submit that the factual predicate for the must-carry rules cannot sustain them under *any* form of heightened First Amendment scrutiny, including the test of *O'Brien* and *Ward*. For example, "the fit between the interest and the regulation is extremely weak," because there are less intrusive alternatives endorsed by Congress demonstrating that §§ 534 and 535 are not narrowly tailored to the asserted governmental interests. 819 F. Supp. at 61.

Amici submit this brief not only to support appellants, but also to make this Court aware that the analytical approach taken in the present case could well have an impact on many other cases involving cable and other new technologies for the transmission of ideas, information, and opinion. For example, the constitutionality of the statute prohibiting telephone companies from providing video programming directly to subscribers within their telephone service areas, 47 U.S.C. § 533(b), is a question that may soon be before this Court.[3] *Amici* believe that the decision below should be reversed; but whether or not this Court accepts that argument, the Court should not prejudge any of the related, but nonetheless very different, questions regarding the flat ban on speech contained in § 533(b).

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[3] As is noted above, one federal district court has struck down the law as a "draconian" measure burdening substantially more speech than is necessary to serve the Government's asserted interests. *Chesapeake & Potomac Telephone Co. of Virginia v. United States*, No. 92-1751-A, Mem. Op. at 46 (E.D. Va. Aug. 24, 1993), *appeal pending*, Nos. 93-2340 (4th Cir.) (filed Oct. 15, 1993). Other First Amendment challenges have also been brought.

I. THE COURT SHOULD NOT CREATE A FIRST AMENDMENT HIERARCHY AMONG THE VARIOUS MEMBERS OF THE PRESS

This case presents no occasion to articulate a First Amendment hierarchy in which certain members of the press would be deemed "more equal" than others and in which varying levels of judicial protection for particular transmittal technologies would be frozen into the Constitution. Although in the past this Court has explained that "[e]ach medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems," *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975), the Court has also emphasized that "the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles . . . make freedom of expression the rule." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952).

The proper approach is not to formulate individual standards of scrutiny for various communications technologies, which are not only rapidly evolving but also converging. Rather, the proper approach is to recognize that differences between these technologies and the more traditional media of mass communications can be considered on a case-by-case basis in identifying the government's interest in a particular regulation at issue. Specifically, we urge the Court not to constitutionalize a permanent First Amendment bias that would give less freedom to speech that is delivered over electronic information highways rather than over asphalt and concrete rights of way. If a particular technology presents a special public policy problem, that problem can be taken into account in determining whether the government has adequately demonstrated an overriding interest in the individual regulation at issue.

This approach is strongly supported by several factors with which *amici* are especially familiar.

A. The Ongoing Communications Revolution Counsels Against Any Attempt To Construct A First Amendment Hierarchy

Traditional distinctions among different media are breaking down, and technological change would overwhelm any attempt to establish any sort of First Amendment hierarchy among various print and electronic communications media.[4] The Government has already conceded in this case that wireline communications such as telephone and cable services eliminate the physical scarcity of the electromagnetic spectrum and the problem of interference on which *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), is based.[5] In the same way, contemporary technological changes are transforming and merging previously distinct methods of transmitting information.

Thus, newspapers and magazines are losing their former identity as exclusively print media and have increasingly turned to electronic means of distributing their wares directly to the homes and offices of their subscribers. Once the information is transmitted, the recipient can store or manipulate it in electronic form, or print it in hard copy to read in the familiar paper format.[6]

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[4] *Cf. Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 458 (1983) (O'Connor, J., dissenting) (noting the problem of technological change overtaking constitutional categories).

[5] The Government has not disputed that "cable television is technologically distinct from broadcast television" and that "there exist no absolute physical limitations to the construction of cable systems equivalent to the physical scarcity of the broadcast spectrum." Defendants' Response to Time Warner Entertainment Co.'s Statement of Material Facts Allegedly Not in Dispute, in *National Cable Television Ass'n v. FCC*, Nos. 92-2495, et al., at ¶ 23 (D.D.C. filed Feb. 25, 1993) (emphasis omitted).

[6] Many publications are already available in electronic versions, from such services as America Online, CompuServ, Prodigy, LEXIS/NEXIS, DataTimes, and Dialog. Time magazine, the San Jose Mercury News, the Chicago Tribune, and other newspapers and periodicals have their own electronic services, and many publishers, including Dow Jones, Times Mirror Co., Cox Enterprises, Gannett, Knight-Ridder, the Washington Post, and U.S. News and World Report, have announced plans for more in the future.

The electronic medium allows publishers to enhance the depth and timeliness of their coverage.[7] In short, the notion of a First Amendment hierarchy with the print media at its apex is already obsolete.

More generally, advances in the electronic delivery of information mean that many kinds of previously disparate communications services are converging in a single, sprawling market. By itself, each new development may seem a technical curiosity — interactive cable and television shows that permit the audience to respond to news and entertainment; video on demand, which permits viewers to select movies and other programming at their discretion and in effect to become their own programmers; instant on-line access to health care information, educational materials, computer software and video games. But each development is a signal that telephones, televisions and computers are merging into a single technology and that the ongoing electronic and digital revolution is already transforming the press. One noted commentator has explained that, in the computer age,

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See Click! On-Line Newspaper Is a Mixed Read, Wash. Post, Oct. 23, 1993, at A-1.

Beginning in 1994, the Wall Street Journal will offer an electronic newspaper called "Personal Journal," which will replicate the Journal's traditional format, using similar typefaces and retaining features such as the front-page "What's News" index. *Washington Business*, Wash. Post, Oct. 11, 1993, at 17.

A leading cable company has announced plans to enable its customers to receive and to print magazine articles, coupons, or ads via cable TV service. *Digest*, Wash. Post, Oct. 12, 1993, at D-1.

And a division of Motorola broadcasts pages of news, sports, and weather reports from USA Today to customers who use its beeper-size receivers. *Ameritech to Offer "Solutions" for Wireless Data Providers*, Wireless Messaging Report, Oct. 26, 1993, at 5.

[7] For example, stock prices in a newsprint paper are out-of-date by the time the edition hits the streets, while stock prices in the paper's electronic version can be constantly updated. Moreover, electronic newspapers can incorporate interactive components that permit subscribers greater control over what they read. In the electronic version of some newspapers, for instance, readers can ask for additional information that is not available in the newsprint edition.

"bits are bits. . . . There really is not as much of a fundamental difference as we want to think between radio, television, newspaper, magazines."[8]

Developments in fiber optics and signal compression technologies mean that information and advanced services can now be delivered over broadband networks with immense carriage capacity. New wires can be deployed without interfering with existing networks. *Red Lion*, with its focus on problems of physical interference and scarcity, is strikingly inapposite in this context. Indeed, these broadband networks will be equally available to all speakers, so that there will be no need for the kind of governmental allocation that occurs in the context of the electromagnetic spectrum.

In light of the ongoing technological and market upheavals, it would be extraordinarily unwise to use the instant case to constitutionalize extant but potentially ephemeral technological distinctions among various forms of public expression. The history of the legal treatment of emerging technologies provides a cautionary lesson. At the dawn of the motion picture age, this Court held that movies were not protected by the First Amendment. *Mutual Film Corp. v. Industrial Comm'n of Ohio*, 236 U.S. 230, 244 (1915). When radio was in its infancy, the Federal Radio Commission, predecessor to the FCC, warned licensees that "[t]he Commission is unable to see that the guaranty of freedom of speech has anything to do with entertainment programs as such."[9] As one astute observer has explained, "[t]echnical laymen, such as judges, perceive the new technology in that early, clumsy form, which then becomes their image of its nature, possibilities, and use. This perception is an incubus on later understanding." I. de Sola Pool, *Technologies of Freedom* 7 (1983).

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[8] *Into Media's Future, Digitally*, N.Y. Times, Oct. 17, 1993, at F-9 (quoting Nicholas Negroponte, director of MIT's Media Laboratory).

[9] FRC Second Annual Report at 160, quoted in Caldwell, *Censorship of Radio Programs*, 1 J. Radio L. 441, 467 (1931).

There is no reason to repeat this cycle with the communications technologies of the new information age.

B. In Any Event, Video Programming Should Not Be Relegated To Less-Than-Full Constitutional Status

1. Video Programming Is a Critical Form of Communication

As traditional media increasingly rely on electronic means of delivering information, the primacy of video programming has become all the more evident. Video programming is an uniquely effective and popular form of communication that has become the public's principal source of news, entertainment, and other information. Many more households have televisions than subscribe to newspapers.[10] The average television household watches television seven hours per day, whereas the average newspaper receives only 45 minutes of attention.[11] In addition, the "'power to communicate ideas through sound and visual images . . . is significantly different from traditional avenues of communication because of the immediacy of the medium.'" *Telecommunications Research & Action Center v. FCC*, 801 F.2d 501, 508 (D.C. Cir. 1986) (quoting FCC Report and Order), *cert. denied*, 482 U.S. 919 (1987). In short, video programming is the most pervasive form of communication in the United States today; it is the contemporary equivalent of the handbill, newspaper, and live entertainment source rolled into one.

Moreover, this Court has already indicated that video programmers are members of the "press" and exercise editorial

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[10] According to the Census Bureau, 92 million households (or 98 percent of all households) have a television, in contrast to a total daily newspaper circulation of 62 million. U.S. Dept. of Commerce, Bureau of the Census, *Statistical Abstract of the United States 1992*, Table 884 (112th ed. 1992).

[11] Federal Communications Comm'n, Office of Plans and Policies, *Broadcast Television In a Multichannel Marketplace*, OPP Working Paper No. 26, at 19, 107 (June 1990); Newspaper Ass'n of America, *Facts About Newspapers '92*, at 25 (1992).

discretion that is protected expression under the First Amendment. *Leathers v. Medlock*, 111 S. Ct. 1438, 1442 (1991); *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986). Video programmers exercise such discretion in creating, choosing, arranging, and packaging programming for sale to consumers. These functions are indistinguishable from those performed by booksellers or newspaper publishers, which also frequently distribute material prepared by others and must determine in the first instance whether the material should be published at all and also how it should be arranged and editorially packaged.[12] In the information age, it is the exercise of this editorial discretion and judgment, not the technological means which the publisher uses to deliver the resulting information, that should be the primary determinant of First Amendment protection.[13]

For these reasons, it would be utterly unjustified to place video programming at the low end of an arbitrary First Amendment hierarchy, or to give the government broad license to determine who may engage in constitutionally protected programming functions. Indeed, this Court's decisions reflect special solicitude for "uniquely valuable or important mode[s] of communication." *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984); *see also Schneider v. State*, 308 U.S. 147, 164 (1939) (invalidating restrictions on pamphleteering, while noting that "pamphlets have proved most effective instruments in the dissemination of opinion"

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[12] Newspapers typically rely upon news services like the Associated Press for national and international news. A 1986 study found that AP member papers fill 37% of their news needs with AP copy. C. Fink, *Strategic Newspaper Management* 167 (1988). Newspapers also rely on feature syndicates for materials such as cartoons, editorial cartoons, sports scores, weather maps, and columnists. Many Sunday newspapers include preprinted inserts such as comics sections, magazines like *Parade*, and television listings.

[13] When acting as video programmers, telephone companies exercise the same editorial discretion as other electronic publishers. This activity, however, does not detract from their concurrent obligations to provide electronic distribution services to unaffiliated video programmers when operating as common carriers. *See* pp. 23-24, *infra*.

and that "perhaps the most effective way of bringing them to the notice of individuals is their distribution at the homes of the people"). Video programming is a major means of expression for which there is no adequate substitute, and any law prohibiting a class of speakers from engaging in it should be subject to heightened First Amendment scrutiny.

2. The Government's Arguments about Concentration in Cable Markets Do Not Justify Placing Video Programming at the Low End of a First Amendment Scale

The Government's justification for the must-carry rules provides no reason to decree a particular level of First Amendment protection for cable television, or for any other emerging communications technology. The Solicitor General contends that the must-carry rules are a permissible means "of addressing the market power and concentration of cable system operators and the anti-competitive practices existing in the cable television industry." Motion of the Federal Respondents to Affirm, in No. 93-44 at 4-5. Accordingly, the Solicitor General contends, cable television should be subject to a regulatory approach "comparable" to that of broadcasting. *Id.* at 19.

There are powerful legal reasons to reject the Solicitor General's argument. This Court has made clear that the "scarcity" doctrine underlying the broadcast regulatory regime established in *Red Lion* is linked specifically to the problems of interference caused by the physical scarcity of the *electromagnetic spectrum*[14] — a problem

[14] *See, e.g., Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 375 n.4, 376, 388-90, 397-400 (1969). In *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 799 (1978), the Court reaffirmed that this rationale was premised on "the physical limitations of the broadcast spectrum" and "problems of interference between broadcast signals." In *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), the Court once again noted that the broadcasting doctrine is premised on "the scarcity of [electromagnetic] frequencies." *Id.* at 566 (internal quotation omitted; brackets in original); *see also CBS, Inc. v. Democratic Nat'l Committee*, 412 U.S. 94, 101 (1973). The Court has predicted that technological advances altering spectrum scarcity may lead to a revision of the appropriate

that indisputably does not arise in the case of cable television. This Court has consistently held that the broadcasting doctrine cannot be transferred by metaphor to other kinds of scarcity.[15] The *Red Lion* Court itself explained that its decision was premised solely on the unique physical limitations of the spectrum and that it was not addressing scarcity caused by economic conditions.[16]

In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), this Court rejected an attempt to transform *Red Lion* into a broader "scarcity" theory. The Court acknowledged that "the same economic factors which have caused the disappearance of vast numbers of metropolitan newspapers, have made entry into the marketplace of ideas served by the print media almost impossible." 418 U.S. at 251. The Court noted that "[t]he First Amendment interest of the public in being informed is said to be in peril because the 'marketplace of ideas' is today a monopoly controlled by the owners of the market," *id.*, and warned that "a local newspaper . . . has extraordinary power to set the atmosphere and determine the terms of local consideration of public issues." *Id.* at 250 n.15. Nonetheless, the Court concluded that "press

constitutional approach to broadcast regulation. *See FCC v. League of Women Voters*, 468 U.S. 364, 376-77 n.11 (1984); *see also Metro Broadcasting*, 497 U.S. at 590 n.41.

[15] This Court has refused to accept *Red Lion* as justification for regulations affecting arguably scarce resources in the context of elections, *see Buckley v. Valeo*, 424 U.S. 1, 49 n.55 (1976) (*per curiam*), corporate expression, *see First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791 n.30 (1978), and speech by regulated monopolies, *see Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 543 (1980). The limits of *Red Lion* are apparent in the Court's observation that "[o]ur decisions have recognized that the special interest of the Federal Government in regulation of the broadcast media does not readily translate into a justification for regulation of other means of communication." *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 74 (1983).

[16] "We need not deal with the argument that even if there is no longer a technological scarcity of frequencies limiting the number of broadcasters, there nevertheless is an economic scarcity in the sense that the Commission could or does limit entry to the broadcasting market on economic grounds and license no more stations than the market will support." 395 U.S. at 401 n.28.

responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated." *Id.* at 256. The newspaper industry remains highly concentrated today.[17]

More fundamentally, however, the Solicitor General's argument plainly cannot justify reduced constitutional protection for cable television as a categorical matter, or a lower level of scrutiny for every law touching on cable television. Many such laws simply cannot be justified by the governmental interest in preventing cable monopolies. For example, every expert government agency to have studied the issue has concluded that the statutory ban on video programming by telephone companies in their telephone service areas, 47 U.S.C. § 533(b) exacerbates concentration in cable markets.[18] It would be perverse to use the concentrated nature of

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[17] While daily newspapers are published in some 1,513 cities, there are competing dailies in only 37 cities and 19 of these are published under joint operating agreements. NAA, *Facts About Newspapers '92*, at 26 (1992); *see also CBS, Inc. v. Democratic National Committee*, 412 U.S. 94, 144 (1973) (Stewart, J., concurring) ("there are many more broadcasting stations than there are daily newspapers," and "newspapers get Government mail subsidies and a limited antitrust immunity").

[18] *See Video Dialtone Order*, 7 FCC Rcd 5781 (1992) (formal recommendation by FCC to Congess that § 533(b) be repealed); Report of the Federal Communications Commission Regarding the President's Regulatory Reform Program 16, 67 (April 28, 1992) (explaining that removing the ban would "increas[e] competition in the video marketplace, spur[] the investment necessary to deploy an advanced infrastructure, and increas[e] the diversity of services made available to the public," and that introducing competition from telephone companies "would result in significant price savings for consumers and stimulate provision of a range of new information services," with rates falling about 20 percent and subscribership increasing by 11.2 million households nationwide); Reply Comments of the United States Department of Justice, *Telephone Company-Cable Television Cross-Ownership Rules*, CC Dkt 87-266 at 44-46 (Mar. 13, 1992) (explaining that telephone companies "should be allowed to own and directly provide video programming" because telephone company "provision of video programming will have procompetitive benefits that outweigh any anticompetitive risks involved," and because telephone company entry would introduce a needed competitor to the video programming market); Reply Comments of National Telecommunications and Information Administration, *Teleport*, File No. 13135-CF-TC(3)-92 (May 27, 1992) (removal of § 533(b) would

cable markets as a rationale for applying reduced scrutiny to a law that is at least partially responsible for that very problem.

In this regard, the Solicitor General's claim that cable television is a "natural monopoly," Motion to Affirm at 13 — a claim implying that greater competition in cable markets would be infeasible and economically ruinous — seriously misstates Congress' factfinding. In the 1992 Cable Act, Congress found that cable television is an *unnatural* monopoly and that greater competition should be encouraged.[19] Indeed, the Act was specifically directed at exclusionary practices barring second entrants from cable markets. Section 7(a)(1) of the Act amended 47 U.S.C. § 541(a)(1) by providing that "a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise." 106 Stat. 1483.[20] Moreover, the Act facilitated entry into cable markets by municipalities, even in areas where there is already an incumbent cable provider. *See* § 7(c), 106 Stat. 1483, codified at 47 U.S.C. § 541(f). These provisions are testimony to Congress' conclusion that cable markets, although currently concentrated, are not natural monopolies, and that competition should be encouraged as much as possible.[21]

"significantly increase competition in the video services market, which would, in turn, yield lower prices to viewers, better service quality, and better programming diversity").

[19] *See, e.g.*, H.R. Rep. No. 628, 102d Cong., 2d Sess. 46 (1992) ("consumers would benefit greatly from the existence of two competing cable systems operating in a given market").

[20] Prior to the passage of the 1992 Cable Act, commentators and courts had maintained that "the tendency toward monopoly . . . may well be attributable more to governmental action — particularly the municipal franchising process — than to any 'natural' economic phenomenon." *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1450 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986); *see also* Hazlett, *The Policy of Exclusive Franchising in Cable Television*, 31 J. Broadcasting & Electronic Media 1, 18 (1987).

[21] Competing cable systems operate side-by-side in at least 53 communities, *see, e.g.*, 819 F. Supp. at 40 n.16, and some of these competitive systems have been in place for 20 years or more. The government's theory of "natural monopoly" is also belied by its own actions.

The rate regulation provisions of the 1992 Cable Act underscore this conclusion. Congress' stated policy was "to rely on the marketplace, to the maximum extent feasible," to "promote the availability to the public of a diversity of views and information through cable television and other video distribution media." § 2(b)(1), (2), 106 Stat. 1463. Accordingly, the Act embodies a "preference for competition" (§ 3(a), 106 Stat. 1464, codified at 47 U.S.C. § 543(a)) and authorizes rate regulation only "[i]f the [FCC] finds that a cable system is not subject to effective competition." *Id.* The Act plainly evidences Congress' finding that competition in cable markets is economically feasible and, indeed, in the interest of American consumers.

For all these reasons, this Court need not and should not use this case to squeeze cable or any other technology for the distribution of ideas into a First Amendment pigeonhole.

II. THE NATURE OF THE GOVERNMENTAL RESTRICTION ON SPEECH IS THE CRITICAL FACTOR IN DETERMINING THE APPROPRIATE LEVEL OF SCRUTINY

Rather than focusing exclusively or even primarily on the fact that the speech here is the expression of cable companies, the Court should follow the usual approach in First Amendment cases: paying close heed to the nature of the governmental restriction in determining the appropriate level of scrutiny. Under such an approach, the Court would refrain from prejudging questions that might arise not in the context of the must-carry rules, but in such very different situations as that of § 533(b).

The most critical factor in determining the proper level of First Amendment scrutiny has always been the nature of the restriction on speech. Thus, this Court applied strict scrutiny to the cross-

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The government has not only expressed its strong belief that competition can exist, but it has also encouraged telephone companies and others to deploy competing video delivery systems in areas that are already served by cable, *see, e.g.*, *Video Dialtone Order*, 7 FCC Rcd 5781 (1992), a step that would be futile if it believed that cable was a natural monopoly.

burning ordinance in *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992), notwithstanding the fact that the racial hate speech at issue there was completely unprotected, in the sense that its content was constitutionally proscribable. The Court's analysis hinged on the fact that the law was content-based — it singled out "fighting words" for a special penalty if they concerned "race, color, creed, religion, or gender." *See also Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987) (State can ban shouting "fire" in a crowded theater, because such speech is unprotected, but cannot adopt a law that contains "dispensations to those willing to contribute $100 to the state treasury").

In the same way, the nature of the restriction — not merely the character of the medium used to transmit the information — plays the primary role in determining the appropriate level of constitutional scrutiny. In *Sable Communications, Inc. v. FCC*, 492 U.S. 115 (1989), for instance, this Court invalidated a congressionally imposed, prophylactic ban on indecent interstate telephone messages on the ground that it "far exceed[ed] that which is necessary to" achieve the government's interest. *Id.* at 131. The Court did not develop a special doctrine governing information conveyed over telephone lines; it simply took account of the physical characteristics of telephones in assessing the fit between the government's asserted interest and the law at issue.

Indeed, this Court has noted, even in the sphere controlled by *Red Lion*, that "[t]he [Federal Communications] Commission has eschewed direct federal control over discrete programming decisions," *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 585 n. 36 (1990), and has warned that the contrary approach would "raise[] 'serious First Amendment issues.'" *Id.* (citation omitted).[22] In *FCC v. League of Women Voters*, 468 U.S. 364

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[22] *See also FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 n.32, 597 (1981) (noting the policy, even in the broadcast context, of preserving the licensee's editorial control over programming); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 495 (1975) (protecting "freedom of the press" in broadcast context); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 127 (1973) (rejecting right of access in part because it "would tend to draw [the FCC] into a continuing case-by-case determination of who should be heard and when").

(1984), for example, the Court struck down under the First Amendment a congressionally imposed ban on editorializing by public television and radio stations. The Court explained that the scope of the prohibition was "defined solely on the basis of the content of the suppressed speech." *Id.* at 383. Furthermore, the Court observed that, "in sharp contrast to the restrictions upheld in *Red Lion* or in *CBS, Inc. v. FCC*, which left room for editorial discretion and simply required broadcast editors to grant others *access* to the microphone, [the ban on editorializing] *directly prohibits* the broadcaster from speaking out on public issues even in a balanced and fair manner." *Id.* at 385 (emphasis added). In short, even in the broadcast context, this Court has invalidated direct bans on speech that are not narrowly tailored to any legitimate and substantial governmental interest.[23]

Hence, the nature of the restriction on speech must be the Court's chief focus. *Amici* believe that the must-carry rules have the unconstitutional effect of replacing programming that cable operators would otherwise choose to carry with that of certain governmentally-preferred speakers. But it is important to note that access requirements like the must-carry rules, whatever their constitutionality, stand on a vastly different footing from laws that directly ban speech. In short, it is critical to distinguish among (1) flat bans on speech like § 533(b), (2) access rules that embody speaker- or content-specific preferences, and (3) nondiscriminatory access rules. Even if the Government were correct that §§ 534 and

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[23] *See, e.g.*, 468 U.S. at 392 ("the manifest imprecision of the ban imposed by [the statute] reveals that its proscription is not sufficiently tailored to the harms it seeks to prevent to justify its substantial interference with broadcasters' speech"); *id.* at 395 (the government's "interest can be fully satisfied by less restrictive means that are readily available" and thus the ban on editorializing "far exceeds which is necessary" to achieve the interest and "impermissibly sweeps within its prohibition a wide range of speech" that does not cause the asserted evil); *id.* at 396 ("The patent overinclusiveness and underinclusiveness of [the] ban 'undermines the likelihood of a genuine [governmental] interest'") (citation omitted; brackets in original); *id.* at 398 ("Since the breadth of [the ban on editorializing] extends so far beyond that which is necessary to accomplish the goals identified by the Government, it fails to satisfy the First Amendment standards that we have applied in this area").

535 belong in category (3) rather than (2), such a conclusion could offer no support to direct bans such as § 533(b).

There is a qualitative difference between access rules — which directly silence no speech and burden expression only insofar as distribution capacity cannot be expanded to accommodate additional speakers — and direct prohibitions on speech. Access rules usually include new voices without excluding old ones, and accordingly can be less intrusive ways to further legitimate government interests without cutting off the free flow of ideas. Thus, the Court upheld a nondiscriminatory access rule in *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 81, 87 (1980) (State may require shopping center to permit peaceful speech and petition activities), on the assumption that it did not seriously impede the owner's ability to get his own message across. *See Pacific Gas & Electric Co. v. Public Utilities Comm'n of California*, 475 U.S. 1, 12 (1986) (plurality opinion) ("Notably absent from *PruneYard* was any concern that [the state law] might affect the shopping center owner's exercise of his own right to speak"); *id.* at 24 (Marshall, J., concurring in judgment) ("While the shopping center owner in *PruneYard* wished to be free of unwanted expression, he nowhere alleged that his own expression was hindered in the slightest").[24]

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[24] A subsequent decision by Judge Jackson, who authored the opinion below upholding the must-carry rules contained in §§ 4 and 5 of the 1992 Cable Act, makes plain the distinction between access rules and prohibitions on speech. In a separate proceeding, Judge Jackson invalidated a portion of § 11(c) of the Act directing the FCC to prescribe rules "establishing reasonable limits on the number of cable subscribers" a cable operator is authorized to reach through cable systems it owns or in which it has an attributable interest. Judge Jackson held that "[a]ny governmentally ordained quota on the number of subscribers a cable operator may reach leaves the operator with absolutely no intra-medium means of speaking to the remainder of its potential audience." *Daniels Cablevision, Inc. v. United States*, No. 92-2292, mem. op. at 21 (D.D.C. Sept. 16, 1993). Section 11(c) of the 1992 Act also directs the FCC to "consider the necessity and appropriateness" of limiting the extent to which cable operators may create cable programming. Addressing this provision in dictum, Judge Jackson observed that "a regulation *directly* limiting the ability of operators to 'speak' as programmers would surely be constitutionally troubling." Mem. op. at 21 n.17 (emphasis added). In addition, Judge Jackson struck down, as impermissibly "content-

For this reason, the Solicitor General's heavy reliance on *Associated Press v. United States*, 326 U.S. 1 (1945), *see* Motion of Federal Respondents to Affirm, in No. 93-44, at 10, 11, 22, 26, illustrates the limitations of the Government's position.[25] In *AP*, members of a newspaper cartel were refusing to sell their newswire service to competing non-members. In holding such conduct illegal, this Court invoked a generally applicable law (the Sherman Act), rather than an "industry-specific" rule like the must-carry requirement, 819 F. Supp. at 40, that singles out a portion of the press for special regulation.[26] Moreover, the remedy approved by this Court in *AP* neither silenced speech nor included speaker- or content-specific preferences. Quite the contrary: the remedy attacked the antitrust abuse neutrally and directly, by providing that

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related," provisions regulating indecent programming and requiring a set-aside for educational programming on direct broadcast satellites. Mem. op. at 15-16, 18.

[25] *Associated Press* — which is, after all, a case about *newspapers* rather than cable or broadcast television — also illustrates the need to focus on the nature of the restriction on speech, rather than on the characteristics of the medium through which the information is conveyed.

[26] In reviewing "decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news," *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513, 2518 (1991), this Court provided an illustrative list of what is meant by "generally applicable laws": the National Labor Relations Act, *Associated Press v. NLRB*, 301 U.S. 103 (1937); the Fair Labor Standards Act, *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186 (1946); laws providing for grand jury subpoenas, *Branzburg v. Hayes*, 408 U.S. 665 (1972)); copyright laws, *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977); the antitrust laws, *Associated Press v. United States*, 326 U.S. 1 (1945); and non-discriminatory tax laws, *Murdock v. Pennsylvania*, 319 U.S. 105 (1943). Unlike §§ 553(b), 534 and 535, all those laws apply to a broad category of businesses as businesses, and none singles out speech as such for the specific purpose of regulating it. Indeed, this Court has repeatedly rebuffed efforts to characterize a law singling out expression as nothing more than a "general" economic regulation. *See Minneapolis Star & Tribune Co. v. Minneapolis Comm'r of Revenue*, 460 U.S. 575, 581 (1983); *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 112 S. Ct. 501, 509 (1991); *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 789 n.5 (1988).

"AP news is to be furnished to competitors of old members without discrimination." 326 U.S. at 21. This Court carefully noted that this remedy did not affect either AP's or its members' rights to report or publish what they wished. The remedy did not "interfere[] with freedom 'to print as and how one's reason or one's interest dictates.'" *Id.* at 20 n.18. Direct bans on speech, of course, do not leave a speaker free to express herself as she pleases.[27]

The difference between access rules and direct bans on speech is especially significant in analyzing the difference between the must-carry rules and § 533(b) because telephone companies are currently subject to neutral common-carrier obligations far more extensive than a must-carry rule. As the Bell Companies have acknowledged with respect to their telephone networks, their "voluntary dedication of [these] networks to public use precludes any claim on their part that they have a First Amendment right to exclude competing information providers from their networks. The Supreme Court has made clear that, when privately owned facilities are dedicated to the public, the First Amendment does not invalidate laws requiring those facilities to be held open on a nondiscriminatory basis to all speakers."[28] Thus, Judge Williams

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[27] Other antitrust precedent confirms the crucial distinction between access rules and direct bans. In *Lorain Journal Co. v. United States*, 342 U.S. 143, 155-56 (1951), for example, a newspaper sought to drive a radio station out of business by refusing to run ads for those parties that chose to advertise on the station; the Court found it proper to enjoin this antitrust violation by requiring access. In *Citizens Publishing Co. v. United States*, 394 U.S. 131 (1969), this Court held that a decree ordering one newspaper corporation to divest the stock of another, and to refrain from certain joint operating practices such as a "profit pooling arrangement," did not violate the First Amendment. The Court commented that "[n]either news gathering nor news dissemination is being regulated by the present decree. It deals only with restraints on certain business or commercial practices" that bear no significance under the First Amendment. 394 U.S. at 139.

[28] Brief of the Bell Company Appellants, in *United States v. Western Electric Co.*, No. 87-5388, at 25 n.84 (D.C. Cir.) (filed Apr. 17, 1989) (citing *PruneYard*); *see also* Amicus Brief of Bell Atlantic in *National Cable Television Ass'n v. United States*, No. 92-2495 (D.D.C.) (filed Mar. 9, 1993).

contrasted the constitutionally invalid must-carry rules with neutral leased access provisions and with requirements that a carrier "serve all parties that meet neutral criteria for service." 819 F. Supp. at 57-58 (dissenting opinion) (using the example of rules that guarantee telephone long-distance carriers access to local exchange service).

Recognizing telephone companies' right to provide video programming is in no way inconsistent with their common carrier obligations, since an entity "can be a common carrier with regard to some activities but not others." *National Ass'n of Regulatory Utility Comm'rs v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976) (opinion of Wilkey, J.); *see FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 n.9 (1979). Telephone companies already originate electronic information over their own networks in the form of voice and data messages, including time and weather reports, traffic updates, and news and financial reports. Their obligation also to transmit the voice and data messages of third parties on a common-carrier basis, however, is unaltered. In the same way, telephone companies that delivered their own video programming over their common-carrier networks would remain subject to a nondiscriminatory access obligation.

In sum, *amici* ask the Court to remain cognizant of the special nature of the must-carry rules before it. *Amici* believe that those rules offend the First Amendment. Even if this Court nevertheless upholds them, it should make clear that they provide no support at all to laws that directly ban speech, especially where the silenced speaker is already subject to a comprehensive access obligation.

CONCLUSION

The decision below should be reversed. In any event, this Court should not prejudge any of the issues that may soon be presented to it in *Chesapeake & Potomac Telephone Co. of Virginia v. United States* and other litigation regarding § 533(b).

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